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UNIVERSITY OF CALIFORNIA

Los Angeles

Doing Death in Texas:  
Language and Jury Decision-Making in  
Texas Death Penalty Trials

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy  
in Anthropology

by

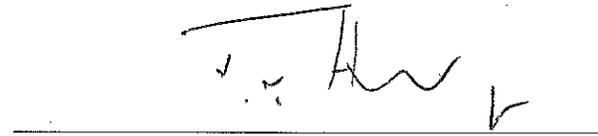
Robin Helene Conley

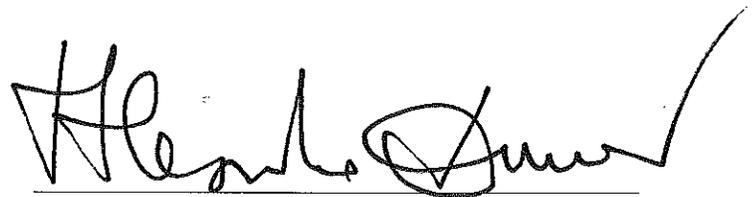
2011

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2011

This dissertation is dedicated first to my parents  
for their intellect, patience, and love.

I dedicate it also to my unparalleled advisors:

Alessandro Duranti,

Elinor Ochs, Candy Goodwin, John Heritage and Justin Richland.

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## ABSTRACT OF THE DISSERTATION

Doing Death in Texas:  
Language and Jury Decision-Making in  
Texas Death Penalty Trials

by

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Doctor of Philosophy in Anthropology

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Professor Alessandro Duranti, Chair

This dissertation explores the means through which language and culture make death penalty decisions possible – how specific language choices mediate and restrict jurors', attorneys', and judges' actions and experiences while serving and reflecting on capital trials. More specifically, it investigates how discursive constructions of place and space are mobilized within trial participants' argumentation and reasoning about death penalty decisions; grammatical and semantic forms as both facilitating and stymying empathic and emotional experiences; and how language mediates jurors' understandings and judgments about agency and culpability, regarding both defendants' criminal actions and their own sentencing decisions. In conclusion, it argues that language is one of the

primary resources by which jurors construct defendants as non-human and thus decide to sentence them to death.

The dissertation research involved twelve months of fieldwork, from 2009-2010, in and around Houston, Texas for data collection. The methodologies included interviews of jurors, attorneys, judges, and prison staff; participant-observation in death penalty trials; audio-recordings and note-taking of these trials; and qualitative linguistic analyses of transcribed interviews and courtroom interaction.

The overall analysis reveals that language is crucial in the making and unmaking of defendants into human beings, acts often described by theorists of law and language as violent. The dissertation argues that language mediates a central tension and source of violence in death penalty trials, between encounters with the face of another human being and the discursive, institutional making of that being. Overcoming this tension is crucial to jurors being able to sentence a defendant to death.

## 1. INTRODUCTION

*“...that's the hardest thing I've ever had to do, to look at a man and, you know, know that I'm saying, you know, I don't think you should live.”* Former Texas capital juror

Whittled down to one essential question, this dissertation asks how it is possible that one human being can sentence another to die. This question itself rests on certain assumptions, one being that such a task is a difficult one. The dissertation explores the means through which language and culture make death penalty decisions possible – how specific language choices mediate and restrict jurors', attorneys', and judges' actions and experiences while serving and reflecting on capital trials. To excavate these issues, the following chapters examine, more specifically, how discursive constructions of place and space are mobilized within trial participants' argumentation and reasoning about death penalty decisions; grammatical and semantic forms as both facilitating and stymying empathic and emotional experiences; and how language mediates jurors' understandings and judgments about agency and culpability, regarding both defendants' criminal actions and their own sentencing decisions.

The analyses that follow are necessarily grounded in perspectives on language and culture that place linguistic practices at the nexus of cultural meaning, selfhood, and experience. Socially relevant aspects of any interaction, including participants' subjectivities, are both created and presupposed by indexical forms of language (Silverstein 1976). Thus deictic terms “here” and “there” and the pronouns “I” and “we” are dependent on contextually and culturally salient aspects of the situation, such as the position and identity of the speaker (Hanks 1990). In addition, these aspects are produced

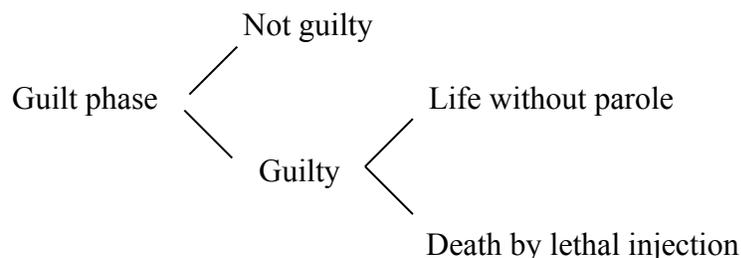
and made explicit through specific elements of language; language forms and situated selves thus bring each other into existence (Ochs 2010). “Ordinary informal conversation is the Baroque site,” Ochs writes, “for working out situated versions of who we think we are” (ibid.:5-6). From this positioning, the analysis will query how language used in capital trials constructs certain versions of persons (or non-persons) – including jurors and defendants – and relationships between them, examining how these contribute to jurors' decision-making processes.

### **1.1 The death penalty in Texas**

The system and implementation of the death penalty in the United States remains to a large degree hidden from the population. Indeed, Sarat (2001:191) argues that the “survival of capital punishment in America depends, in part, on its relative invisibility.” Texas has historically executed the largest number of people annually in the United States and continues to do so. In 2007, Texas’ executions nearly doubled that of all other states combined, as well as exceeding the executions of all countries in the world, save China and the Republic of Congo. Despite this fact, the U.S. population’s attitude remains predominantly indifferent to it (Dow 2002). This is due in part to the opacity of this state practice. Little is known (both academically and in popular culture) about how the death penalty actually operates (Ellsworth & Gross 1994) and what happens when a variety of lay persons (jurors, defendants, defendants’ families) come in contact with the legal system of capital punishment.

In 1972, the Supreme Court ruled in *Furman v. Georgia* (408 U.S. 238) that the implementation of the death penalty in the U.S. was arbitrary to the extent of violating

the 8<sup>th</sup> Amendment prohibition of cruel and unusual punishment and was thus in need of revision. It was suspended country-wide for four years until, with *Gregg v. Georgia* (1976), acceptable sentencing guidelines were established. At this point, states implemented bifurcated trials, which include separate guilt/innocence and penalty phases. In Texas, therefore, after a jury is selected, the guilt/innocence phase of the trial is held, after which jurors deliberate on whether to convict the defendant of the capital crime. If the defendant is convicted, an entire new presentation of evidence begins. For this stage, the same jurors must decide the punishment. Their only two options when the defendant is found guilty of capital murder is life without the possibility of parole<sup>1</sup> or death by lethal injection. This bifurcated trial structure is illustrated in Figure 1.



***Figure 1***

Also as a result of *Furman*, states adopted more rigid sentencing instructions to be applied in penalty phase deliberations. Whereas most states implemented a weighing system, in which jurors weigh aggravating versus mitigating circumstances, Texas (along

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<sup>1</sup> Life without parole, or “LWOP” was implemented in Texas in 2005. Before that, defendants convicted of capital murder and who received life sentences would be eligible for parole after an extended prison term. I spoke to some jurors who served on capital trials before the implementation of LWOP and many of them disclosed that they would have given their defendant death if LWOP had been an option.

with Oregon) adopted the “special issue” framework. This schema requires jurors in the sentencing phase to answer two special issue questions that lead them to a sentence of life or death. The first of these is commonly referred to as the “future danger” question:

“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?” (Tex. Crim. Proc. Code Ann. Art 37. 071 (2)(b)(1)).

The second, or “mitigation” question reads as follows:

“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 unanimously answer “yes” to question one and “no” to question two<sup>2</sup>, the defendant receives a death sentence. Texas jurors are thus never explicitly asked whether they will put the defendant to death; the death sentence is mediated by these special issue questions. The juror interviews and subsequent analysis focuses primarily on jurors' sentencing decisions, however, as will become evident, the distinction between guilt and punishment phase deliberations is not always relevant or evident to jurors themselves.

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<sup>2</sup> If jurors cannot come to a unanimous decision on either of these questions, the defendant receives a life sentence. The Texas statute, however, prohibits attorneys and judges from informing jurors of this fact. Therefore, many jurors feel pressure to reach unanimity because they fear a mistrial if they do not do so. This is an incredibly contentious issue for attorneys, one that deserves its own analysis, but it does not fit within the scope of this dissertation.

## **1.2 Individuals and collectivities**

Investigating the construction of persons and experiences from a linguistic perspective, specifically within the setting of capital trials, requires attention to the intersection of the a) individual and b) generalizable or collective on a number of levels. This work is thus born of the classic anthropological question of how to understand the relationship between individuals and the group or the more abstract entity that is culture. It examines, in line with this relationship, how legal and ethnographic generalizations emerge from and are constitutive of particular practices and persons within their purview.

In one respect, language as a social practice resides precisely where social structure and individual agency dialectically construct one another (Ortner 2006:3). In that social structure exists in and through practices of social actors (Ortner 2006, 1984; Giddens 1979; Bourdieu 1980, 1978[1972]), social institutions (such as law) are emergent and constituted through interactional practices (Drew & Heritage 1992). In the legal arena, for instance, language in the courtroom provides a “crucial way in which the hegemonic order reasserts itself in an institutional structure supposedly designed to work against the order. At the same time, there is room for contestation and resistance” (Mertz 1994:444). From this perspective, this dissertation asks how legal and cultural ideologies about criminality and dangerousness constrain jurors' decision-making practices. How do their language forms work within these ideologies to create new and alternative experiences through which jurors judge defendants?

### **1.2a. Legal and state personhood**

Individuals engaged in legal process are thus not merely agents who act according

to self-defined spheres of knowledge and experience, but are “made” in the process of doing law (Pottage 2004, Danet 1980). Their engagement itself already interpellates (Butler 1993, Althusser 1971) them as specific kinds of persons, such as citizens, defendants, or criminals, that structure the parameters of their involvement with the legal system and each other. The dissertation integrates this perspective with anthropological theory on the state as constantly “emergent” and legitimated through the (discursive) practices with which its inhabitants engage each other. Specifically, it analyzes how the state is discursively formulated as an agent in death penalty decisions, potentially absolving jurors of the ultimate responsibility for a person's death.

The analysis of actual talk used in the courtroom (Atkinson & Drew 1979) is crucial for understanding how power relations operate within legal processes, especially the system of capital punishment. The study of actual language practices allows us to “examine the effect of wider macro power structures that constrain people’s lives by looking at what counts as power during moment-to-moment negotiations in conversation” (Goodwin 2006:9; Speer 2005). This power rests in ideological projects of legitimation (Abrams 1988), which involve defining “available social identities” (Nagengast 1994: 116) according to which people may act in certain definable ways in legal process. Concomitant with this is the production of “undesirables” (Hansen & Stepputat 2006:301, cf. Goode & Ben-Yehuda 1994), likened to Agamben’s (1995) *homo sacer*: “the included outside upon which a community or a society constitutes itself and its moral order” (Hansen & Stepputat 2006:296). This project proposes that linguistic practices surrounding death penalty trials, such as constructions of agency and demonstrative

reference to defendants in trial talk, jury deliberations, and legal statutes, contribute to the construction of the defendant as just such an “undesirable.” The dissertation refines the concept of undesirability through a focus on how “available social identities” and “undesirables” are simultaneously discursively constituted. This involves querying how “normal” and “dangerous” subjects are defined against each other and implemented as legal standards during trial.

Related to this notion of social “undesirables” is the criminological notion of the “dangerous class” (Feeley & Simon 1992; cf. Foucault 1988). According to this theory, criminal justice practices operate under the assumption that “subgroups” or “aggregations of individuals” are at high risk for criminal behavior and, as such, must be managed through “selective incapacitation” (Feeley & Simon 1992:122). “Representative citizens” of these groups are thus imagined as “idealized types,” which are marketed as “merely descriptive of what already exists” (Rhodes 2002:446), eventually implicating the existence of “others” who “form a natural species separate from ‘us’” (*ibid.* 457).

In a similar fashion, Garland (2001:191-192) argues that death penalty support is based not on careful, actuarial prediction, but on intolerance produced by “stereotypical images of danger and negative evaluations of moral worth” in offenders. Weisberg (1983:391) similarly predicts that capital jurors will vote to execute a defendant when he “presents the threatening image of gratuitous, disruptive violence.” These images are enmeshed in a social order obsessed with control in which those who make and carry out the criminal law “segregate, fortify, and exclude” (Garland 2001: 194), which ultimately leads to targeting specific social groups (*ibid.*:194-195). Crucial to understanding such

classificatory practices is interrogating the “naming” of criminals by those in power, including legal actors (Thompson 1975:193-194). The dissertation's focus on the discursive construction of particular sovereign subjects will thereby advance a “view of sovereignty as a tentative and always emergent form of authority” (Hansen & Stepputat 2006: 297) and contribute to knowledge of how “the subject comes to be attached to larger collectivities” through practices of state violence (Das 2008).

### **1.2b. The particular and generalizable in law**

Just as in narrative, legal practices highlight the particular and simultaneously rely on canonicity (cf. Ochs & Capps 2001). Each story – or case – is unique and, as such, each time it is told it reveals a particular perspective on a set of events. But these are always made sense of in terms of well-established narrative genres, or, in the legal realm, precedents. In this sense, defendants are beholden to legal generalizations, in that they must be identifiable within particular categories of persons and behavior, such as “guilty,” “liable,” and “continuing threat.” Jurors must fit the individual facts about defendants lives and cases into these pre-established categories in order to render judgments. This tricky navigation between the particular and generalizable is a powerful process, in that it can challenge the legal status quo. As Gerwitz (1996a:5) argues, legal narratives “give uniquely vivid representation to particular voices.” As such, law is never solely based in the sovereign, Bruner (2002:50) asserts, but always has a local point of view.

The complex relationship between legal individuals and generalized categories resonates with historical accounts of the origin of the jury, which state the jury's goal as democratically representing collective, or community values. Thus, as a juror, some

argue, one suppresses the “I” in reverence to the “we;” deliberation, jury scholars argue, transforms individual biases. Abramson similarly cites the ideal of the jury as “join[ing] with others in search of norms whose power lies in the ability to persuade across group lines” (2000:192).

Objectivity in general, including that striven for in law, involves the suppression of individuality. As Bourdieu (1979) writes, “objectivity is defined by the agreement of subjectivities.” This can be seen as a basic statement of what law does; it creates consensual patterns out of individual acts. However, while the origin of the jury is often attributed to the democratic desire to take legal decisions out of the hands of idiosyncratic judges, there is no real consensus within the law as to how much jurors should or should not rely on their own individual judgment. An 1895 Supreme Court decision stated that “upon the jury [lies] the responsibility of applying the law so declared [by the judge] to the facts as they, upon their conscience, believe them to be.” Indeed, death penalty case law asserts that jurors should not make a decision so as to violate their own individual conscience. This flies in the face of instructions that urge jurors to put their own individual beliefs aside.

This interface between the individual and generalizable is greatly complicated in the instance of death penalty trials, which require jurors to give unparalleled weight to the defendant *qua* individual in capital decisions. In the guilt phase of capital trials, jurors make typical criminal legal judgments, in that they identify a legal category, such as murder or manslaughter, into which the facts of the defendant's case fits. In the punishment phase, however, not merely the act, but the person is on trial; jurors must

decide on the “moral condition” of the defendant and whether such relegates him as deserving of the death penalty (Weisberg 1986:303). This opens the penalty trial to diverse forms of evidence, such as victim impact testimony and mitigation presentations about the defendant's childhood, potential mental illness, drug abuse, physical abuse, and any other fact of life that might sway a juror to spare a death sentence. Thus evidence presented about defendants, its effectiveness, and jurors' bases for decisions are highly variable from case to case.

This inherent variability of death penalty trials in part led to the decision of *Furman v. Georgia*. With the subsequent restructuring of capital punishment decisions, Weisberg argues that the “[Supreme] Court has tried to dignify the once lawless death penalty with the reassuring symbolism of legal doctrine” (1986:307). The resultant contradictory trajectories of death penalty decision-making (which, despite Supreme Court decisions, both still operate) – one towards legal generalizations and the other towards individual considerations – lead Weisberg to identify a two-fold dilemma with capital punishment: because of the danger of “arbitrary” decision-making procedures, courts are compelled to control capital decision making with legal rules; yet, at the same time, the decision of death is an “intensely moral, subjective matter that seems to defy the designers of general formulas for legal decision” (ibid.:308). Capital jurors are caught at this juncture of individual considerations and legal generalizations. The inherent contradictions the death penalty process entails, as explored in the remainder of this text, have significant consequences for how they arrive at their decisions.

### **1.3. Legal processes as translation**

Sifting individuals and individual actions through legal categories involves an element of translation, in which everyday categories are translated into applicable legal terms. This process takes the form of what Mather and Yngvesson (1980-81:778) term “narrowing,” whereby “established categories for classifying events and relationships are imposed on an event or series of events, defining the subject matter of a dispute in ways which make it amenable to conventional management procedures.” In this framework, which others refer to as “transformation” more generally (e.g. Felstiner, Abel and Sarat 1980-81, Richland 2004), disputes are brought into institutional settings through a process of partial re-definition. This involves narratives of personal injury or wrong-doing being retold in court according to relevant statutes and constrained by institutional rules and procedures. Crucial in the process of narrowing are the legal specialists involved (Mather and Yngvesson 1980-81:793), for it is according to their interests that the direction of the narrowing will be guided. Thus voices that carry authority and those that are heard over others during trials affect how this process of translation occurs, designating in part what versions of events and persons prevail.

Jurors, however, as lay persons thrust into the legal system, must use everyday categories of judgment to make decisions based on these legal categories, for legal determinations such as “willful” and “knowing” are not defined specifically within the legal statutes. Bennett and Feldman (1981), in their explication of narrative legal sense-making, convey how jurors draw on common sense narrative tropes, such as the linear temporal trajectories of actions and notions of intentionality and motive that result in attributions of causality, in making their decisions. Legal narratives are thus

“[e]veryman’s portal into the arcane realm of law” (Bruner 2002:48). In this sense, while legal narratives are constrained by institutional procedural rules, they must also resonate with jurors’ everyday understandings of causality, sequence of action, and intentionality. It has been shown, in fact, that jurors themselves use everyday narrative frameworks to re-construct what they hear in the courtroom and apply judgment to it (Conley & Conley 2009, Pennington and Hastie 1993).

In this process of translation, parties’ versions of what happened become distanced from their original tellers through the institutional storytelling of the court. Parties to a case are especially distanced from courtroom narratives in criminal cases, for victims are not those bringing the cases against the defendants. Instead, the case is brought by the abstract being of the “state” (e.g., *The State of California v. John Doe*), which depersonalizes the crime and transforms it further into the state’s or society’s problem (Gerwitz 1996b:137). Witnesses still maintain some agency in this dialogue, however, as will be explored in Chapter V. In highlighting the intersection of legal and lay logics (Steiner, Bowers & Sarat 1999), i.e., how jurors manage to reconcile legal instructions and definitions with everyday notions of morality and justice (*ibid.*, Minow & Rakoff 1998, Weisberg 1983), this dissertation augments understandings of the “social role of legal doctrine” (Weisberg 1983:383)—how legal texts are interpreted and put to use in everyday applications of the law. As will be examined throughout the dissertation, everyday and perhaps primordial properties of human encounters, such as empathy and emotion, are suppressed in varying ways by legal processes. Although these properties do persist, they are mediated in important ways in jurors’ experiences and decisions.

#### **1.4. Contributions to legal theory and practice**

This dissertation aims to advance theory in anthropology, legal studies, criminology, and related fields, as well as making practical and theoretical contributions to the practice of justice. Absent from anthropological research on sovereignty and violence and legal scholarship on capital punishment and jury decision-making is a focus on the role of language in the processes they describe. This dissertation's unique contribution will be to highlight linguistic practices within processes of state violence and legality.

Through a focus on linguistic practices and their roles in the construction of persons and realities, the dissertation aims to contribute to an understanding of the state and its role in everyday constructions of violence and criminality. It aids in retheorizing anthropological inquiries into law and sovereignty by applying a micro-analytical, linguistic anthropological perspective to the question of how persons are constructed within and through these domains. Studies of sovereignty have until recently neglected the extent to which state practices are manifest in the lives of everyday actors (see Greenhouse, Mertz & Warren 2002 for an exception), which has resulted in both understating and overstating the “idea of the state as a center of society” (Hansen & Stepputat 2006:296). This dissertation thus follows the lead of those scholars “charting and advocating an ethnographic approach to sovereignty in practice” (*ibid*:297).

During capital trials, laypersons (jurors) are thrust into the legal system and required to decide the fate of defendants according to poorly defined standards. Since jurors’ abilities to interpret and apply the law are the “backbone” of the American justice system (Barron 2003:239), studying capital jurors provides a unique opportunity for

anthropology to contribute materially to discussions of how the state and its inhabitants collide during the exercise of ultimate state power. This will advance theory on the relationships between states and morality (Pardo 2004) and sovereignty and subjectivities (Hansen and Stepputat 2005).

The dissertation specifically involves querying state violence in the United States, which is highly understudied. It will therefore contribute to the ethnography of America, specifically the American south, where a paucity of work on the state's role in citizens' lives has been conducted. Furthermore, the dissertation will augment investigations of cultural sensibilities within particular American communities (cf. Greenhouse, Yngvesson & Engel 2004, Greenhouse 1992, Merry 1990), thus addressing “where ‘America’ and its various bits and pieces are formulated” (Moffatt 1992:223).

Anthropological theory and practice are uniquely situated to benefit researchers, legal professionals, and advocates attempting to improve the administration of justice (e.g., Merry 2006, Bowers 1995, Weisberg 1983). The dissertation thus contributes to legal theory and practice in several ways. First, it makes a significant contribution to advancing research on jury decision-making. In the instance of capital jurors, researchers are barred by federal law from accessing actual deliberations (Costanzo & Costanzo 1992:188). To get around this limitation to data collection, studies have utilized simulations, experiments, or interviews with randomized members of the population to investigate understandings of legal instructions and what particular legal and extra-legal issues influence jurors' decisions (e.g., Diamond 2004, Ellsworth 1989). Given the unparalleled context of a capital trial, however, these studies fail to approximate the

situational variables involved in an actual capital juror's decision. By utilizing linguistic anthropological and ethnographic methods, such as interviews with jurors and other legal actors, participant-observation in death penalty trials, and linguistic analysis of trial talk, this work provides a unique perspective on jurors' decision-making, thus significantly augmenting knowledge on how actual capital jurors decide to sentence someone to life or death and, more generally, how jurors interpret the law and put it into practice.

Second, by investigating how capital juries operate, this dissertation contributes more broadly to research and legal debates regarding the death penalty in the U.S. The majority of death penalty scholarship is based on philosophical and political argument, statistical analysis of sentencing patterns, and surveys (Fleury-Steiner 2004). This dissertation interrogates the linguistic ambiguities in the future danger question and the significance of this ambiguous legal language to jurors' decisions. It assesses varying considerations jurors rely on in interpreting their instructions and, in turn, the extent to which the court's instructions are adequate to enable them to come to a fair and informed decision. Because a death sentence is irreversible, it is absolutely crucial that jurors be given all opportunities to correctly interpret the law and understand how it should be applied.

The limited anthropological work on capital punishment interrogates processes of lawyering (Kaplan 2008, Cheng 2007), images of executions (Lynch 2000), and the practice of the death penalty in pre-colonial societies (e.g., Dillon 1980). In studying the language practices of actual death penalty trials, this dissertation will thus contribute to a facet of legal anthropology that is currently extremely understudied. Anthropological

theory has also been largely absent from studies of jury decision-making. Social psychologists studying juries (e.g., Pennington & Hastie 1993) have relied primarily on mock trial experiments and statistical inferences from decided cases (Blume, Garvey and Johnson 2001). Only in the past fifteen years are so have actual jurors been included in the analyses of how capital juries work, but such projects are still rare (Fleury-Steiner 2004, 2002; Bowers & Steiner 1999; Steiner, Bowers & Sarat 1999; Bowers 1995). A few scholars have had access to actual (non-capital) jury deliberations (Conley & Conley 2009, Diamond 2006, Manzo 1993, Maynard and Manzo 1993, Kalven & Ziesel 1966), but this is unlikely ever to happen in capital cases. By interviewing actual jurors and comparing what they say with what occurred during their trials, this dissertation therefore gains the best practicable access to jurors' perspectives and link them to what happened in each trial.

In sum, the dissertation focuses innovatively on the cultural and linguistic elements of capital punishment practice in the United States, and, more generally, the role language plays at the intersection of sovereign powers, legal systems, and social actors. This unique focus will augment anthropological and legal theory, as well as contributing to knowledge of how criminal legal processes in the U.S. operate.

### **1.5. Research design and methods**

The dissertation research involved twelve months of fieldwork, from 2009-2010, in and around Houston, Texas for data collection<sup>3</sup>. I chose Houston as my base because it is one of two hubs for death penalty litigation and policy-making in Texas, Austin being the

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<sup>3</sup> This research was generously supported by the Wenner Gren Foundation and the National Institute of Justice.

other. I obtained contacts with attorneys during my pilot research in 2008, which involved a legal internship with the Texas Defender Service, a non-profit organization that provides trial and appeal aid to capital defenders. Texas Defender Service attorneys were crucial in providing me with information, trial documents, and research assistance as my fieldwork progressed. During these twelve months, I attended four capital trials from start to finish and conducted post-verdict interviews with jurors. This work took me to six different Texas counties in central, east and west Texas, thus introducing me to a wide variety of areas of the state. I did not, however, have much exposure to the areas of Texas along the Mexican border, about which a preponderance of the anthropological work on Texas has been written (e.g., Martinez 2009, Spener 2009, Murphy 2001, Saldivar 1997, Paredes & Bauman 1995).

The research and analysis relied on a variety of ethnographic and linguistic anthropological methods, including interviews of jurors and other trial participants, participant-observation in death penalty trials, audio-recordings and note-taking of these trials, and qualitative linguistic analyses of transcribed interviews and courtroom interaction (see Sidnell 2010, Bernard 2006, Duranti 1997). This integration of methods serves, in the absence of access to actual capital jury rooms, to provide the clearest window into jurors' decision-making processes as possible.

*1. Participant-observation:* I attended four capital trials from jury selection until the sentencing verdict was read. Three of these resulted in death sentences, one in a life sentence. One was located in a very sparsely populated, fairly rural central-Texas town, another in the capital city, a third in a good-sized college town in western Texas, and the

last in another college town of comparable size in central Texas<sup>4</sup>. I worked very closely with the defense attorneys on these trials, attending strategy meetings, assisting with jury selection, providing assistance to defendants' family members, meeting with witnesses, and aiding in drafting legal documents, including jury instructions. These experiences provided me with a tremendous background against which to interpret jurors' remarks and analyses of trial language. Participating in these trials was an intensely emotional experience for everyone involved, including myself. In addition to my more formal activities, I tried to provide emotional support when possible for attorneys, defendants and their families.<sup>5</sup>

The emotional nature of these experiences often led me to have conflicting feelings about my level of involvement (or lack thereof) in these trials. How was I to act, for instance, when I ran into the victim's mother in the bathroom, knowing she had been eyeing me sitting with the defense for the entirety of the trial? And how was I to behave with the defendants, for whom I developed a tremendous amount of sympathy, while trying to maintain a professional and personal level of distance? A scene from my field notes conveys an element of my phenomenological trouble during fieldwork:

I handed a defendant a piece of chocolate, joking to him about how much he had been eating. Meanwhile, at the witness stand, a psychologist testified to the judge about how scientific research that had for decades convinced jurors that defendants would commit future acts of violence was grossly unreliable and

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<sup>4</sup> Though trial information and transcripts are part of the public record, I will keep details about the trials ambiguous as much as possible in order to discourage any linkage between the data I present and the identities of the jurors I interviewed.

<sup>5</sup> For example, at the conclusion of the punishment phase of the first trial I attended, I was invited to sit with the attorneys while they impatiently and restlessly waited for the jurors' verdict. I felt out of place and was unsure of what to do, so I offered my computer's music library to the lead counsel, who was pacing, not knowing what to do with himself either. He sat, headphones in his ears, sifting through my "eclectic" list of songs, as he called it, sometimes singing along. I'm not exactly sure if it helped him through the process, though it seemed to in some way.

decisions that had utilized it should be considered unconstitutional. At that moment, I was attending both to my relationship with the defendant, which mostly consisted of keeping him calm during the course of the trial, and my analytic observance of the testimony going on.

I thus constantly tacked back and forth between differing stances towards my experience, often deciding that one was for some reason or another more appropriate in a given situation. As will be seen through the jurors' interviews presented in this work, jurors often were similarly phenomenologically challenged, having to monitor their own thinking and judgments, convincing themselves that a particular "objective stance," for instance, was needed, while a more empathic one should be suppressed.

In addition to engaging in trials, I immersed myself in the Texas system of crime and punishment more generally. I thus spoke with a variety of attorneys and judges in informal settings, such as bars or meetings not related to trials. I stood and spoke with protestors during two executions outside the Walls prison complex. I also visited the death house inside Walls, viewing the cell in which inmates are kept until their scheduled execution time and the death chamber with its cross-shaped injection table. I toured the rest of the prison as well and visited two other prisons in Texas that house death row inmates (the standard death row and a psychiatric facility where death row inmates are sent). Lastly, the majority of my personal engagements were with capital attorneys. I forged some lasting friendships as they expressed their tribulations of working within a system they viewed as deeply flawed.

2. *Interviews:* All interviews were audio-recorded, in order to obtain verbatim renderings of what each interviewee stated. This is crucial to analyzing the linguistic structure of jurors' and others' responses.

*a. Juror Interviews:* I interviewed 21 jurors from nine death penalty trials.

Jurors names were obtained from public records and I located their contact information using internet search tools. Most of the interviews were conducted within six months of when the trial took place, many within weeks. I was thus able to reduce participants' memory limitations, though all retrospective interviews must be analyzed with an eye to this potential problematic factor (Haney et al. 1994). The first stage of the juror questioning asked open-ended questions about the jurors' general experiences serving on capital trials. This was in order to discern what parts of the trial experience were most salient to the juror him/herself, rather than imposing researcher-based categories onto the jurors' responses. This model of interviewing is based on the paradigm of person-centered ethnography, which investigates what features of a community are salient to its inhabitants (Hollan 2001:48; LeVine 1982). This approach attempts to “avoid unnecessary reliance on overly abstract...constructs” created by the researcher (Hollan 2001:49). The goal of this stage of interviews was thus to have the jurors “construct their responses in their own ways” (Fleury-Steiner 2002:555), to ascertain what was significant in the jurors' decision-making from both within and external to the trial.

The second stage of the interviews focused on the jurors' understanding of the language of the jury charges, or instructions. The following are some examples of questions from this stage of the interviews:

1. During the punishment phase of the trial, you were given two separate issues on which you had to base your sentencing decision. Can you please, to the best of your recollection, repeat to me the first issue [the future danger question], in the

court's language?

2. Now, can you, in your own words, explain the first issue to me?

3. Can you tell me, in your own words, what "probability" means to you in this instruction?

These questions were designed to interrogate how jurors processed and interpreted their instructions and what impact this had on their decision-making processes.

*b. Additional Interviews:* I interviewed judges and lawyers involved in a variety of death penalty trials, including those on which the jurors I interviewed served. I additionally interviewed others involved in the system of capital punishment, such as prison wardens, guards, and protestors at executions. These interviews were conducted in order to obtain contextual information regarding jurors' knowledge about and interpretation of various aspects of the death penalty process. These interviews were less structured than the jurors' interviews, the main purpose being to elicit actors' impressions of defendants, their trials, and the implementation of the death penalty.

*c. Interview Analysis:* Transcripts of the audio-recorded interviews were analyzed to ascertain the linguistic forms used by interviewer and interviewee (Briggs 1986:4), in order to analyze both linguistic and content-based aspects of the data. Instead of coding each interview according to subjects that I, the analyst, found important, I looked to the actual wording of interviewees' responses to deem what was important to them (see discussion above regarding person-centered ethnography). This analysis revealed not only the propositional content of the jurors' responses, but also ideologies (e.g., Schieffelin *et al.* 1998) regarding death penalty defendants, including what kind of

(sub)humans they are and how they should be punished.

3. *Trial analysis*: Trial analysis was based on the audio recording of one trial on which the jurors I interviewed served and official court transcripts of three of the other trials, which were transcribed by court reporters. The audio recordings were transcribed to convey interactional resources that are necessary for linguistic analysis, in a form loosely based on transcription for conversation analysis (Jefferson 2004)<sup>6</sup>. The analysis of the trial transcripts focused on the following: linguistic encodings of emotion (Caffi & Janney 1994, Ochs & Schieffelin 1989) and empathy, such as emotive lexicon, intonation patterns, assessments (C. Goodwin & M. Goodwin 1992) and embodied displays of stance (Goffman 1981, C. Goodwin 1981); reference forms (Sacks & Schegloff 1979) used to refer to defendants during trial; and grammatical constructions of agency (Duranti 2004, Ahearn 2001) regarding defendants' criminal acts and jurors' and others' involvement in sentencing defendants to death. In addition, the analysis of trial transcripts tracked portions of the trial that address the salient categories identified in the interviews, including what portions of the trial were most salient to jurors' decisions, moments that were important to jurors' conceptualization of the defendants, and ideologies from jurors and others about who defendants are and how they should be treated.

The final stage of analysis involved a comparison of the interview data with the trial transcripts. The comparison of these data sources included identifying specific linguistic forms (such as syntactic, lexical, and morphological forms) that were used in

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<sup>6</sup> For the purposes of this dissertation, the only transcription symbols that will be used are “-”, to indicate an utterance that was cut short, “( )”, which indicates a part of the recording I could not decipher, and “[“”, to indicate overlapping speech.

portrayals of dangerousness – both in trial and in interviews – by jurors, attorneys, judges, and witnesses. In order to make this comparison, I first identified from the interview data patterns of confusion and understanding among the jurors about the future danger language. Once specific parts of the question were highlighted, I looked to the trial data to determine when, how, and by whom these parts of the question were addressed in court. In addition, I examined in detail any parts of the trial that the jurors identified in the interviews as significant to their understanding. Also, based on the findings from the trial data, I determined linguistic techniques used in court that led to an overall portrayal of the defendant as dangerous. Looking then to the interview data, I investigated whether jurors considered these portrayals significant to their decision-making process.

From these comparisons, I gained an understanding of what specific linguistic forms and techniques were used in trials to portray the defendant in certain ways and which of these the jurors find significant to their decision-making processes. This analysis additionally illuminates what extralegal factors (such as jurors' own ideas about dangerousness) contribute to jurors' decisions. Lastly, the analysis reveals the extent to which jurors (mis)understand their instructions, specifically the future danger question, what specific parts of the trial affected these (mis)understandings, and how these (mis)understandings inform the jurors' decisions.

## **1.6. Overview of chapters**

The following chapters investigate the construction of persons within the process of legal translation described above. Each will examine a different group of linguistic phenomena

and the ways in which they mediate jurors' interpretations of what they hear in trial, their understandings of defendants and their actions, and ultimately their decisions for life and death.

Chapter Two, "Lone Star Justice: Notions of place and space in ethnography," examines the roles of conceptions of place in trial participants' constructions of identity. Ethnography is increasingly losing its sense of place; field sites are less often locations than abstract points on some placeless network. Borders are questioned; ethnographers focus more on their absence than their definition. The chapter queries what is regionally distinctive about Texas jurors and their decision-making. Texas is a capital punishment anomaly. In recent years it has sentenced to death over twice as many people as the rest of US states combined. How can anthropological conceptions of place help me discern what makes Texas special in this regard? What is it about this locality that makes jurors give death sentences more than in any other state? What separates Texas from other southern states, and American death penalty practice in general?

Chapter Three, "Empathy, Emotion and Objectivity in Death Penalty Trials," proffers the perspective that legal subjects, traditionally conceptualized as disembodied, rational abstractions, are, in practice, agentive subjects who are intersubjectively and bodily entwined with others throughout the course of a trial. The analysis demonstrates how face-to-face encounters in capital murder trials shape the construction of defendants and in turn the trajectories of jurors' decision-making. Interactional and experiential aspects of the trials, such as emotional encounters between defendants and witnesses and eye contact between jurors and defendants, often put jurors in intense conflict with

deeply-seated ideologies about law as objective and reason-based. The chapter examines how Texas capital jurors negotiate these conflicting demands for objectivity and empathy. More specifically, it investigates what strategies attorneys use to reduce the humanity of defendants; how face-to-face encounters with defendants perhaps counteract these strategies of dehumanizing; and what cultural and institutional forms of engaging and/or constraining empathy and intersubjective encounters are salient for jurors' decision-making.

Chapter Four, "Living with the Decision that Someone will Die: Linguistic distance and jurors' decisions," examines deixis as a primary tactic through which jurors gain emotional and cognitive distance from defendants and their actions. This and other linguistic means of distancing also serve to separate jurors from the intensely difficult decisions they have to make. The chapter makes analogies between the role of proximity in philosophic and other theories of empathy to proximity and distance in the structure and usage of linguistic deixis. It asks to what extent these two forms of distance are interconnected, and whether they contribute to jurors' abilities to sentence defendants to death.

Chapter Five, "Linguistic and Legal Agency in Jurors' Decisions for Death," explores the ways in which jurors' language choices mediate their conceptions of their individual responsibility for putting defendants to death. In that the Texas sentencing scheme does not require jurors explicitly to render a death sentence, this chapter uses the analysis of linguistic constructions and mitigations of agency to examine how jurors view their roles in the sentencing process, from finding their verdict to the implementation of

the sentence itself.

Chapter Six, “Intentionally Causing Death’: Linguistic framing of defendants’ agency in criminal acts,” analyzes the constructions of agency regarding defendants’ criminal acts, investigating how jurors, attorneys and judges linguistically encode defendants’ agency in their criminal acts and how these inform jurors’ decisions of guilt and punishment.

Chapter Seven, “Conclusions,” queries whether the jurors’ decisions, including the linguistic acts described in the previous four chapters that inform them, constitute acts of violence. These chapters reveal that language is crucial in the making and unmaking of defendants into human beings, acts often described by theorists of law and language as violent. The conclusion argues that language mediates a central tension and source of violence in death penalty trials, between encounters with the face of another human being and the institutional making of that being.

## **2. TEXAS JUSTICE: LOCATING PLACE IN ETHNOGRAPHY**

*“If there are fewer of us who retain our identity with a region there are fewer regions powerful enough to force an identity.” A.C. Greene, 1968, *A Personal Country**

## **2.1. The concept of place in ethnography**

This chapter serves a dual purpose. First, it introduces the reader to the settings in which I conducted my fieldwork, as the first or second chapter in any anthropological dissertation is bound to do. Secondly, taking Geertz's (1973:22) affirmation seriously that the *locus* of ethnographic study is not its *object* of study, this chapter begins with an ambivalent stance towards the often relied upon (and implicitly embedded) assumption in anthropological work that place should be the starting point of ethnographic description and analysis. Rather, this chapter first questions how the notions of place and space factor into cultural identity-making among those I studied, only then ascertaining the import it has for making sense of jurors' experiences in Texas death penalty trials and this ethnographic work more generally.

In Chapter Five, I will delve more deeply into the weighty role the state as an abstract entity plays in jurors' decision-making. This section, however, deals more specifically with Texas as a place – constructed in part through jurors' discourse about their experiences – and to what extent jurors imbue this place with meaning. I will ask how Texas as a geographic and/or symbolic entity intersects with other meaningful places, whether concrete or imaginary (Appadurai 1996, Anderson 1983), and how these places and their intersections figure into jurors' interactions. More specifically, I examine how places and spaces are linguistically constructed and made relevant to specific identities. This chapter thus analyzes tropes of Texas identity, culture, and landscape, such as local justice, Christian fundamentalism, and “country” living, that arise as salient categories in discourse surrounding capital trials.

The process of becoming a juror involves in large part an occupation of a variety of identities, some real, some imagined or symbolic, some local to a town or county or state, some national and American. These identities have different reference points, all of which are linked in some way to place. As I sat through trials and talked to jurors in Texas while conducting my dissertation fieldwork, I thought about what it meant for these people to be involved in death penalty trials. How do they identify themselves within this process? How do their identities change or merge or shift upon participating in this institutional ordeal? In sifting through these questions, especially in trying to maintain my own identity as an anthropologist while asking them, I realized that it is impossible to omit place from the equation. It seeps into how jurors talk about their experiences, it's in the casual and often jocular conversations the judges and attorneys have when court is out of session, either in the courtroom or in chambers, I was saturated in it as I drove through the vast Texas landscapes from county to county, I was in it on the bucolic ranch roads that took me to a juror's house two miles in from the main road, then equally so when I impatiently stood in the line that wraps around the Austin criminal courthouse in order to be fed through the metal detector.

This, it seems, is where the joy of ethnography lies, in literally occupying some place in order to experience, see, feel, smell, and taste the lives of some body of people. I recognize that this sort of physical occupation is not always possible and certainly not necessary to establish community, especially with the increased impact of neoliberal global movements and technological advancements, which has led social theorists to concepts such as “imagined communities” (Anderson 1983), “virtual neighborhoods”

(Appadurai 1995), “ethereal cultures” (Kinkade & Katovich 2009), and “networks” (Green et al. 2005, Castells 1996, Strathern 1996). In addition to being relegated to imaginary or virtual realms, place has been deemed irrelevant to the formation of community and identity altogether (Green et al. 2005: 806, Tsaliki 2002). But the notion of place, I argue, remains central to how people experience their identities and cultural surround. This parallels Fox's perspective on place and culture, which finds identity in the “emplacement of a knowable, narratively real locality” (2004:82, Feld & Basso 1996). Physical places are often integrated with other meaningful spaces and places in the construction of identity. As Bendixsen notes in his ethnography of the American West, real and imagined spaces are thus not contrastive, but are “actively and mutually influential” (2010:24).

I propose, in line with these authors, that people (both ethnographers and those they study) rely on the “shopworn anthropological trope” (Fox 2004:81) of physical place in order to construct meaningful identities, often based in differentiation (Bucholtz & Hall 2004, Appadurai 1996). Physical spaces often generate meaningful senses of place that are mobilized as “indicators of either social distance or identity or both” (Davis 2009:45). In this chapter, I will show that identities such as an American juror, or a Texan, or “country people,” though they may cross geographical lines and garner meaning across seemingly spaceless networks of media and discourse, are invoked in culturally-specific interactions through reference to physical places (see Bendixsen 2010), whether they can be tangibly occupied at that moment or not.

To invoke the importance of place in understandings of identity, I find it

appropriate to speak of *occupying* identities, especially when so-called lay people become entangled in some institutional process. Carr (2009) speaks of a similar process when former drug-addicts become institutional social workers within rehab programs, and as such must find discursive ways to “inhabit,” as she writes, this institutional identity. As soon as the jury selection process starts, different kinds of people are required to occupy the institutional identity of being a juror, and, as this chapter will show, there is some shared sense of how this occupation is carried out. Though this process starts far before the jurors' summons are sent, what a juror is, and what a juror is in Texas, exists in the minds of these people well before they come into the courthouse to sit through questioning. Before walking through the courtroom doors, jurors have acquired notions of what it means to be inside the jury box from a variety of sources, such as their families and the media.

Jurors, attorneys and judges evoke this shared configuration of juror identity through discursive references to different places, on broad, geographical scales such as Texas or America, to specific places in the courtroom such as the jury box or witness stand, to interactionally-constituted deictic points, such as here or there. More importantly, perhaps, abstract identities and cultural notions such as moral beings, justice, and criminality are similarly invoked through these references to place. It is as if these ideals must occupy or inhabit some place, real or imaginary, in order to make sense and to become recognizable referents for a shared identity (cf. Fox 2004).

## **2.2. Place and identity in interaction**

In order to examine jurors' conceptions of place and their meaning in constructions of

identity, I analyze legal actors' linguistic constructions of places and spaces. Interactional space itself is a place where meaning is made and in which identities are actively constructed. To explain this notion, Fox invokes Bakhtin's (1981) notion of chronotope, which he defines as an “alignment of space, time, and subjectivity in a genre-bound narrative universe” (Fox 2004:81). Within trial discourse and jurors' post-verdict interviews, as well as interviews with other legal actors, different levels of places and spaces are invoked in the construction of various subjectivities. In particular discursive contexts, certain places or spaces are accentuated, and it is this variable accentuation that makes up the hierarchical relations of which a place's identity is constituted (Gupta & Ferguson 1992). To probe these subjectivities, I will thus examine how place becomes meaningful within the linguistic alignments of space, time and subjectivity.

This perspective aligns with those scholars who, while not discussing place specifically, underscore the interactional construction of identities through discursive practices (see Mendoza-Denton 2008 and Bucholtz & Hall 2004 for overviews of this literature). In these approaches to identity construction, attention to specific linguistic and interactional forms can reveal a great deal about how and to what ends people construct particular identities in a variety of contexts. Identity is thus not a property of persons, but of a social interaction (Bucholtz & Hall 2004:376).

In probing the reliance on place in discursive constructions of identity, I investigate instances of linguistic distinction (Bucholtz & Hall 2004), whereby legal participants establish identity categories through distinguishing themselves and their localities against a variety of other places, spaces, and groups of people. Sameness and

difference, Bucholtz & Hall argue, are “not objective states, but phenomenological processes that emerge from social interaction” (*ibid.*:369). The production of a group identity, or any identity for that matter, relies on constructing an alterity who is positioned against those with whom one constitutes similarity. Identity work in general, the authors propose, consists of the organization and reification of systematized difference (*ibid.*). This is not to assume, however, that distinction is all that goes into the construction of identities, for such work is “multiple, complex, and contextually specific” (*ibid.*:375, Hall 1995, Hall & O'Donovan 1996).

The people I spoke with, worked with, and shared experiences with interacted within a network of meaningful spaces, which were differentially made relevant in moments of interaction to serve particular purposes, such as distinguishing themselves from the criminals they were required to judge or establishing their viewpoints about the death penalty within deeply entrenched Texas ideologies of crime and punishment.

### **2.2a. Constructing locality**

Jurors are locals in the most literal sense, in that they are drawn from a pool of county inhabitants, and must have resided in that county for at least 30 days in order to serve. However, the ideal jury, as attorneys often point out during jury selections, comes from a “cross-section” of the community; thus it should not be homogeneous, as a more classic sense of locality might suggest. This cross-section, however, is itself an ideal construction, since in death penalty trials especially, certain components of these cross-sections are automatically excused. Jurors are weeded out that have extreme views about the death penalty<sup>7</sup>, or cannot afford to miss work, or have children at home, for instance.

<sup>7</sup> Though the law requires that jurors who have extreme views about the death penalty either way – that

After these automatic excusals, lawyers then tend to weed out certain categories of people through the strike process, such as women, African-Americans, teachers, lawyers, police officers, ultra-conservatives, etc. Even though this ideal of a cross-section of the community may not be satisfyingly reached, juries do retain some level of diversity. As one juror from an exceptionally small Texas county noted when asked how the jury defined reasonable doubt:

*Example 2.a*

...for us it was what's reasonable to our group there. Because we were pretty diverse I mean sure we're all country people we all live here but, there's a lot of different backgrounds. And a lot of different educational levels, a lot of different work experience. Life experience. And while perhaps we are in general more conservative than people in Berkeley, I don't know that, you know, we're that hhhfar differenthhh.

This brief excerpt from a juror interview serves as a good introduction into the different levels on which place can be invoked to make sense of an experience and project a certain identity. First, the juror references “our group there,” identifying the jury as a body through a deictic reference to the courthouse or jury room “there.” “There” serves to locate the jury in a specific place and point in time, that is, the jury room during the trial. In addition, the inclusive pronoun “our” serves both to create unity among the group of jurors, as well as distinguish this group from others who do not belong. Next,

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they would always give it or always give life – be excused, many argue that juries are stacked towards death because it is much easier to convince a venire person who is a death supporter that they could consider life in some hypothetical case than convince someone to give death when they do not believe in the death penalty.

the juror describes the difference and similarity among the jurors, first through the term “country people,” which is an identifying referent to a general category of people that relies on both a physical and imagined place called “the country;” this notion of country people includes what Fox (2004) has identified as “prototypical independent and free Americans.” “We all live here,” the juror goes on, referencing the country in general as well as the specific location of Horrace County. While recognizing some potential similarities among the jurors based on their being from the same place, the juror rejects that this means they are not diverse in any way. “There's a lot of different backgrounds,” he says, which includes different educational levels, work experience, and life experience.

Through the use of the pronoun “we,” the juror further identifies the jury as a collective and continues to define points of commonality among them, next, the fact that they are conservative. He does this through the practice of differentiation introduced above, defining similarity by invoking some distinct other. This other, not surprisingly, is defined through a place name, Berkeley. “Perhaps we are in general more conservative than people in Berkeley,” he says, which echoes an often used comparison in Texas, that is, we are NOT California. Berkeley as a cultural reference also serves here to set up a polarity of extremes, Berkeley being an archetypical symbol of liberalism, which positions Texas as the archetype of conservatism. But, he continues, “I don't know that, you know, we're that far different.” In other words, Texans aren't entirely different from others in the country, even those in Berkeley.

I argue that this complex palette of place references allows the juror to occupy a

variety of identity categories at one time. Each category is defined in relation to another. First is the juror identity, located in the jury room in the courthouse, which all Americans have the potential to share. Next is the local identity of country folk from Horrace County, which is broadened into a conservative, Texas identity. Thus the jurors are Texan but also American, American but not Californian. Within these invocations of similarity and difference, the juror maintains the ideal of a jury as a cross-section of the community, maintaining that the jurors in this case represented a diverse array of backgrounds.

I will comment briefly on the laughter in this example, as it illustrates that the juror recognizes some kind of irony or humor in his statement that Texans from the country are not that far different from people in Berkeley. To me this is a self-deprecating laugh, one I've heard from other Texans throughout my ethnographic encounters. More specifically, a lot of Texans I've spoken to both in small, rural and large, urban counties laughed at themselves in my presence for being hicks that an anthropologist might want to exploit or expose. Multiple judges, when finding out that the strange girl in their courtroom furiously writing was a graduate student from California, asked me, with a knowing laugh, if I've come to show the rest of the world what "backward hicks we all are." Of course not, I responded, I'm from North Carolina myself, throwing in a slight southern accent. This seemed to give them a sense of comfort that I was not there simply to gawk at their weird, country ways.

### **2.3. We are Texas: Inclusive pronouns and distinction in the production of identity**

As mentioned above, a great deal of social science and linguistic scholarship has been dedicated to the study of identity as an enactment of difference. A question less well-

examined is when precisely difference becomes relevant to an actor's construction of identity. Accounts of identity that deny place as a central anchor point often speak of culture and identity as boundless and open-ended (Castells 1996:807). This section will locate boundaries in identity formation that are based specifically in place and embedded in discursive markers of difference, specifically, through the use of inclusive pronouns such as “we” and “our.”

Texas scholars and native lay persons often remark at the difference one feels in America being a Texan. All Americans, inside and outside Texas, most likely have a sense that Texas is especially unique among the states. As Graham (1998) describes in a collection of essays that explore his Texan identity, in other cities, such as Philadelphia, inhabitants are concerned with what ethnicity they represent within the country as a whole. They will often define themselves as, for instance, African-American or Irish-American. When in Philadelphia, he, in contrast, was not identified according to a particular American ethnicity, but, rather, as “Texan” (1998:6). In this sense, even when traveling elsewhere, the border between Texas and other states remained with him.

As illustrated in Example II.1 above, the inclusive pronouns “we” and “our” can be mobilized in order to distinguish certain places through which speakers construct their identities. There is a particularly strong sense of inclusive identity in the state of Texas and it is often based around a sense of hard and severe justice. For instance, in a televised debate to support his bid for the republican presidential nomination in 2012, Texas Governor Rick Perry was asked whether having overseen more than two hundred executions during his tenure makes it hard for him to sleep at night. When the questioner

read out this statistic, the audience erupted into cheers. After responding that he experiences no unease due to his lengthy execution record, he went on to describe criminal justice in Texas:

*Example 2.b*

“But in the state of Texas, if you come into **our** state. And you kill one of **our** children, you kill a police officer, you're involved with another crime and you kill one of **our** citizens. You will face the ultimate justice in the state of Texas. And that is you will be executed. [loud cheers]”

Here Rick Perry creates a unified collective that is Texas through the use of the inclusive pronoun “our.” Significantly, he addresses a hypothetical criminal in the second person, “you,” thus excluding him (I would assume his hypothetical criminal is a man) as a member of this collective. The criminal is thus seen as an outsider who enters the state in order to inflict harm against its citizens. His mobilization of Texas as a unified place with unified goals for hard justice is met with an exuberant round of cheers. Thus even though the number of death sentences actually handed out in Texas and in the country as a whole have decreased over the past few years, support for the death penalty, as evidenced through the response to Perry's answer, still exists as an ideology that unites Texans according to their underlying values of swift and strict justice.

In jurors' post-verdict reflections on their decisions, Texas was often similarly evoked in discussions of the death penalty, in which pronouns “we” and/or “our” again created a sense that the juror was part of a collective body – Texas – that entails certain beliefs, ideologies, and values about crime and punishment. The following juror talked

about the nature of a capital jury's sentence:

*Example 2.c*

MG1: There's either guilt or innocence. This is not, especially in this case, it's not grey, did he do it? Did he not do it. Did he do it by the, the standards that **we** have set forth in the state of Texas as capital murder? Talk about it.

Here we have a simplification of a capital jury's duty that relies on an ideology of black and white; the juror decrees that the decision is a clear either/or. The authority backing this binary set of criteria is Texas, but not Texas as an entity separate from or transcendent of this juror. He includes himself in the body that is Texas through the pronoun “we,” thus giving his claim authority through its basis in Texas law and his involvement (however metaphorical or transitive) in the making of such law.

Another juror similarly marks her familial relationship with Texas and its representative ideologies about crime and punishment. She references her status as part of a collective that believes wholly in the death penalty in order to support her personal opinion:

*Example 2.d*

I don't have any problem with the death penalty at all. At all. I mean that may be me being mean, but. And I'm from Texas. **We** have like you know **we're** like the death penalty state. **We** have like an express lane. And maybe I grew up that way. But, but you know. I don't have a problem with it.

This juror cites her strong belief in the death penalty as a characteristic of her Texas upbringing. Implied with the use of “we” to demarcate herself as a member of this

collective is an opposing “they,” most likely the other states in the U.S. with markedly different views about when and how to apply the death penalty.

This discursive distinction between the in- and out-groups of Texas and the rest of the country (and perhaps world) is made explicit by a former Texas prison warden, whom I interviewed. During his tenure as warden, he oversaw hundreds of executions and after retirement often spoke of his change in perspective leading him to question whether the death penalty is appropriate. He reflected on this during our interview:

*Example 2.e*

Sometimes I wish **we** didn’t have it. I don’t think it’s a deterrent. In most cases. On the other hand I, I think that the state probably has the right to execute people for certain crimes. And I get a little irritated with people sometimes that are not from Texas that get on **us** because, you know my way of thinking is, you know **we** very clearly tell you, **we’re** gonna consider executing you if you go out here and murder some policeman, for instance.

And then if some guy does I don’t know that I have any sympathy for em.

The warden reveals conflict within his own view of the death penalty. But as he explores its appropriateness, he evokes Texas as a collective in which he belongs, with a shared ideology about punishment that separates it from other places in the country. His membership in this collectivity is marked through his repeated use of the pronouns “we” and “us.” This appeal to his belonging in a group seems to bolster his support for the practice of the death penalty, or at least the reasoning behind its use.

While inclusive pronouns imply some level of affiliation with the entity being

described, one juror, before delving into quarrels he has with the Texas criminal justice system, referenced Texas as “they,” thus marking his exclusion from the state collectivity and its practices. At the start of our interview, he asked me (admittedly rhetorically) why I chose Texas as the locus of my study<sup>8</sup>:

*Example 2.f*

J: why did you come to Texas?

R: Um, [just cause

J: [(clears throat) well I h- I know why.

R: hhhhhh

J: I know why but I was just seeing what you was going to say.

R: yeah just because-

J: because Texas has m- **they** convict more people and put em to de- uh, convict em in the death penalty every year.

R: yeah. That's why.

In contrast to the jurors above, who affiliated with Texas and its uniqueness regarding the death penalty, this juror distinguished himself from the state, setting up his critical stance, about which he opined further along in the interview. Of course, underlying this colloquy is the fact that he and I both recognized the widely held assumption that Texas is *the* death penalty state. These examples, in which jurors either cite their membership in or distinction from Texas illustrate the connection between place and ideology: Texas stands as a representation of extreme support for capital punishment.

Attorneys and judges also relied on references to place, specifically images of Texas, in order to establish certain points about how Texas justice is done. They used similarly comparative tactics that differentiated Texas from other parts of the country. During the general jury selection, in which the lawyers and judge address large panels of

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<sup>8</sup> In all excerpts from juror interviews, “J” represents the juror and “R” me, the interviewer.

potential jurors, prosecutors invoked Texas as a referent for specific purposes. For one, it was often repeated that “we represent the state of Texas, we represent you.” In a murder trial, the defendant is generally present in the courtroom and thus jurors can talk about the defense case in terms of a specific person. Who the state team is and represents, however, is more elusive, especially because the victim is both not the person bringing the case against the defendant (The State vs. John Doe) and is no longer alive. Thus by stating we represent Texas, we represent you, the prosecutors locate their case in terms of identities that can resonate with the jurors, being part and representative of the state of Texas.

The default “we” established during capital trials is thus the State of Texas. In criminal trials in general, there are no plaintiffs or injured parties to bring a case against defendants. Instead, the indictment originates from the State of Texas, represented in trial by the team of prosecutors. Texas, as defined through its government, is thus established as the seat of authority from which laws are established and from which the framework of the trial proceeds. Prosecutors bring this authoritative entity into practice, discursively marking themselves as its representatives. The following prosecutor introduces himself to a venire person before individual questioning, in a manner common to all such introductions:

*Example 2.g*

P: My name is Ed Lee and I'm an Assistant District Attorney here in Harris County, Texas. I will be assisted by Andrew Smith in the trial of this case – in the capital murder case in which the State of Texas is seeking the death penalty against the defendant, [defendant's name]...

Further along in the questioning, the prosecutor explains the punishment phase of the trial and the special issue questions:

*Example 2.h*

P: Again, the burden of proof is on the State of Texas. **We** have to convince you that the answer is yes. If the State fails to convince you beyond a reasonable doubt, you answer it no.

In these excerpts, the state of Texas is not merely a geographical location in which the trial takes place, but is the agent of the criminal law<sup>9</sup>. The prosecutor, who indexes his role as part and representative of the state through the inclusive pronoun “we,” establishes Texas as the authority through which to understand and judge the case. When jurors evoke different “we”s to which they belong, and from whose perspective they make judgements about crime and punishment, they are in a sense deviating from this default “we” established by the prosecution.

In addition, the prosecutors often compared Texas to California (as did the juror speaking of Berkeley above) in order to assert that in Texas, executions actually get carried out, as compared to California, where defendants are known to sit on death row for decades. We don't have a “morbid pride” for these swift executions, one prosecutor stated during a general voir dire, but we want to convey that “it will happen.” This point was often directed at venire persons who were unsure of their ability to give the death penalty. By assuring the potential jurors that death will be a swift process, prosecutors hoped to have them disqualified on the basis that they would not be able to deliver a

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<sup>9</sup> I will examine in more depth the state as an agent of the death penalty in Chapter Five.

death verdict.

Certain tropes served to represent the comparison between Texas and California, such as the OJ Simpson trial, which, most in Texas (and potentially elsewhere) seem to agree was a debacle for the justice system. You won't be here for three months, prosecutors assured the jury pool, as you might in California where death penalty trials never end. These comparisons to a state that stands for many as a beacon of liberalism served to convey the Texas criminal justice system as swift and efficient, qualities of which many Texans are extremely proud. Justice is often considered a community affair in states such as Texas, whose frontier history created situations in which justice was not state centered, but carried out on individual and community levels. Within such a state, the executioner is often envisioned as an agent of the community, rather than an arm of the state government (Zimring 2003.:111). Processes such as appeals and pardons, which extend the execution process to years in many cases – one of the attributes of the California process prosecutors were referring to -- is thus viewed as an impingement on local justice. Those on the anti-death penalty side, however, though they may be outnumbered, see such efficiency as a funneling system that expedites trips to the gurney.

#### **2.4. Local justice: Distinguishing Texas, place, and identity**

In her exploration of Texas culture and identity, Clemons inquires, “What exactly is this 'Texas'...Is it a place? A culture? Does Texas actually exist anymore?” (2008:1). This section will investigate such questions, querying to what extent trial participants, in a variety of contexts, rendered Texas as a distinct entity and salient marker of regionality.

To what extent was Texas considered a homogeneous whole with a distinct set of cultural or ideological characteristics? What kind of variations were seen within Texas as a bounded entity? What did Texas stand for; what assumptions were implicit when it was evoked in interaction? Analyses in this chapter attempt to establish the ways in which “Texan cultural identity is [revealed as] a complex set of performances that creates and maintains the idea of the state as a distinct entity and as a site of identity for its inhabitants” (Clemons 2008:2), while attempting, through a micro-perspective on language practices, to unearth the nuanced variability among these performances and their meanings.

Texas perhaps holds a “paradigmatic” (Clemons 2008:1) status of regionality within the United States. In my experience, many people cling to their Texas identity more so than other regional or state identities in the U.S. There are a number of potential reasons for this, some of which include its previous status as a sovereign nation and past and current, quite strong separatist movements within the state (Clemons 2008). I have also heard over and over again the perhaps clichéd proposition that “Texas is just different.”

Texas indeed occupies a unique position in the United States regarding the death penalty. As of 2010, Texas had executed the largest number of persons in the country since the reinstatement of the death penalty in 1976. Its total executions from that time period constituted three times that of the state with the next highest number, Virginia (463 to 107). In 2010, Texas executed nearly the same number of people than the rest of the states combined (Texas' 16 to the remaining states' 17) (Death Penalty Information

Center, [deathpenaltyinfo.org/factsheet](http://deathpenaltyinfo.org/factsheet)). Given these statistics, it is arguable that the death penalty anomaly that is the U.S. within the world democratic context (it executes more than any other liberal democracy in the world) is due in large part to Texas' executions<sup>10</sup>. In this sense, Texas serves as a metonym for American policy and ideology on the death penalty when compared to other (especially democratic) countries.

Texas is its own death penalty anomaly within the U.S. Many attribute this to its vigilante history. As its inhabitants settled in the western part of the state – warding off Mexican and American Indian occupants – and fought for its independence from Mexico and the U.S. (e.g., Zimring 2003, Gober 1997), the lack of a cohesive governmental presence in the new territories led Texans to rely, many argue, on the “law of the gun” (Gober 1997:xiii). This left individual settlers to manage disputes on their own, often favoring violence, a phenomenon often epitomized in the image of the lone Texas Ranger (e.g., Collins 2008, Webb 1965[1935]). Inhabitants protecting their land and resources are seen as concerned more with the “rule of force than the rule of law” (Collins 2008:4). Greenhouse (1992) argues that the valuation of individualism in America more broadly provides a vocabulary to resist certain kinds of authority, thus leading people to find solutions to conflict outside state governments and institutions.

Zimring refers to this ideology of crime and punishment in Texas and other similar locations<sup>11</sup> as the “mythology of local control” (2003:89). Modern executions, he argues, tend to be located in places where mob violence or “popular justice” (*ibid.*) was common in the 19<sup>th</sup> century. For this reason, current residents largely view executions in

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<sup>10</sup> A majority of the U.S. States still legally obtain the death penalty, but they use it sparingly as compared to Texas.

<sup>11</sup> These tend to be in the south.

their areas as “expressions of the will of the community rather than the power of a distant and alien government” (*ibid.*). Whether “community” is the proper analytic term, we can see Texans in the examples above alluding to their membership in such collectivities to explain their beliefs in the death penalty, thus separating their own locality (Texas) from the country as a whole.

Texas was often treated by various trial participants as a unique entity in which the death penalty has vigorous support. For instance, during his closing argument in the punishment phase of a trial, a defense attorney demonstrated to the jurors his recognition that it is hard to give a life verdict in Texas:

*Example 2.i*

D: It has evolved and evolved into a situation where I suggest to you that it's perhaps easier to vote to kill somebody than it is to vote that their life be saved. It is easier to kill now in Harris County than it is to find reasons, even from the evidence, to suggest why a person's life should be saved.

It is a testament to the strength of this ideology that this attorney finds it necessary to address the difficulty of what he is asking for: a life sentence.

Aside from addressing the death penalty specifically, Texas was evoked as a place of local justice more generally. During one of my juror interviews, I asked the juror if anything from the trial resonated with his own life. He said that his sister had had boyfriends harass her, just as the defendant had done to the victim in the trial on which he sat. He said he didn't think about it too much in relation to the case, however, because it never reached the level of violence it had with the defendant. As he recounted:

*Example 2.j*

JT1: You know like they, she never had that kind of trouble where they would come over to the house, you know...mostly because my dad was really large guy who collected guns. So, you know. He's a good Texan.

The juror alludes here to the quintessential Texan as one who takes justice into his own hands. There is a level of irony to his depiction, however, recognizing that some Texans, probably him included, do not exactly fit this mold.

**2.4a. Local variation**

Though both jurors and attorneys relied on Texas as a distinct entity in defending their views on justice, numerous jurors remarked on the cultural and ideological variability within Texas, especially as related to values and beliefs about crime and punishment. Many distinguished themselves as separate from other parts of Texas, which to them represented the archetypical picture of local justice illustrated above. As Clemons notes, the variability of Texas identities are mapped along “competing spaces and groups which vie for a dominant place” (2008:7). These competing spaces are revealed in jurors' and others' discourse about capital punishment. For instance, a judge with a particularly colorful personality was interviewed by a local newspaper regarding one of his trials. It had changed venue into a neighboring county in the hopes of getting a fairer trial for the defendant. He admonished those watching and participating in the trial to respect the etiquette of the “other” county:

*Example 2.k*

“This case was moved up here on a motion of the chamber among

allegations that they couldn't get a fair trial in Walker County," he said

"We're in **other people's country** up here...This is Leon County and they know how to behave in court," he added. "They don't appreciate any rowdiness or talking. I'm going to be very strict about that." Keeling then told spectators if they were in the courtroom to carry on a conversation or make facial expressions, they would be asked to leave and would not be allowed to return for the remainder of the trial. "You are Huntsvillians in a different county and you will be expected to behave," he said. "You're going to act properly or you will feel my wrath." (*Huntsville Item*, Oct. 22, 2010)

Though the counties are a mere 30 miles apart, this judge (who often served on the bench in both counties) assures the trial audience that he recognizes the unique nature of the neighboring county, it being "other people's country," and that relocating there will mean a reexamination of one's behavior.

Jurors differentiated themselves not simply as Texan within the range of American identities, but as further grouped according to local communities within Texas. They commonly depicted their home communities as cordoned off from those places – often not identified but left as unspecified simulacra – where criminal activity occurs. Many were shocked to find that the crime involved in their trial actually took place in proximity to their homes. As one juror explained:

*Example 2.1*

I live in the neighborhood where the parents live. It's a gated community.

And they talked about [the defendant] and some of his friends swimming in

**our** swimming pools at the community. And that sent a little bit of a chill up my spine because my kids spend a lot of time in those pools...and really brought it close to me in terms, this all happened in **our** neighborhood in the Belmont area. So I knew the scenes and the places where events took place but, that really brought it close.

Another juror made a similar comment:

*Example 2.m*

And then this whole thing is going on right around where I live. I mean like, not that far north of where I live **these people** are- you know and then you start worrying, oh my God. This is going on in the- **right now**, people are killing just random people. That's kind of scary.

Both of these jurors were surprised that these crimes took place extremely close to their homes. They both distinguished their home communities – including the people within them – through the linguistic construction of otherness. The first juror distinguishes “our neighborhood,” the “places where events took place,” from an implied “their neighborhood,” where she would expect crime to occur. The second juror identifies a distinct class of “these people” and is disarmed to find out they are conducting criminal activity near where she lives, in her immediate temporal and spatial present. Thus, while jurors might represent themselves as members of the community that is Texas, sharing in its values of swift and severe punishment, they create distinctions among their communities and those where they imagine (or know) crime to be taking place.

In addition to identifying classes of behavior (such as criminal) with particular

Texas communities, jurors also identified particular types of people with specific places. The following juror discussed his initial impression of the defendant, which was not one of a typical capital murderer:

*Example 2.n*

Um, I don't know, it uh, of the of the capital murders I would imagine a large percentage of them would be something where someone would steal a car and kills somebody. Right? And it doesn't happen in south University Town, you know? And then you have somebody where, this looks like a normal kid, looks like a kid I could be friends with was, you know, indicted on those two things which was kind of, yeah. ( ) he just didn't fit what I would've thought.

Thus, to this juror, the defendant seemed to resemble those boys he grew up with in his home town, where things like capital murders tended not to happen. Similar to the jurors excerpted above, he expressed surprise at the proximity – both geographic and experiential – of the defendant, his character, and his criminal actions. He was someone from his part of town, who looked “normal,” “like a kid I could be friends with.”

Intra-state variations are not merely depicted on the level of instances of and ideologies about criminal behavior, but also regarding attitudes about the death penalty. The following juror, whose jury sentenced their defendant to death, explained that each member of the jury began their deliberations wanting to find some way to give the defendant life, which I questioned him about:

*Example 2.o*

R: Um, I'm just curious, does anything that people said make you say that? That you were looking for, that the jury was looking for anything

J: it was just clear in the way people deliberated, okay? Even, the one guy that you might have thought from his personality, **he was a contractor and he had kind of a rugged guy and kind of got his you know blue collar**, he even he said I'm so he said you know, **down in parts of Texas where I work, we would have a room full of eye-for-an-eye people just wanting to hang this guy**. He said you know everybody, he was just a very thoughtful guy as it turns out he was like, glad everybody took the time you know, this kid's life is at stake here and everybody took it seriously. Everybody kind of (acted that way). I was looking for a way. Everybody was looking for a way.

While ideologies abound about Texas as a whole and its interrelated characteristics of extreme Christianity, conservatism, and strong, unyielding support for the death penalty, this juror relegates those qualities to another part of the state. Blue collar identity and conservative Christian beliefs are attributed to a place where the juror considers the death penalty to be a certainty among its inhabitants. The image of the gallows summoned by this juror harkens back to a time and place where local justice was carried out swiftly and dramatically. But even the juror who came from such a place was thoughtful, this juror remarks (implying those from these places generally are not), and began the deliberations searching for some way to give the defendant life.

## **2.5. An eye for an eye: Christianity and the death penalty**

While many (including Texans themselves) consider Texas distinct from the rest of the

American south, explanations for the preponderance of the death penalty in Texas and other southern states often attribute to both locations qualities of ultra conservatism coupled with fundamental Christianity. For instance, a poll taken in 2007 reveals that white evangelicals constituted the strongest group of death penalty supporters in the country as a whole (*Christianity Today*, February 19, 2008), the majority of whom resided in southern states. When I worked with defense attorneys in selecting jurors for capital trials, many of them, upon reading the venire persons' questionnaires, would automatically flag a juror for dismissal if she or he cited strong Christian, especially Baptist, beliefs.

The religious background for death penalty beliefs often comes in the form of eye-for-an-eye biblical logic. On their jury questionnaires, a number of venire persons cited “eye-for-an-eye” as their reasoning for supporting the death penalty. This was true across Texas counties, in both rural and urban areas. In a combination of national polls, Ellsworth & Gross demonstrate that over half of Americans who supported the death penalty listed “life for a life” as their reasoning (1997:97), though the authors recognize that this logic could come from a number of sources, not all of them biblical.

Eye-for-an-eye reasoning played a demonstrable role in the death penalty trials that I observed. Throughout one individual voir dire process, for instance, when the potential jurors were individually questioned, a large portion of them attributed their belief in the death penalty to eye-for-an-eye doctrine. The same colorful judge from the newspaper article above took it upon himself to instruct these jurors on the “real” meaning of eye-for-an-eye, which, he explained, did not oblige someone to give the death

penalty. He informed the jurors that while they were Christian, the eye-for-an-eye doctrine actually came from the Old Testament, by which they were not bound.

Jurors also talked about their support for the death penalty in religious terms because, as one juror explained, when facing their ultimate judgment by God, everyone is responsible for their actions. As I summarized in my field notes, “she believes everyone is equally responsible for what they do, no matter what color they are or whether they grew up rich or poor, because everyone has to stand up in front of God.”<sup>12</sup>The juror believed that God led her to give a death verdict, thus allowing the defendant to meet his ultimate judgment.

Religious beliefs serve just as important a role in anti-death penalty sentiments, however, especially the Christian values of reformation, forgiveness and mercy. In his examination of clemency applications, Sarat identifies the importance of the linked value systems of religion and family in “American thinking about remorse, redemption and mercy” (2008:190). Thus while causal connections are often assumed between conservative Christian thinking and support for the death penalty, Sarat cites religion and family – the “twin pillars” of conservatism – as primary sources for clemency petitions.

Despite the differing ways in which Christian beliefs are woven into death penalty beliefs and practices, there is in general an extremely close connection between religion – Christianity in particular – and the criminal justice system in Texas. Across the four walls of the clerk's office of a Texas prison, for example, is painted a colorful mural of Calvary, with Jesus' crown of thorns wrapped around the perimeter of the office. And, as a former

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<sup>12</sup> This interview took place during my pilot research, for which I did not yet have permission to audiotape.

prison warden explains below and as seen in pastors' intimate involvement with death row inmates, Christian practices are integrated deeply into many prison programs.

In an interview, a this warden exalted the Christian ideals of transformation and redemption as providing inmates with chances for reformation and thus giving reason to render life verdicts. I asked him if he had any advice to give people working in the criminal justice system, and Christianity featured prominently in his answer:

*Example 2.p*

J: Yeah I can fix the whole system. I've got it figured out.

R: All right.

J: And you're gonna laugh when I tell ya. You change these people's morals and you'll straighten all (the) problems up. And I even know how to do that. And I think there's an example.

R: Okay.

J: The Angola prison over in Louisiana, has historically been known as the bloodiest prison in the United States. If you'd asked somebody 15 years ago there wouldn't have been anybody in criminal justice system in the United States who would've argued that point. They hardly have any problems anymore and they still have the same kind of inmates. Inmates doing life without parole. And warden (Burrough-Cain) went over there and instituted a bunch of Christian programs and even has a seminary going on over there, and those people changed the way they live.

R: Really? So do you think religion is the best way=

J: =I think Christianity...I left the prison system and was asked, that you gotta give these guys a chance. You gotta teach em how to do somethin so they get out and they know how to make an honest living. But I think Warden Cain was right in that if you just educate an inmate, when you get through with that, you've got an educated inmate. You gotta change their morals. And some of them didn't have a whole lot of example growing up. So. But I think our whole society could do better on that.

The warden extols the Angola prison as exemplifying the possibility for transformation in prison, claiming that moral transformation more than anything is the key to inmate success.

Furthermore, religious beliefs, especially of the defendant himself, were often raised in the context of death penalty trials, especially as part of the defense's mitigating evidence. In an interview, the following juror described her reaction to a prison chaplain's testimony about the defendant:

*Example 2.q*

One of the chaplains that had um, done a lot of work on death row in Texas, came in and had visited with [defendant's name] a lot in jail here in Stoneybrook, and had you know, very much presents him as this guy who realizes he's kind of got to make his life right with God, and and gotta make it count for something, and try to have a little bit of redemption in it...

In this trial, the defendant was given a life sentence. We see illustrated here the value of redemption, connected explicitly to religious belief, as a reason to spare a defendant's life.

In the next example, a juror explained the religious thinking of her fellow juror, who believed in the redemptive value of religion as a mitigating factor. Their jury wanted to vote no on the mitigation question, but this particular juror did not agree:

*Example 2.r*

...mitigation, other than for the, for for possibly one juror was pretty well settled pretty quick. Except for one juror, one juror had the idea that we're all children of God and everybody gets, you know, everybody deserves. So, and again (did) finally realized that at some point you gotta shake the dust off your feet. At some point there's no hope, it just ain't gonna work.

Here again we see the redemptive quality of God serving as the juror's reason for initially wanting to find some mitigating evidence to support a life sentence. The juror being interviewed, however, saw no such redemptive value in this particular defendant.

## **2.6. “Somewhere Down in Texas”<sup>13</sup>: Texas as the country**

Those outside Texas (and inside as well) often hyperbolically represent Texas as a preservation of “country” living, (Clemons 2008) which connotes backwardness, rurality, and agrarianism. Portrayals of the Texas country life can be seen in media representations such as the television show *King of the Hill* and television appearances by former President George W. Bush at his Texas ranch. The generalized portrait of Texas country often serves as a metonym of “rural America” and its ideals, as depictions of the south often do (Marius 1984:144). Fox describes how these idealized versions of “nature” and “country” living persist despite their disturbance by industrial and urban conglomerates such as “huge, carbon copy Walmarts and overflowing prisons” (2004:75). These “disturbances” are, he writes, “retransformed by resurgent 'nature' and resurgent ideology into a simulacrum of the unspoiled, bucolic, the heartland, or, simply, 'the country’” (*ibid.*). Even in Houston, a city with the fourth largest population in the U.S., my friends' popular hang outs included the local beer joint housed in a trailer that only served Texas beers on tap and the race track – both cherished for their “country” feel.

This simulacrum of the country as a seat for American values exists in Texas ethnographies as well, in which Texas country can be analogized to the classic ethnographic, exotic “other” (E. Bruner 1997). Anthropologist Douglas Foley, for

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<sup>13</sup> This is the title of a country song by George Strait, who was born in Texas and has been dubbed the “King of Country.”

instance, describes his entry into a Texas town where he conducted his fieldwork: “I settled into North Town with a strong sense of coming home to rural America” (1990:3). Gupta & Ferguson warn against unquestionably representing such an imagined, symbolic sense of place, where “nostalgic settings such as 'small-town America' or 'the frontier,'...often play into and complement antifeminist idealizations of 'the home' and 'family'” (1992:13). Such idyllic generalizations exclude large portions of the population, most notably African-Americans, women, and Hispanics (*Tejanos*) (Clemons 2008). Indeed, Foley's ethnography outlines the “fundamental American values” (1992.:28) of (white) masculinity, which glorify bravery and pain, as enculturated through small-town football. Foley does recognize competing cultural memes, such as those of the hispanic population, but he fails to question whether the white, majority population of North Town accept this totalizing account of their value system. Jurors and scholars, in contrast, recognize the inherent variability of a state of its size with such a long, motley history. “The country” certainly exists, but it does not refer to the entirety of Texas.

A number of jurors' reflections on identity, crime and locality – including those illustrated above – revealed their uneasiness with being lumped into these broad brush-strokes of Texas places, beliefs and ideologies. In the following excerpt, a juror discussed the county where she is from, which is also where the crime she adjudicated took place. She contrasted its backward nature to her current residence (Houston):

*Example 2.s*

well I mean going into it you always go, oh crap I've got jury duty, and plus it was in Crawford County. Which is (.) **way out there in the boonies**. And, I

used to live in Meadowmount so of course I'm in Crawford County, and I thought well this is gonna be something silly like, **Joe Bob stole Bubba's tractor**, you know something like that.

In a slight reversal of the jurors' characterizations seen above, this juror denies that any serious crime takes place in such a remote area, expecting to encounter a farmland squabble or something similar. She further depicts the place and its inhabitants in similar tropes: "It's all very suburb white trash...it was just very *countrified* [in strong southern accent] it was cute," They found the body over in Ephesus...But Ephesus is kinda *hickville* [in strong southern accent]." Through her own caricature of this country town, the juror distinguishes herself, emphasized through her change in accent, from "white trash" and "country" characteristics often attributed to Texas (and the south) as a whole.

This image of Texas country as distant (in the "boonies") is common to a number of descriptions of Texas life, and often embeds values of individuality, hard work (remember the "blue-collar" label above), and small government. Fox, for instance, describes the sparsely populated area where he did his research as a "working-class promised land where the taxes are low and people leave you alone" (2004:5). The bucolic Texas landscape, he further describes, seems to encapsulate moral virtue (*ibid.*:75). The emphasis on "country" as a descriptor of this locality, he argues, foregrounds the sense of place as a salient cultural category (*ibid.*:29). At the same time, however, Fox emphasizes the extent to which locals do not live in, but "out" the country, outside of city lines and modern life (*ibid.*:76), just as this juror recognizes country life as "way out there in the boonies."

Within these broadly shared notions of Texas identity and place, we see that jurors and attorneys differentiate their identities, ideologies and beliefs in a variety of ways. While place remains a central trope through which Texans often represent themselves and their values, scholars of Texas remind us to treat understandings of Texas culture and history with the nuances that its inhabitants appreciate. Webb, an early 20<sup>th</sup> century historian of Texas and the American west, directs readers that “between the Eastern Woodland and the Western Plains nothing is so striking as the contrasts, and these must be considered carefully by one who seeks to understand the social and cultural problems of the people” (1965[1935]:4). Furthermore, in that identity is often (or perhaps always) defined according to relations of difference, the analyst must always ask to whom or what a given identity or group is being compared. Thus while Texans identify themselves within a network of differentiated local identities, this intra-state variability may in fact aid in Texans' identification as a collectivity within the country as a whole. As Almon observes, “[i]ronically, Texans have historically promoted their state's cultural uniqueness because of its lack of true unity and cohesion” (2002:4).

## **2.7. Being a good juror in Texas and America**

The variable identities illustrated in the above examples correspond with symbolic discourses used to give meaning to jury service – that it is a uniting of subcultures or diverse sections of communities in order to give the defendant representatives from different pieces of his world to determine his fate. Judges and attorneys devote a significant amount of time during jury selection to conveying to potential jurors what it

means to be a good juror, and, in turn, a good citizen.

During general jury selection, in which potential jurors are brought into the courtroom in panels of 100 or more, jurors are seated in the gallery of the courtroom, the attorneys and defendant are seated at tables facing the large group, and the judge is seated on the bench facing them as well. The judge typically begins with a monologue that includes an introduction to the pertinent law in the case and the requirements for being a juror in such case. There is no form or rubric under which this must be done in Texas; each judge has discretion on how to introduce such topics, but certain legal language and ideas are reproduced in different trials. For instance, judges often quote Texas law's requirement that jurors be of "sound mind and good moral character." The type of jury the "system of justice requires," one judge described, is a fair jury, unbiased, one that hasn't prejudged the case and is impartial to both sides. This same judge asserted that these requirements come from both Texas and American laws, which date back to England with 500 years of jurisprudence to back them up, and are based on the idea of a free society. This was a common strategy among judges, to locate jury laws within an almost mythological space that starts in England with the birth of the idea of a free society, then travels to America where it reaches its ideal implementation.

The question is why judges choose to situate the law in such places and times. It may be from a genuine love for the law and its history that judges share, but I argue that it has more to do with the need to translate, in a sense, what justice means to potential jurors. In order to do this, the judges rely on the "emplacement of a narratively real locality," (Fox 2004:82). The narrative of settlers coming to America in order to establish

a free society is well-known to most Americans. This narrative is situated in imagined and historical places, such as England, or the colonies perhaps. Reading laws to these potential jurors in the present moment in the courtroom, judges can give authenticity and symbolic significance to these laws by invoking ideas that they came from far away, both in time and place, and thus were central to founding the society in which we live. That in turn locates the jurors among these places, giving weight to the process in which they are involved and urging them to take it seriously.

Texas, as a label for the state government and all it entails about how justice should be carried out, was often cited as the authority governing how one should be a good juror and, in turn, a good citizen. This includes, as will be explored further in subsequent chapters, ideologies about justice as based in reason and rationality. Thus current ideologies in Texas regarding how capital juries should be conducted are connected with legislative practices that have occurred in Texas since the death penalty was reinstated by the national Supreme Court in 1976. The reinstatement required that all states develop punishment schema that would insure the death penalty was applied with “guided discretion” (*Gregg v. Georgia* 1976) and not arbitrarily, as *Furman v. Georgia* (1972) had held.

During his first address to the jury panel of over 200 venire persons, the following judge remarked on how Texas jurors are meant to conduct themselves:

*Example 2.t*

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.

The judge evokes Texas as the authority governing jurors' decisions, which, because of the sentencing guidelines, are objective and based on the evidence. Through the pronoun *we*, he identifies himself of as an agent of this authority.

## **2.8. Deixis, place and identity**

Attorneys strategically use references to specific places in the courtroom in order to invoke concepts of jury service and evidence. They often stress that being a good juror means being unemotional and putting aside any personal opinions that one might carry into the courtroom. Indeed, this image of shedding particularities of individual personalities at the door is often invoked to convey to jurors what being impartial means. Once jurors enter the courtroom for individual questioning, they are seated at the witness stand to be grilled by both teams of attorneys. “Any person that comes up there” is “going to have their own feelings,” an attorney proclaimed during this individual questioning. Once “there”, however, up on the stand, one is urged to set these personal feelings aside.

In a similar fashion, during his portion of the individual questioning, a prosecutor invoked the witness stand as the seat of rational decision-making, based in concrete evidence. He described that mitigating evidence is not just a funny feeling, it's “evidence that you hear from the witness stand.” What the prosecutors specifically fear, they often say, is that up here on the witness stand, during the jury selection, someone will say they are comfortable with giving the death penalty but later, when they sit in “that” jury box,

they realize that they can't actually do it. According to one juror, an attorney successfully used the jury box in order to incite the jurors to follow the law and resist relying on any sense of vengeance. As the juror told it,

*Example 2.u*

when they were doing final arguments on the punishment phase, and when **he's standing up there over us there in that jury box**, and he says, I don't remember how he led into it or what he said afterwards but when he said unless you just want to kill a man, (.) you don't need to vote this way more or less. And that, you know it didn't have any d- thing to do with the way I voted, but it s::ure, I mean that hurt.

Again, in this example, we see the use of a deictic reference, “there,” to locate a specific identity in space; that is, this juror noted the significance that the attorney placed himself next to them, indeed over them, “in the jury box” while instructing them on how to justly make their decisions.

In the next example, drawn from an individual voir dire questioning sequence, a juror was asked about his feelings about the death penalty:

*Example 2.v*

P: How do you feel about capital murder – the offense – the State of Texas having the offense of capital murder, that is, crimes for which the citizen can be assessed the death penalty?

J: I feel about it – abstractly I believe in it. How I feel about it sitting **here** is that a whole lot of it makes me feel uneasy.

This juror was faced with assessing a part of Texas law, under which he lives, and the state's role in potentially putting to death one of its citizens. The juror, however, foregrounded not the state, his role as a citizen, and what that entails, but instead brought into focus the present space in which he was located – sitting in a witness chair in a courtroom, with the defendant sitting in front of him. His present space thus took precedence in his current feelings about the death penalty, leading him to feel uneasy about something he, in theory, supported. The juror's foregrounding of the present “here” underscores the potentially restricting power of the courtroom: it holds the authority to induce people to do things they may feel uneasy doing, but are bound to do by the law.

In a potential reaction to this question, the defense attorney later used this foregrounding of the present space of the courtroom to reach the potential juror:

*Example 2.w*

Let me take you **away from here**. Let's just say we met on the golf course and I'm riding around with you on your- in your cart and we're getting ready to play a round of gold. We start talking about each other's lives and what we believe and what we think, okay, and I tell you, for example, that I'm a criminal defense attorney...

The defense attorney's tactic here is to draw the juror's focus away from the restricting space of the courtroom he occupied at the time, with the judge above him and the defendant below him, and immerse him in the image of a place where he can feel free to express his own beliefs. Attorneys worried that jurors would provide rote answers, saying “yes I could follow the law and give life or death,” when in actuality they would not be

able to do such a thing. As the attorney later remarked, “we know the process. That's the process...but I'm trying to get to your gut feeling and what you really believe.” Thus in order to get to this gut feeling, he attempted to erase the current place, the courtroom, which embodies the process and the law that must be followed.

As discussed in the introduction, being a juror involves some level of translation. Jurors must reapply terms they use in everyday life, such as “reasonable,” “intentional,” and “probable,” in a legal context, which may involve importing their everyday meanings or redefining them in ways that may not make apparent sense to non-experts. This line between ordinary and specialized knowledge was often made visible through marked places such as the courtroom. In the following excerpt, a judge explained during voir dire the meaning of “probability” in the trial context:

*Example 2.x*

that word probability. It's not going to be defined for you. We use probably all the time and **everywhere we are**, we use that word. Whatever definition you put on that word **outside the courthouse**, you bring the same definition to it **here in the courthouse**.

The judge distinguishes spaces outside the courthouse, “everywhere we are,” and “here in the courthouse.” This distinction serves to construct a boundary between quotidian and legal knowledge, which in this case happen to overlap.

A juror remarked on this boundary, extending it to encompass normal experience and that of a capital trial, which is anything but:

*Example 2.y*

Yeah. (.) yeah. I'll tell you something on that line of thinking right there, on that little statement you just made, that most people never go through. I remember going **home** the first night and gettin **in my house** and thinking about what just happened **up there in that room**, and I was a part of it. In that realm of thinkin, **this isn't normal!** People don't do this **out there**. Most of the world has no idea what just went on **in there**.

This juror juxtaposes two distinct places, his home and the jury room, which respectively embody ordinary, normal experiences and the extraordinary experience of sentencing someone to death. What happened “up there in that room” is something that “most of the world” does not go through and, furthermore, has absolutely no knowledge of. This juror thus uses distinctions of space in order to vividly reveal this jarring removal from his ordinary life. Here, as in examples given above in which jurors talked about their “normal” upbringings in “normal” communities in which criminal activity is unexpected, different levels of place and space are utilized to represent normality and distinguish the speaker's experience as atypical.

Thus specific locations within the courtroom itself are conjured in order to specify to jurors that partaking in this process will involve a separation from their ordinary lives. Once they enter the jury box, they must be able to put their personal feelings aside and occupy the identity of a rational and unbiased decision-maker. Furthermore, the witness stand is used as a physical representation of this rationality. The jurors must make their decisions based on facts and evidence, which, unlike personal emotions or experiences, come directly from the witness stand itself. In addition, the jury room becomes a

bounded, salient place that separates jurors from normal experiences and realms of knowledge, which contrast with those they are confronted with during these trials. Places and spaces thus serve as experiential anchors or boundaries for a variety of identities, ideologies, experiences and knowledges. Jurors locate themselves among these spaces at different interactional moments, thus occupying a variety of identities, such as juror, country folk, or “good Texans”.

While the jury selection and trial proceedings are rife with images and rhetoric about what it means to be a good juror who can remain impartial and unbiased, another, more experiential level of place draws jurors out of this abstract world of morals and justice and into an actual encounter with an actual defendant. Attorneys, especially prosecutors, often require the potential jurors during jury selection to look directly at the defendant and state whether they could sentence him to death. When faced with this phenomenological shift, many jurors reflect that their thoughts about the death penalty and criminal justice have changed since they filled out the juror questionnaire only weeks or, for some, hours before. This face-to-face encounter, being co-present with the defendant, often leads jurors to disregard the rhetoric about being unbiased and rational, and simply admit that they could not be good jurors in this situation, notwithstanding the witness stand they currently occupy or the jury box they are instructed to revere.

## **2.9. Concluding remarks**

After being weaned on post-modern ways of thinking that have led me to at least question and perhaps reject a majority of the concepts upon which anthropology was founded (cf. Appadurai 1996, Clifford 1983), I am grateful that my research experience has brought

me to a point of reconsideration and re-evaluation of these concepts. It is true that what place means for a majority of people has changed since the first ethnographers embarked into the field. But, as I have tried to show here, even imaginary or symbolic notions or ideals are still, at least metaphorically, linked to some sense of physical space. Whether it be a deictic reference to a specific part of the courtroom, or a blatant comparison between Texas and California, place seems to me to remain a steady and significant means through which cultural and social meaning is produced. I recognize and continue to struggle, however, with the difficulty of walking the fine line between fetishization and displays of authentic difference within this methodology.

Through these interactional tactics, by which identities are located and occupied through the invocation of places, identities such as an American juror can carry across geographical lines. I suspect that jurors in other parts of the country, though they may have different views on the death penalty or criminal justice, attach a similar amount of weight to the image of the jury room and afford the rules of law the same amount of respect, allowing them to pledge to set aside their emotions and personal beliefs in the name of justice. I thus suggest a twist on the original sense of the term multi-sited ethnography. Multiple sites need not be imagined places within a technological network, for instance, or multiple geographical locations that are linked by some kind of political or economic movement. Rather, multi-sited ethnography can refer to exploring the imagined and symbolic identities and cultural meanings that are shared across a patchwork of narrowing senses of place, from grand geographical settings to interactionally-situated referents.

### **3. EMPATHY, EMOTION AND OBJECTIVITY IN DEATH PENALTY TRIALS**

*“Such as that someone else is here ‘facing me’, bodily and with his own life, and has me now, in like fashion, as his vis-à-vis; that I with my whole life, with all my modes of consciousness and all my accepted objects – am alter ego for him, as he is for me; and, in like fashion, everyone else for everyone else; so that ‘everyone’ receives its sense; and in like fashion, we and I ‘(as ‘one among others’) as included in ‘everyone’.”* Husserl 1969: 237–8

*“I was waiting for it in his eyes I was waiting for it in what he was saying in his voice, in his, in his demeanor, I didn't see none of that. And there is no I don't, there's there's, I don't see any hope for him.”* Former Texas capital juror

Anthropologists question in what situations human capacities for empathy are stilled in order to commit acts of violence against others (Throop and Hollan 2008:397; Daniel 1996, Das 2007, Hinton 2005, Kleinman et al. 1997, Scheper-Hughes 1993). When a juror sentences a defendant to death, the assumption is that, since people cannot harm others with whom they empathize, the legal process must somehow blocking empathy in order for jurors to return a death verdict (Garvey 2000). The following two chapters explore to what extent the legal process mediates, in a variety of ways, distance and proximity between jurors and other actors, their own decisions, and the sentences they ultimately vote for and the effects these mediations have on jurors' decisions. Relying on my ethnographic experiences in Texas death penalty trials, transcripts of these trials and post-decision interviews with jurors, this chapter will specifically reframe theories of jury decision-making by querying a variety of the multi-modal, often embodied actions within these trials and legal restrictions placed on them that may curtail jurors' abilities to empathize with defendants and other people present. I will discuss the implications empathic encounters and restrictions on them (either explicitly legal or assumed) have for jurors judging the motives and intentions of others in death penalty trials. In other words, what interactional resources do legal actors use to make or unmake others into human beings?

Trials are social encounters and, as such, involve face-to-face interaction between a variety of institutional and lay persons. This includes a number of culturally-specific semiotic modalities, such as eye-gaze, intonation, and visual stimulation, which can be central to jurors' ability to empathize with and thus judge the actions and motives of

defendants. These modalities are not easily fit into the textual schema by which legal professionals define evidence, however, and thus occupy an ambiguous space within jury decision-making. The traditional legal subject, Laster and O'Malley (1996) describe, is the “individual rational man,” in which rationality is distinguished from emotions and the body. The legal subject in practice, however, whether it be a defendant or juror, is intersubjectively and bodily entwined with others throughout the course of a trial. The tension between these two kinds of subjects has implications for the ideological tension between democratic legal concepts of generality and neutrality, on one hand and empathy and emotion, on the other, which are deemed unpredictable and individual. The latter is often deemed irrelevant and potentially dangerous for legal decision-making. The following sections investigate this legal subject in practice as a physically present, emotional being, and examine how jurors and other legal actors attempt to curtail characteristics that make him a potential object of empathy – in other words, that make him human.

### **3.1 Defining Empathy**

Empathy has been and can be defined in innumerable ways, from an imagined experience of another (e.g. Strauss 2004, Henderson 1987) – a sort of stepping into another's shoes – to the perception and understanding of others' emotions (e.g., Loewenstein & Small 2007). On the more cognitive side, it is seen as a “conceptual perspective taking” of another (Henderson 1988, Minow 1987). In a more affective connotation, it encompasses emotional responses to another's emotional state (e.g., Hoffman 1993). Empathy is said to occur on a variety of experiential levels, from the

most primordial to the highly ordered and mediated. According to Hoffman (1993:651), for instance, differing levels of empathic experience develop over time as a person is socialized through a variety of experiences with others. “Empathic affect arousal,” which entails an affective response that is related to someone else's situation rather than one's own, operates first when a neonate cries to the sound of another's cry. Then, mimicry of others develops, followed by the conditioning and direct association, wherein the child learns to associate particular expressions with particular feelings, or mental states. Then, language-mediated association develops, followed by the ability to put oneself in another's place. From this developmental process, several levels of empathic involvement emerge. Affective arousal can involve “rather shallow levels of cognitive function,” yet the subjective experience is much more complex, in that we may recognize that the arousal comes from someone else and form an idea (as opposed to mere “arousal”) of what that other is going through (*ibid.*:649).

This dissertation draws on definitions of empathy developed by Husserl (1989), Stein (1989) and subsequently Throop (2008; see also Hollan and Throop 2008), in which empathy is considered humans' ability to approximate others' subjective experiences through our own embodied experiences. In Hollan & Throop's terms, empathy is the “complex emotional, embodied, and cognitive work that is implicated in approximating the subjective experience of another from a quasi-first-person perspective” (2008:387). This process is intimately tied to how we as humans interpret and understand others' motives, thoughts, and emotions. Empathy itself is not understanding, but allows for the possibility of understanding an other, through the

assumption that if I were in an other's place, the world would present itself to me as it does to her (Duranti 2010; Husserl 1989). This is not an unproblematic process, as Throop (2008) reminds us; and this fact has serious implications in the setting of death penalty trials. Though empathy may be a universal ability, the ability to understand another's experience and the transparency of others' emotions and internal states is decidedly not, which anthropologists have repeatedly demonstrated (e.g., Keane 2002, Ochs & Schieffelin 1994, Lutz and White 1986). Legal processes, however, rely on the assumption that an other's intentions can be known and subsequently judged, and all within a context that attempts to deny empathic experiences with the one who is judged. In that understanding another's intentions relies on empathic experiences, the attempted denial of these, I argue, results in a denial of defendants' humanity and thus constitutes an act of violence.<sup>14</sup>

Empathy, as Throop further delineates, is a process “informed by the work of emotions” (2010:772). Empathy involves both emotional and cognitive aspects, but to deny affective experience is to deny a capacity for empathy (Henderson 1988:134). Emotions are a way in which, at least in certain cultural contexts, one may be primed to the experience of another (Throop 2010). This is often referred to as “emotional resonance” (Halpern 1993), an experience wherein emotion highlights something about a situation that is salient for another. Relatedly, as Rorty argues, “conditions that are experienced as intense or disturbing...become central in our psychological field” (1995:213). Testimony in court that is particularly experientially intense, for example, or pictures that engender highly emotional responses from jurors may rest more salient in

<sup>14</sup> This argument will be fleshed out further in the dissertation's conclusion.

their psychological field than the textual forms of evidence that the law privileges (cf. Fishfader et al. 1996). For this reason, defense attorneys often object, with frequent success, to saturating jurors with pictures of crime scenes and victims' dead bodies. Emotion, furthermore, is often understood as a source of evidence for motives that are assumed to be otherwise unobservable (Lutz & White 1986:412). Legal processes require that motives be proven in a way that can be made visible or audible to the jury, and displays of emotion are often present in these processes. This chapter will thus specifically focus on encounters in which emotion serves as a window into understanding the subjective experiences of others, and how the lack or denial of these windows can convince jurors that defendants are somehow not fully human and do not deserve to live.

From this perspective, feeling empathy for another is deeply linked to one's own empathic and emotional arousal. In this sense, empathy is linked to our own frameworks for feeling and understanding; thus the other is perceived at least in part through the self. Beatty explains that emotions are linked to personal histories, that they exist not only in the moment, but also “participate in manifold relationships formed over periods of time” (2010:430). Understanding or feeling another is thus intricately bound up with cultural and social frameworks of relationships and meaning-making. In order to understand one's individual emotional experience, one must consider the subject's position within a field of social relations (Beatty 2010:432; Rosaldo 1984).

There is much debate regarding whether empathy is a primordial and thus pre-rational, pre-linguistic and pre-cultural experience, or if it is shaped by cultural and linguistic frameworks. Duranti, in interpreting Husserl's conceptualization of empathy

and intersubjectivity, regards empathy as a “non-rational, non-cognitive” process; empathy is an “experience of participating in the actions and feeling of another being *without* becoming the other” (2010:7; see also Stein 1989; Husserl 1969:233). This conception of empathy has serious ethical implications, in that intersubjectivity, as enabled through empathy, is the foundational aspect of humanity (Duranti 2010:9; see also Schutz 1967, 1966). This dissertation takes the perspective that empathetic experiences operate both at a pre-linguistic/cultural level and can also be mediated by linguistic and cultural frameworks, and that both are consequential for ethical actions in the context of death penalty trials.

### **3.1a. Empathy and culture**

On one hand, face-to-face encounters, which involve primordial forms of interaction – such as the meeting of eyes – can jar one's deeply-seeded ideologies through which we filter experience and cause one to feel empathy for a person he or she might not have even considered a person before the encounter. For instance, though a juror may state repeatedly (and often with a great deal of vigor) that murderers are not people and do not deserve the oxygen they breathe, being forced to be face-to-face with a convicted capital murderer can cause one to unexpectedly empathize with this person and thus begin to consider his humanistic qualities. This process is due in part, as Duranti states, to the “exposure to [others'] bodies moving and acting in ways that we recognize as similar to the ways in which we would act under similar circumstances” (Duranti 2010:7).

On the other hand, though being physically present with an other, confronted with their face, can kick-start and intensify empathic and emotional experiences, these can

always be filtered through particular cultural, institutional sieves (Lynch 2002). For instance, though a juror may feel empathy for a defendant crying on the stand, this empathy is processed alongside notions of why this particular defendant with his particular characteristics is crying, what this means, and how one should react to it. Jurors' feelings and consequent decisions are thus related not just to the past of the defendant, but jurors' own complex pasts as well (cf. Throop 2008). For instance, the juror watching the defendant cry on the stand might have long-standing beliefs that those who commit crimes do not deserve pity, and thus might resent the defendants' display of tears. Our bodies at the present moment thus serve as filters through which we perceive/understand the other, as do our cultural, linguistic and experiential histories.

A question to be investigated is how these conceptions of empathic experience (one primordial, immediate, ignited by the presence of another body; the other, rational, more deliberate, and culturally and linguistically framed) intersect, and if one prevails over the other in certain situations. For instance, Bandes argues that empathy is a “counter narrative” force, in that it allows a juror to imagine himself in the place of another even if it contradicts his own normative narratives (1996:377). Can looking a defendant in the eye during trial, for instance, allow a juror to empathize with someone they deem is evil and thus unworthy of empathy based on their beliefs about actions he has committed? This section will investigate this claim, illustrating the variety of forces that both restrain and encourage empathy, shaping jurors' feelings towards and understandings of events and persons.

Throop describes that empathic experiences are “shaped in important ways by

particular orientations of the self to his or her world of experienced others” (2008:406). Thus while Rorty describes a level of understanding others that operates in interaction as “implicit and unarticulated” (1995:206) and delineates these from theory-laden and articulated understandings of others, these implicit, interactional empathic encounters are filtered through theories about others that we have developed over time through lamination after lamination of interpersonal experiences. Thus, while the world is populated with other bodies, who we understand and interact with on a variety of experiential levels, these others are “always perceived and understood as particular types of beings” (Duranti 2010:12).

This account of empathy reveals why it is deemed dangerous to interpretive processes, both in anthropological and legal contexts. Geertz (1977), for instance, argues that when an ethnographer considers him/herself expressing empathic awareness of their field subjects, he is merely projecting his own thoughts and feelings onto the the subjects, thereby mischaracterizing them. Empathic encounters with others should not then be, he argues, the goal of anthropological understanding. Legal scholars and professionals share the same worry, that explicitly allowing emotion and empathy into jurors' or judges' decision-making will invite mischaracterizations of the defendants' or others' actions and feelings. This is related to Anglo-American legal requirements for jurors to be unbiased, that they not allow their own feelings and prejudices to affect their decisions. Perhaps, however, to the extent that empathy and emotion necessarily enter decision-making, the better tactic is to understand more completely these experiential processes, rather than attempting to ban them from the courtroom. Bandes (1996:371) argues similarly that the

ideal should be not to shed all individualized perspectives from legal decision-making, but to become aware of them and control those that might have a negative outcome on the decision.

### **3.1b. Empathy and similarity**

Haney (1994:1461) argues that a defendant, by virtue of being on trial, is automatically designated as “other” and is thus susceptible to violence; “the more we can designate a person as fundamentally different from ourselves, the fewer moral doubts we have about condemning and hurting that person” (*ibid.*). He thus urges capital defense attorneys to present defendants in settings similar or familiar to the jurors (*ibid.*). Jurors are likely to be very different from defendants in many ways, but the notion of “jury of one's peers” indicates that there should be some similarity between them (if only geographical proximity). The difficulty with this is the often great experiential gaps between defendants and jurors in how and where they were raised, what kinds of people they associate with and patterns of behavior they are involved in. The mere fact of committing such a crime as murder serves for many jurors as an immediate block to any feeling of similarity or kinship.

Scholars of empathy, such as Hoffman (1993), argue that one is more likely to empathize with someone who is more similar to you (Strauss 2004:435, Linder 1996, Henderson 1987, see also Hume's concept of “sympathetic infection”). In judicial settings, in particular, it has been shown that people are more empathic towards victims who are familiar to them (Hoffman 1993:667, Krebs 1970, Feshbach and Roe 1968) and show more mercy to those with whom they feel kinship (Haney 1997:1453). In a social

psychological account of empathy and rape, Barnett (1986) argues that individuals are more likely to respond empathically to another when they have experienced a similar unpleasant event.

Lynch and Haney (2011) operate from this perspective when assessing the impact of race on jurors' decisions for death. They argue that because empathy is more likely to be felt for those who are similar to oneself, differences, such as race between juror and defendant, as well as processes of dehumanizing and “othering” the defendant, inhibit jurors' empathy towards him, thus making a life sentence less likely. Haney conceptualizes this situation as an “empathic divide,” described as

“jurors' relative inability to perceive capital defendants enough like themselves to readily feel any of their pains, to appreciate the true nature of the struggles they have faced, or to genuinely understand how and why their lives have taken very different courses from the jurors' own.” (2004:1557)

In the conception of empathy discussed above, this would be tantamount to not being able or willing to see the world as the other sees it, to deny that the other is a person like you. A lack of similarity between juror and defendant then, Haney argues, stymies empathy for the defendant and, more generally, what Haney refers to as “compassionate justice” (*ibid.*:1583). Arresting these processes are crucial in facilitating a death sentence.

Throop aptly complicates these assumptions about similarity and empathy on which many legal scholars rely, claiming that homologous experiences, while often explained as facilitating empathy, can actually conceal aspects of another's existence (2010:772). It is this to which Geertz (1977) is referring in his critique of anthropologists' empathic understandings, for he claims that by focusing on similarities with others' experiences, we elide the differences that may be crucial to the meaning an individual

attributes to a given situation. This section attempts to unravel the complications involved in the relationship between similarity and empathy by closely examining the language used to talk about defendants, jurors, and their relationships among one another.

In the following example, a juror related in an interview that sharing similar experiences was what allowed him to empathize with the victim, not the defendant. I had just asked him whether he thought about death itself during the trial process, and he responded that he did not feel badly about the defendant's death, but about the fate of the victim:

*Example 3.a*

If I did feel (any) with death it was, it was for um, for for the um the lady for um...But yes Nina, uh, **I felt close to her**. I did. Especially with the family going through everything what they did, I really did. I really felt, you know. **I felt like I was a part of her**. About, **her family, because I went through everything they went through**. You know I had **I experienced all this stuff that they had to endure and experience**. [inhale] so um, it was a good closure, it was a good, um but no I did not have any, any um thing thoughts of um, being part of a death or, or or anything.

Expressing a colloquial and explicitly embodied definition of empathy, placing oneself in the position of another, this juror felt that he was “a part” of the deceased victim and her family. His basis for this is their shared experiences. His sensorial experience of the trial led him to feel that he had lived through the crime just as the victim and her family had. (The extent to which these experiences are really comparable is questionable but beside

the point. The fact that the juror finds them comparable is telling.) If relying on having had similar experiences to facilitate empathy, it may indeed be difficult for jurors to empathize with defendants because their relative experiences are often perceived as being incommensurable. This juror stated elsewhere in the interview that he found himself unable to even look at the defendant during trial, surely limiting any empathic understanding the defendant might garner. Acts of empathy prevail, despite these limitations, and the following sections examines in what contexts these occur and what they look like.

### **3.2 Empathy vs. rationality in law**

Within anthropology, legal studies, psychology, neurology, and philosophy at least (this list is of course not extensive), scholars have debated the extent to which empathy and emotion<sup>15</sup> are oppositional human experiences to rational thinking. Since the Enlightenment's hailing of the rational, thinking individual, empathy (and related notions alongside it, such as emotion, affect, and feeling) has been relegated to the inferior side of the dichotomy, with “reason” and “thinking” prevailing. This has been true in academic circles and legal arenas, and has oftentimes been a product of dialogue between the two.

Enlightenment ideals of reason, according to which emotions “came to be seen as antithetical to order, justice, and coherence” (Laster & O'Malley 1996:24), coupled with the development of democratic, especially Anglo-American notions of law as transcendent, generalizable, and objective, have created legal ideologies according to

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<sup>15</sup> While empathy and emotion should not be equated, I will treat them here as occupying the same side of this dichotomy.

which the workings of law should be kept uncontaminated by purportedly unpredictable, unreliable sways of emotion (Deeb 2010, Maroney 2006, Henderson 1998). Emotion, in this view, is seen as dangerous to dispute processes, for relying on it, it is assumed, would lead to violence and injustice (Marcus 2002:6). The objective of law, then, is purportedly to “define and refine measures which would provide an *objective* basis of assessing causation, the nature of wrongdoing and the method of assessment to harm” (Laster & O'Malley 1996:24, emphasis mine); the operative concept here being objective measurement. A variety of legal processes, such as policing, punishment, and judges' and juries' decision-making, have been subsumed under this umbrella of objectivity, leading to a legal institution based in large part on scientific measurements and prediction (Freiberg 2001). Within this framework, the “individual rational man” (Toulmin 1990, Laster & O'Malley 1996:33) – the archetypical rational agent of democracy (Marcus 2002; Rawls 1997) – is opposed to a person for whom “emotions and appetites of the body” (Marcus 2002:18) dominate. The latter, it goes with out saying, is proffered as the antithesis to the legal subject.

A crucial element to the operation of this rational system of law is the “impartial juror,” who embodies the qualities of “detachment, open mindedness, and objectivity” (Gobert 1988:276). This ideal is related to the development of citizens as rights holders, along with which came an obligation to judge without partiality (Marcus 2002:40; Barry 1995). Bruner describes the assumed impersonal nature of the American legal system as exemplified by the “neutral” judge and jury (2008:30). Adam Smith, in his account of sympathy and judgment, argues that, though affective relationships with familiars inform

our judgments about others, the judge “is coolly removed from his distress or pleasure.” The “change of position” that enables one to understand another “is only 'imaginary' and 'momentary’” and thus maintains the ideal of impartiality (Forman-Barzili 2005:192; Smith 1759). Whether these impartial personages are mere fictions has been debated and the ideal of the impartial juror has been criticized, particularly for the fact that putting one's personal biases, opinions, and beliefs aside is not as easy as law makers and adjudicators may hope (Gobert 1988:319). Though this ideal might seem to suggest the opposite, a partial reliance on empathic experience for legal decision-making does not necessarily contradict this aim for impartiality. Basch (1976, see also Bandes 1996) asserts that empathy is primarily a value-free capacity, and in this sense is not reliant on prejudices or biases, which some critics fear are wrapped up in empathic and emotional judgments and thus should be stricken from the purview of law.

Alongside the rationalization of legal subjects such as jurors, many have argued that justice has become “depersonalized” (Laster & O'Malley 1996), and has as a result come to deny persons – who entail human experiences, affect, and bodies – recognition and legitimacy (Henderson 1987:1575, 1576; Noonan 1976). This is related to the above point that the personage of an “impartial juror” is, in actuality, an unobtainable abstraction. Rational law is seen as universal and outside time and space (Laster & O'Malley 1996:34)– in other words, separable from human experience. Noonan comments on this tendency of legality to “abstract the problems of persons to the point of denying persons altogether” (1976). Not just individuals, but human bodies are also elided from accounts of legal processes. Emotion and empathy, which are often,

especially in the legal framework, aligned with the human body, are thrown out with it as not pertinent to legal reasoning. This expulsion of human experience, rather than its uncertainty, is the real danger to law, Henderson argues: “law takes place on a human field, and to lose sight of this reality in search for predictability and control results in abuse of the human” (1998:128).

### **3.3 Empathy and Embodiment**

If individual persons are elided within legal categories and processes, their bodies are refracted even more so. Though much legal scholarship attends to the relative inclusion and exclusion of individual lives in legal contexts, little has paid heed to the extent to which bodies are made relevant in trials (see Goodwin 1994 for an exception) and how attention to bodies allows and or restricts empathy in law.

Scholars such as Amelie Rorty (1995) argue for the centrality of embodied actions to understanding others' intentions, a practice which takes place along similar experiential lines as empathy and has affective components. “[O]ur responses to the high salience of facial expressions, posture and gestures,” she writes, “serve as sources of – and evidence for – our understanding of others. They become continuously meshed with more developed and clearly cognitive inferential interpretations of the very same phenomena” (*ibid.*:214). This conceptualization has demonstrable parallels to descriptions of legal reasoning, providing support for a model of such that encompasses affective and empathetic responses to others' bodily actions. Moreover, as Rorty implies here, embodied actions may actually be more salient in our experiential field than other forms of communicative acts, such as verbal language, further justifying a view of legal

reasoning that takes this into account. This aligns with theories of empathy, such as Levinas', that cite the face-to-face encounter as its primary locus. Emotional experience is similarly attributed to the co-presence of another (Sandlund 2004). Within particular cultural logics, the face is the key site for access to another's thoughts and feelings (Throop 2008:415), and it is these that serve as the basis for interpreting the foundation of criminal law: one's intentionality.<sup>16</sup>

During a trial, the contextual configuration, which Charles Goodwin defines as the “locally relevant array of semiotic fields that participants demonstrably orient to” (2000:1489), is institutionally mediated in order to manipulate ways in which the jurors may empathize with the defendant. Despite the institutional mediation of jurors' encounters with the defendant, empathy finds its way into trials and jurors' experiences. “[In] much of social life,” Hollan and Throop argue, “[empathic-like] awareness is actively suppressed or discouraged. And yet even in places...where empathic awareness is mistrusted or curtailed, we find evidence of its marked or unmarked presence” (2008:394). Thus the embodied contextual configuration of death penalty trials has important implications for what kinds of empathic encounters take place and in turn the extent to which jurors read emotion from defendants and others.

A 1930 account of a woman's experience in jury service reveals the extent to which legal abstractions are jarred into relief when one is confronted with the face-to-face reality of the trial process. Describing herself in third person, she writes, “A woman, untrammelled by preconceived notions about jury service, opens her eyes in wonder when

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<sup>16</sup> The concept of *mens rea*, translated as “guilty mind,” is the basis for defining criminal behavior. It necessitates one's intent to commit the act in question and awareness that such an act is criminal.

initiated” (Oakley 1930:229). This image captures brilliantly the experiential reality of serving on a jury. In Oakley's case, her wide-open eyes provided evidence to confirm the defendant's likeness to a criminal stereotype: “You have only to look at the man to know he is guilty” (*ibid.*:288).

### **3.4 Mind/body dualism within the law**

In addition to legal settings, emotion and empathy have been described in academic contexts as distinguished from the mind and cognition and, as such, on the body side of the mind/body divide. Deemed separate from rational thought processes, empathy and emotion are often considered “mindless surges of affect” (Nussbaum 1996: 23) and are thus considered to be ungeneralizable and subject to the whims of the individual. As Rorty has argued in a discussion of our ability to understand others, “[e]very mind, insofar as it is rational...is identical with every other mind. But passion-ideas that are caused by the body can be idiosyncratic” (1995:206). When viewed as resultant of bodily processes and separate from cognition, furthermore, emotions are considered disordering, problematic, vague, and thus irrational (Lutz & White 1986:409). This individual nature of affect, or “passion-ideas,” as Rorty terms them, does not fit in with the objective and generalizable goal of Anglo-American jurisprudence. In Anglo-American legal contexts and in democratic institutions more generally, many fear emotions as having the ability to take over our actions, even change the state of our consciousness at times (Marcus 2002:11). The fear lies in the fact that emotion is considered part of the moment, impetuous, and legal institutions rely on patterns of predictability.

Rational legal ideology privileges calculated, deliberate decisions, and emotion, as argued above, is often considered an unpredictable, unintentional human phenomenon, not subject to our control (Feigenson & Park 2006:144). In defining Hume's notion of "sympathetic infection," Rorty propounds that we are "causally affected by the psychological activities of other persons...without first forming a diagnosis of their psychological condition" (1995:213). Emotion is thus seen as a reactive phenomenon, stemming from "hidden and uncertain causes" (Marcus 2002:21), that occurs before a more reasoned diagnosis of another's state is made aware to us. Again, it is the reactive nature and immediacy of emotional processes that is considered potentially detrimental to the workings of Anglo-American law. One experiences "relatively unconscious, spontaneous evaluations" (Alicke 2000:558) of a given event or behavior, and legal rules and procedures for decision-making are used to slow this process, to circumscribe these immediate, affective moral judgments (Feigenson & Park 2006:145). The extent to which they succeed, I argue, remains to be seen.

There are mind/body divisions even within the category of emotion itself; certain scholars distinguish between natural, bodily emotion and ideal, cognitive and cultural emotion. The latter is often referred to as second-order emotion (Lutz & White 1986:407). How we read first-order emotions in others, however, is also culturally patterned, according to specific logics of what emotions can be known and which are appropriate or possible in what setting (e.g., Ochs & Schieffelin 1994). Empathy and emotion are thus not as unpredictable as the proponents of these views claim, but are ordered through cultural and linguistic practices. Burbandt (2009), for instance, in his anthropological

account of violence and negative empathy (Lipps 1906, 1903), argues that empathic “attitudes” are inseparable from their political and social contexts. This, he proposes, challenges the idea of empathy as a universal virtue (*ibid.*:566). In the legal arena, too, first-order emotions, when related to crime, are highly ordered according to notions of appropriateness and causality (Maroney 2006, Nourse 1997, Dressler 1982). For instance, the law makes a distinction between murder committed in the heat of passion or “under the influence extreme mental or emotional disturbance,” and murder committed when one is under a less agitated mental state.

### **3.5 Jurors' ideologies about reason, emotion and the law**

These links between mind and reason, objectivity and law, are thus bound up with moralizing discourses about cognition (as rational thought) and emotion. Reason, in its trustworthy, calculated form, is moralized as encompassing the democratic notions of universality and equality (Marcus 2002:19; Arkes 1993). Within this moral framework, reason is linked to our “higher faculties,” and emotion is then relegated to our “baser,” more animalistic human characteristics (Marcus 2002:134). This moralizing of reason and resultant demoralizing of emotional processes has tremendous hold for those involved with legal institutions, jurors included. Jurors I talked to often echoed the legal ideology of decision-making which privileges rational, seemingly emotionless thought processes.

Along with statutory language that states that jurors' decisions should be based merely on evidence, legal rhetoric, as used in the courtroom, creates an ideology of determinism, facticity, and objectivity. Jurors consistently hear, from the *voir dire*

onward, that their decisions are to be based on facts and evidence, and should not be influenced by anything from the “outside,” or from feelings or emotions. During voir dire, prosecutors often reminded jurors of their instructions that their decisions should be based solely on fact, and that emotion has no place in their decision making, as the following examples illustrates.

*Example 3.b*

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

J: whatever the law **dictates**.

The word “dictates” in Example 3.b implies that jurors see objectivity as obligatory under the law. In addition, as I often saw, jurors depicted the law as an entity, a grammatical agent, here as one that dictates jurors' behaviors. Attributing agency to the law gives it control over jurors' actions. As seen in Example \_\_\_ and the following examples, jurors often displayed an ideology of the law as objective and based on facts, not emotion, and that their duty as jurors was to approximate this objectivity.

*Example 3.c*

J1: Our own system of justice is based on the law...that's what we **should** follow...bring out the facts and link that with the appropriate laws.

J2: I understand about emotion and making a decision early, but I understand that's not what's **prescribed**.

In these examples, with the modal verb should and the description of what is prescribed, we see further that jurors understand putting emotion aside as part of their duty. Case law

recognizes that jurors come into the courtroom with their own beliefs and feelings.

What's required of them, however, is to “put these aside” in in order to “follow the law.”

Jurors often reiterate this spatial trope of putting feelings aside. Many jurors, even if they came into voir dire with reportedly strong feelings about the death penalty, once asked by attorneys if they can put them aside and follow the law, they acquiesced. The following responses during individual voir dire questioning illustrates this:

*Example 3.d*

D: Could you put your **feelings** of the father of the victim **aside**?

J1: Yes. I would like to think I could be that **objective**.

D: If we keep you on this jury will you still be a 10? [killer]

J2: It's my **personal belief**, but following **the law I would follow it**.

J3: Not for me to decide but the legislature, whether this is a fair process.

We've all got personal views but we've gotta abide by it...Don't think feelings are allowed to enter in...you don't easily **set them aside, you gotta** abide by the laws.

This assumes a dichotomous relationship between emotion and objectivity, where the absence of one equals the presence of another. An attorney's instructions during voir dire exhibits this view of objectivity and emotion as mutually exclusive:

*Example 3.e*

P: You understand that the way the system is set up is all of these are **fact-**

**oriented questions.** They are **not feeling-oriented**...the testimony is designed that you answer this question based on what the facts are...

While a majority of the rhetoric succeeded in persuading jurors to set their feelings aside, those who were against the death penalty admitted that putting their feelings aside was not in the realm of possibilities:

*Example 3.f*

I don't know if I'd say I couldn't sit on the jury but I wouldn't be able to consider the death penalty. It would **feel like I was responsible** for someone else's death and I don't think I could be a part of that.

Here, the juror admitted she would continue to “feel” responsible, and that, instead of setting her beliefs aside, separating herself from them in order to make a decision, she would feel “part of” a process she does not support.

Objectivity in general, including that striven for in law, involves the suppression of individuality. As Bourdieu (1979) writes, “objectivity is defined by the agreement of subjectivities.” This can be seen as a basic statement of what law does; it creates consensual patterns out of individual acts. However, while the origin of the jury is often attributed to the democratic desire to take legal decisions out of the hands of idiosyncratic judges, there is no real consensus within the law as to how much jurors should or should not rely on their own individual judgment. An 1895 Supreme Court decision stated that “upon the jury [lies] the responsibility of applying the law so declared [by the judge] to the facts as they, upon their conscience, believe them to be.” Indeed, death penalty case law asserts that jurors should not make a decision so as to violate their own individual

conscience. This goes in the face of instructions we've seen above urging jurors to put their own individual beliefs aside. Again, this contradiction within law provides jurors with opposing lines of guidance, often taken advantage of by attorneys. The following examples illustrate metaphors of the individual mind used as explanation for how legal objectivity can be achieved. What exists in the mind is apparently something that can be and should be ignored when making legal judgments.

On the issue of forming a previous opinion, the following juror stated:

*Example 3.g*

My **mind might say** if you're charged with it you're guilty, but **the law says** innocence...I think that there's a reason he's been charged with two murders...**what I believe in my mind**..but I have to listen to both sides.

The prosecutor later asked this juror,

*Example 3.h*

P: Is this blemish just in your mind?

J: yes.

This implies, with the word just, if the juror's prior opinion exists only in his mind, then it can be put aside to make room for the law.

Here, a juror is questioned by a defense attorney about the future danger question:

*Example 3.i*

D: Would you automatically **think** someone convicted of capital murder is a future danger?

J: I lean towards yes because there's a tendency there so, I'd at least **think**

that....I'd have the tendency to **think that in my mind...**[but] I would still need to **be proved** that he is a threat.

Again, we see that what is in the mind can be set aside in order that proof in the form of facts be relied on. Not all jurors admit to the ease of setting thoughts aside, however. A defense attorney asks a related question, but to a different end, remarking that ignoring what's in your mind is not such an easy task:

*Example 3.j*

D: Your beliefs don't leave your head, do they?

J: No. Not about the death penalty.

This juror explains that these beliefs that exist in his head can't be set aside, even if he is chosen for the jury. Again, we see evidence here that setting beliefs aside, separating yourself from what exists in your mind, cannot always be trumped by the objectivity of the law.

In Example 3.k, this juror had told me previously in the interview that his wife thought he would be picked because he would be an excellent juror. I asked him why:

*Example 3.k*

R: well I'm curious so why do you think your wife thought you'd be a good juror?

J: because um, she um, her first thing was that, I'd never been in trouble with the law. Her other, um, her other view was because of my, my view, my view on things, my personality, um, she always says that uh, she can **react** so much to the things and go on, but, going on the **personal side**, it's

like um, I'm her ( ) that calms down, let's **think about the rational** let's  
(bring it) down um, and we ( ) (get to know people) and she was just  
confident that I was **what they wanted on the jury**.

Mirroring the ideological gendered divisions between emotion and rationality that accompany much of this discourse (see, e.g., Strauss 2004), this juror states that while his wife “can react so much...on the personal side,” he encourages her to “think about the rational.” We see here the division between feeling and thought, the latter being what is required of a juror. His wife “reacts” and he “think”s, and thus he has the kind of personality the attorneys and judge wanted on the jury.

Jurors are socialized into this ideology from a variety of sources, including the judge presiding over their trial. The judge is a powerful voice for the jurors, as he<sup>17</sup> is the ultimate authority on law that the jurors encounter. In the following example, a judge instructed the jurors before they had been questioned for voir dire, when they were gathered in the hundreds for jury selection. This is generally the first instruction jurors receive on any part of the law before they go through the trial process.

*Example 3.1*

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 – your **evaluation** of that evidence – and you **use that evidence** in answering each

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<sup>17</sup>. Most of the judges I encountered were male, so I will continue to use the male pronoun in referring to them, though there are a great number of female judges in Texas.

of these three questions.

In this example, the judge puts forth the dichotomizing ideology between feelings and objectivity. He admonishes the jurors against using “subjective” judgement, instructing them only to rely on “objective findings” based in “evaluation” of the “evidence.”

While jurors are exposed to these discourses and potentially naturalize them before they even enter the courtroom (as in the above jurors' beliefs about empathy and rationality in marriage relations), those I interviewed picked up on the ideological frameworks judges bestowed on them and use them to direct their decision-making. During an interview, a juror told me he would not have been affected by seeing displays of emotion from the defendant (he claimed the defendant was emotionless during the trial). I then asked him if he thought other jurors' decisions would have been affected.

*Example 3.m*

R: yeah. And I think you said it wouldn't really have affected you. Do you think it would have affected any other jurors if he had **showed emotion**?

J: Oh. I can't say. Um, I don't know if that would've been, with with **human beings** anything's possible. With other, you know with people in general.

Anything's possible. But um, if you, **if you do what the judge tells you and look at the facts of the case**, then it shouldn't be.

Here, the juror explicitly recites the judge's instructions back to me that decisions should be based on facts, not on what I characterized as emotion. His response also mirrors the depersonalization of Anglo-American law discussed above. With “human beings,” he says, anything is possible. He contrasts this, through the conjunction “but,” with what

you should be dealing with in trial, which is not human beings, but “facts of the case.” If you rely solely on these, then emotions “should” not enter into your decision.

Bandes astutely argues that the positioning of reason against emotion is not a neutral assessment, but, rather, constitutes an assertion of power that serves to privilege the former (1996:370). This often leads to those with a more rational-seeming framing of events or relationships to prevail in legal arenas over those that rely on emotional accounts that may predominate in more everyday and non-legal settings (Conley & O'Barr 1990). Moreover, in order to transcend bias, legal institutions marginalize particular kinds of emotional processes, such as compassion, empathy, and mercy, which are deemed inappropriate for legal decision-making. Other forms of emotion, such as “hatred and zeal to prosecute” are not marked in the same way and find unchallenged homes in legal institutions (Bandes 1996:388-89). As discussed in Section \_\_\_\_\_ below, death jurors in fact use the logic of objectivity and facticity to convince life jurors to change their minds and vote for death by claiming that the latter's decisions are based merely in emotion and are thus not valid.

While reason is morally valued, especially in the democratic process, empathy is itself a richly moral component of human behavior. Empathy, many argue, is a basis for moral action (Hoffman 1993), in that it is routed in the subjective experience of another, thus allowing one to understand how the other would want to be treated (Strauss 2004:435). When one experiences another's distress, Hoffman argues, one feels their own version of distress, either “empathic” or “sympathetic,” and this compels one towards moral action (Hoffman 1993:657). Emotional language, Haviland argues similarly,

“live[s] in a moral universe, which includes...how to think and feel about what” is being talked about; affect is thus a part of performing a moral act (1989:61, see also Bandes 1996). By engaging emotionally or empathically with an other, whether through language or non-verbally, one is embarking on a moral trajectory. The question I propose is to what extent law has the capacity to restrict this kind of engagement. Though there are linguistic and legal restrictions to empathy and emotion at work in legal processes, law is itself an inherently moral project and thus cannot keep these forms of moral engagement separate from its operation. Emotions can be said to maintain value systems in a society (Sandlund 2004:69, Cornelius 1996), and law is often cited as performing the same service. Law is thus an emotional undertaking, though those who shape it may wish it was otherwise.

### **3.6 Empathy and emotion as embedded in reason**

The law's resistance to emotional and empathetic experience is based in a belief that reason and desire are “separate and irreconcilable” (Henderson 1988:124). Many scholars of empathy, including cognitive scientists who study how empathy and emotion operate in the brain, however, argue that empathy and emotion facilitate more ostensibly rational forms of understanding (e.g., D'Amasio 1994, Clore et al. 1994) and should rightfully be considered an integral part of cognitive functions, including reason and rational thinking. Feeling and thinking, to simplify the dichotomy, cohabit our cognitive processes and are central to how we formulate empathic understanding. Understanding another's thoughts depends intimately on understanding another's emotions. Many emotions, furthermore, embed certain thoughts and desires (Rorty 1995:209). In a similar vein, Blackburn argues

for the non-detachability of emotion from reasoning, in that those things we rationalize over are “things we care about” (1998:123). Bodily movements, moreover, such as facial expressions, postures and gestures, which are often cited as expressions of emotion and considered epiphenomenal to thoughts, are actually “continuously meshed with more developed and clearly cognitive inferential interpretations” of our understanding of others (*ibid.*:214). More simply, as Marcus puts it, “[p]eople are able to be rational because they are emotional” (2002:7).

From a cultural anthropological perspective, Beatty argues that “[e]motions are the substance and possibility of experience” and as such, do not “hover above” it, but are instruments of analysis and lenses through which we view the world (2010:437). Many authors note that even though there has been a divide in the West between emotion and cognition, the recognition of the importance of emotion in activities of debate and reasoning goes back at least to Aristotle's treatise on rhetoric (Angus 2010, Wilce 2009, Caffi & Janney 1994). Many philosophers (Gibbard 1990, de Sousa 1987, Frank 1988) and psychologists (Clare et al. 1994) since then have argued for emotion's influence on rational judgment (Marcus 2002). Emotions are thus intertwined with processes of moral reasoning and evaluation in everyday life. As White argues, “specific emotions...designate interactive scenarios with known evaluative and behavioral implications. The attribution of emotion brings to bear presupposed knowledge about the desirability or undesirability of generic courses of action on the interpretation of events” (1990:48). Lakoff & Kovecses (1987) argue similarly that every emotion is processed along with detailed knowledge about the world in which the emotion resides (Hsia & Su

2010). Along with emotion, the body is interlocked with our knowledge and judgments of the world. Through interaction, “the social body,” as Hanks writes, “becomes a ubiquitous part of talk about the world, and by implications, knowledge of it” (1990:14).

The attribution of a specific emotion to an event entails a moral interpretation of that event and, in turn, a suggested recourse to it (White 1990:48). In this sense, emotion is indispensable to legal reasoning, for at its core is the evaluation of events within a logic of what *should* have happened. Legal scholars have recognized that empathy and emotion are necessary to any judgment and thus cannot be entirely banned from legal processes (Henderson 1998). Feigenson and Park, for example, argue that emotions offer “informational cues to the proper attribution of responsibility or blame” (2006:145). They argue, relying on Haidt's (2001) interpretation of moral judgment, that given the “affective valence” of moral judgments (*ibid.*), moral reasoning and in turn emotional considerations are necessarily involved in justifying one's legal judgments.

Given the complexities of the involvement of emotion in law, it is important to make a distinction, which most legal scholars who address emotion fail to make, among the multiple forms of emotion within legal processes and the varying degrees to which they are sanctioned (see Henderson 1998 for an exception)<sup>18</sup>. For instance, as stated above, the emotion of a defendant at the time of the crime is often highly relevant to judging the nature of the crime and appropriate punishment. According to the law, however, is the emotion of the defendant during the trial relevant? Are the emotions of the jurors relevant? Is the jurors' empathic or emotional connection to the defendant

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<sup>18</sup> When a distinction is made, it is usually between “good” and “bad” emotions, such as love and hate, and their differing effects (both detrimental, usually) on law (Henderson 1998, Bandes 2001)

relevant? This chapter in part attempts to answer these questions. Another wrinkle missing in many accounts of emotion in law is the extent to which emotions vary across experiencers, groups, societies, etc., that operate under the same legal system. Nussbaum, for example, astutely questions whether one's emotions are necessarily those of a reasonable person (1999:21), for this is the assumption upon which the law relies.

### **3.7 Moral blameworthiness and emotional displays**

The following example from a juror interview illustrates this reliance on emotion and its embodied displays in evaluating the moral implications of a defendant's criminal actions. Here, the juror reflected on his reactions to how a crime as it was displayed in court could have occurred. For this particular juror, rational thinking was not sufficient in processing the crime and the defendant's involvement in it.

#### *Example 3.n*

Really **how could this happen?** It was almost really **disbelief**. I mean, it sounds terrible to (sound) **you don't believe what you're seeing** but, as a, just coming in and saying this is what happened, all that goes through your mind well what happened? How? Who? Who was, what? What type, wh-, did anybody see? What what, I mean, **you're trying to get all these explanations, make it rationalize, and you can't**. And it wasn't until, and that's when, at the beginning you try and ( ) okay well what does he, did he really do this? **They're showing the bloody part the knife, and then his reaction of just, the nonchalant, you know, nothing.**

This juror recounts his struggle with grasping how a crime such as this (the victim was

stabbed over 100 times) could have occurred. The affect of his delivery of these utterances, which are replete with stops, hesitations, and repetitions, exhibits that this is something he still struggles with at the present moment of the telling in the interview.

The juror lacks an explanatory framework through which to interpret his experiential contact with pieces of the crime during trial. He comments on how he reacted with disbelief at the presentation of the “bloody scene” through crime scene photos and the victims' bloody articles of clothing, which not only had visual remnants of blood, but smelled like dried blood as well, intensifying the sensorial experience of violence. To answer his potentially rhetorical question, “how could this happen?,” he searches for “explanations,” to try to “make it rationalize,” but this rational tactic fails. In the end, he relies on the defendant's interactive behavior during the trial in making sense of how this happened and how a man could have done what the defendant did. When the prosecutors displayed the actual murder weapon in court, a bloody knife, the defendant's reaction was “nonchalant, you know, nothing.” This reaction is counter to the behavior a juror would expect from someone confronted with such an object, especially if he wielded it himself while murdering another human being. It is this emotional (or lack thereof) explanatory framework that allows the juror to, some lines ahead in the interview, assess the morality of the defendant and his actions:

*Example 3.o*

Okay **you're not normal. This is not normal.** Because then [after seeing the defendant's reaction], at that point then you could connect him, with this even though you have the pictures of the fingerprints and then the knife, the

scar and everything.

Despite the evidentiary legal paths of identifying an offender, such as fingerprints and matches between a knife and the pattern it leaves in someone's skin, this juror cannot make sense of the fact that the man sitting in front of him in court actually committed this act. Not until he watches his reactions to the display of the crime that is. When these reactions do not map onto the jurors' ideologies of how a “normal” human being would act, he accepts that this “not normal” being in front of him could have done such a thing.

### **3.8 Language, empathy and emotion**

Language has historically had an ambiguous relationship to empathy and emotion. Beatty succinctly ponders this sticky emotion/language relationship: is talk about emotion emotion itself? (2010:435). In one of Sapir's (1921) first queries about language, he tackles this issue. He argues that “under the stress of emotion,” we involuntarily express vocalizations regarding such emotion, leading many to assume that language, like emotion, is “instinctual” (*ibid.*:3). This type of utterance is not speech, however, he argues, but is an “automatic overflow of the emotional energy; in a sense, it is part and parcel of the emotion itself” (*ibid.*).

Relatedly, many consider language to bely empathy and emotion; talk lies, in other words (Haviland 1989:32; Ekman 1977, 1976). In this perspective, personal feelings are expressed and felt through pre-linguistic means and language is seen to constrain and artificially categorize such feelings. As Carr notes in her discussion of American addiction narratives, language's ability to be “flipped,” or used to convey persuasive falsehoods, reveals the “limits of language as a means of detecting or denoting

inner states” (2010:19). Emotions are often deemed too individualized and particular to be captured through generalized linguistic means, even resisting ethnographic formulation (Haviland 1989.:438). Language is thus not a vehicle for emotionalism, according to modern and particularly Protestant conceptualizations of it, but is, instead, the “proper vehicle for objectivity” (Keane 2002:68).

Language, in this sense, is a distancing device, which keeps people from the “true nature of the activities in which they engage” (Haney 1997:1475) and loses “the feeling side of the phenomenon” (Beatty 2005:20, see also Leavitt 1996:522-23). Legal discourse is often considered even more abstracting and impersonal, allowing legal subjects to “sustain psychological barriers” against personal emotions (Haney 1997:1454) and blocking “affective and phenomenological argument” (Henderson 1987:1575). In other institutional contexts as well, emotive language is considered limited. As Caffi & Janney argue, the chance of a given expression being interpreted as emotive decreases when one is engaged in a highly ritualized, e.g., institutionalized, context; there is a direct correlation, they claim, between the level of strictness of linguistic conventions and the speaker's freedom of emotive choice (1994:348).

Related to this intellectual separation between language and emotion/empathy is the long-standing divide between language and the body. Anthropologists struggling to combat the reification of the mind/body dichotomy have somehow left language out of the picture. Van Wolputte, for instance, in summarizing Csordas' (1994, 1990) influential work on embodiment in anthropology, claims that the body is situated on the level of lived experience, not discourse (2004:258). This is coupled with his statement that a

focus on embodiment “collapses the difference between subjective and objective, cognition and emotion, or mind and body” (*ibid.*). Clearly, language has been left out of the effort to destabilize these dichotomies. Those working on language as a situated, embodied activity (e.g., M. Goodwin 2007, Streek 2003, C. Goodwin 2003), however, have brought language into the realm of the body, treating it as a meaningful part of phenomenological experience (Duranti 2010). My analysis takes this approach, exploring the vicissitudes of language in lived, embodied experience, while recognizing that language can also serve as a distancing device between speakers, their interlocutors, and the contextual elements of their discourse.

Despite the history of work that has promoted empathy and emotion as pre- and supra-linguistic phenomena, scholars do recognize that empathy can be aroused by verbal messages. Hoffman, for instance, explores the emotional reactions of linguistic expressions during victim impact statements given after capital sentencing (Hoffman 1993[1987]:652). The semantic meaning of a particular event, entangled with the words used to describe it, can also produce affective responses (*ibid.*:658, Razran 1971, Zanna et al. 1970). This form of empathic experience, however, is said to require more complex processing than empathic experiences that are triggered by non-verbal cues (Hoffman 1993[1987]). Henderson illustrates this hierarchical ordering of experience through an example, in which a juror first experiences the noticing of an action, such as the defendant rolling his eyes, and then classifies it as meaningful in a particular way (1993[1987]:1651). From this viewpoint, the categorization of an event into a particular semantic type can produce particular affective responses, but these do not occur on the

same immediate level as those to pre-linguistic cues (see also Beatty 2005).

Others, especially anthropologists and language scholars studying the actions accomplished through interpersonal encounters, question this experiential separation between linguistic and affective responses. They see language, including linguistic structure, as part and parcel of emotional expressions and empathic encounters, and vice versa (e.g., Bandes 1996:363, Ochs & Schieffelin 1989). Language is thus not a barrier between person and experience but is, rather, experience-near (Ochs 2010). Haviland, for instance, argues that “affective expression...is an integral part of the design of language as it emerges through verbal performance” (1989:29). In legal testimony, he writes, emotions can be evoked through the performance of a previously occurring event; a linguistic description is thus never merely a linguistic description (*ibid.*:30-31).

Through what means these emotion-laden performances are accomplished can be seen especially in work on language and affect (Goodwin et al. forthcoming, Goodwin & Goodwin 2000; Besnier 1990; see Caffi & Janney 1994 for a review of such literature), which attempts to identify the linguistic and multi-modal actions through which interlocutors display emotion. These perspectives challenge the limiting, denotative ideology that defines language as merely a container for the propositional content of messages (Carr 2011, Wilce 2009, Reddy 2008, Hanks 1990, Irvine 1989, Duranti 1988, Lyons 1981, Silverstein 1979), a conception of language privileged also in legal contexts (Daniel 1997:356). Since language is itself a phenomenological medium (Duranti in press, 2010), linguistic expressions of emotion do more than refer to a feeling; they produce a “pragmatic effect,” a “reaction” (Beatty 2005:25; see also Hsiao & Su 2010).

In his analysis of “danger of death” narratives, Labov (1972) argues that what a speaker is telling can affect the authenticity of the narrative. In telling about a near death experience, “because the experience and emotions involved here form an important part of the speakers' biography, he seems to undergo a partial reliving of that experience, and he is no longer free to monitor his own speech as he normally does in face-to-face interviews” (1972:355). Thus in these narratives, Labov argues, more authentic speech arises, in which emotions and experience are expressed untrammelled by closely monitored speech. In my data, jurors are often telling of things they submit as life-forming and/or altering experiences. In this sense, their narratives can be seen to fit into Labov's characterization. The narratives told in court, however, are highly mediated, though often even more emotionally laden than my interviews with jurors. These data are thus rich sources in which to examine how emotion is handled in differing narrative contexts and how language mediates the expression of empathy and affective experience.

### **3.8a. Legal language, emotion and sincerity**

Questions still remain as to whether a linguistic display of emotion is equivalent to feeling an emotion. Assuming a direct correlation between emotion words and emotional experience can indeed be problematic (Lutz & White 1986). Sincerity is in fact a major issue in language and affect scholarship; how does one distinguish true from deceitful affective displays? (Besnier 1990:430; Irvine 1982). This, however, is not merely a linguistic issue, for affective displays of all kinds can be deceitful. Besnier suggests that by considering emotions as interactive constructs, rather than individual, internal states, this issue becomes moot (1990:430). The question becomes how emotions

are produced and understood interactionally, rather than whether they map on accurately to one's inner feelings. How does this further our inquiry about emotions in the law, however, when what is at stake is specifically the internal state of an individual?

Assuredly, American legal processes rely on the assumption that one's individual internal states can be reliably understood by others (cf. Bruner 2008, Keane 2002) , which we know is not universally accepted (e.g., Ochs & Schieffelin 1994). Law is ambivalent, however, on whether it privileges language or non-linguistic phenomena as revealing the “truth” about a person's inner state, especially his motives. In one sense, the structure of legal proceedings assumes that actions express intent; if someone kills with a gun, rather than a stick, for instance, the intent was more assuredly to kill. Furthermore, legal processes rely in part on the explicit recognition that words can lie, as seen in its barring of hearsay from court as unreliable testimony, and in turn privileges other kinds of sensorial testimony, such as eye-witness. In an interesting twist on this logic, however, the “excited utterance” exception to the hearsay rule assumes that statements made during extreme emotional arousal are likely to be true because “raw emotion” trumps cognitive function (Maroney 2006:130). In another sense, law relies heavily on linguistic expression as a marker of truth and reliability. Consider the recitation of Miranda Rights, for instance, during which persons give themselves over to the law by uttering a few prescribed words. A legal sentence, indeed, is first and foremost a linguistic statement that puts into motion a series of very consequential actions (cf. Austin 1955).

Despite the law's ambiguous treatment of language, emotion and truth, legal scholars argue vociferously that, in the end, “the dry and disconnected discourse of legal

authorization” limits the “full range of human elements” in a juror's decision (Haney 1997:1485). As Supreme Court Justice Brennan has argued, the language of judging must be expanded to reflect the “subjective, experiential, and emotional” influences of decision-making (Henderson 1988:123; Nussbaum 1996). Contrarily, Bandes argues that there are dangers in allowing empathy into legal processes without “sufficient structural safeguards” (such as language), for this would invite prejudice and arbitrariness to prevail (1996:399). Despite these different attitudes about language and emotion/empathy in legal process, law ultimately relies on words (Daniel 1997:350), and thus the nature and implications of legal language should be subject to scrutiny. I take the stance that the best way to approach these issues is by dissolving the harsh distinctions between language and emotion, mind and body, reason and empathy, and treat them as integrated and constructed in dialogue with one another within human interaction.

### **3.9. Empathy and emotion in death penalty trials**

Current research on empathy in capital trials claims that the procedural structure of the capital sentencing process limits jurors' ability to empathize with the defendant to the extent that more death than life sentences are rendered (Garvey 2000). The logical presupposition behind this theory is that people cannot kill those they empathize with, and so something in the capital sentencing process must be inhibiting jurors' ability to empathize with the defendants (*ibid.*). Death penalty law, however, is ambiguous on its attitude towards empathy in the courtroom.

As Weisberg (1983) argues, because the death penalty is irreversible, capital defendants must be protected by legal rules when others decide their fate; jurors are thus

repeatedly instructed that they must remain impartial and unbiased throughout the case, and, above all, follow the law. At the same time, however, the death decision is an “intensely moral, subjective matter” that defies legal rules (Weisberg 1983:308). The 8<sup>th</sup> Amendment of the Constitution requires the death penalty to be “contextual and particularistic,” but this often raises concerns that its implementation is unstructured and thus arbitrary (Bandes 1996:390).

The legal system's contradictory stance on empathy is compounded by the bifurcated structure of the capital trial. The purpose of the first or “guilt/innocence” phase is to determine what, if any, crime the defendant is guilty of. This requires the jurors to be fact finders in the traditional sense and consider the defendant as a token of a particular legal type. In the penalty phase of the capital trial, the final question, or “mitigation question,” asks what aspects of the defendant as an individual, including his character and background, might sway jurors to spare his life. This is defined in case law as a “personal, moral judgment” and is considered necessary because of the severity and finality of the sentence. Within this bifurcated trial system, the mitigation requirement to consider the individual morality of the defendant flies in the face of well-established legal ideologies that decision-making should be objective and based on generalizable rules and facts.

Many consider the guilt/innocence and punishment phases of death penalty trials to be qualitatively different types of decision-making, in that only in the latter is the defendant considered as an individual, whereas in the former, he is judged according to “stereotypes about the inhumanity of capital murderers” (Haney 1997:1455). Bruner

emphasizes this distinction in his discussion of the culture/mind distinction as one of outside/inside conceptions of the individual. In a capital trial, the guilt phase is about the “outside,” he states, while the sentencing phase is about individual psyches (2008:41).

The unique circumstances of death penalty trials constitute an archetypical example of the tension in legal processes more broadly between considerations of individual lives and the general applicability of legal rules and standards to those lives. Jurors are required to view a defendant as an individual and examine the particulars of his case, but they must also judge him according to relevant legal categories applicable to multiple individuals and circumstances. The question often addressed in jury decision research, especially regarding capital sentencing, is whether these individual particulars open up an empathic space in which jurors can try to understand the defendant, and whether this results in jurors' voting for less severe punishment (Garvey 2000). Survey-based research has in fact shown that members of the public are more lenient on a defendant when they know more about his life than when they are asked about the death penalty in abstract terms (Roberts & Hough 2005, Freiberg 2001). Hoffman (1993[1987]) has similarly argued that moral abstractions transform into empathic considerations when one considers an individual victim. Scholars such as Nourse (2008), however, recognize the extent to which individual humans are often elided in law, and especially legal scholarship. Commenting on one of the central definitions of legal culpability, she argues that “scholars have made an analytic mistake in believing that the reasonable man is a person” (*ibid.*:33), highlighting the extent to which explicit legal references to personhood are not really about persons at all.

The complex relationship between legal standards and the people to whom they are applied is consequential for trial attorneys; Henderson, for instance, urges lawyers to formulate empathic narratives from “concrete human stories rather than simple abstract appeals to legal principles” (1987:1650). As Henderson and many others have argued, empathy is crucial to this process of individualization. This chapter examines to what extent jurors view the defendant according to his individual characteristics, and what empathic space this opens up in their judgments. More specifically, I investigate how this space is negotiated, limited, and expanded during death penalty trials through particular embodied communicative practices, and what affect this has on jurors' decisions.

Texas death penalty litigation, including jury instructions, statutory language, and case law, reflects the contradictory ideals of legal generalizability and an appeal to individual defendants. Certain aspects of the law are designed to restrict emotion and empathic understanding. For the penalty phase deliberations, after the defendant has been found guilty, most jury instructions state, “You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding this case.” Jurors are further instructed that “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 in this trial.” Additionally, jury instructions during death penalty punishment phases often inform jurors that specifically, “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.”

Based on these instructions, jurors assert that their decisions should be based

solely on things labelled as evidence and sanctioned to be considered. The following juror expresses how seriously he took such instructions:

*Example 3.p*

Okay. 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 grey-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 expresses difficulty with being co-present with someone who is begging for his son not to be killed, but the juror is able to put this aside, he claims, on the authority of the jury charge. The testimony of a father, however, is part of the individual trial of a defendant's character and background, which is required in death penalty cases. This juror, by evoking the written jury instructions, eschews the father's testimony as merely a plea to emotion that he should not consider.

Parallel to this desire to rely solely on trial elements labeled “evidence,” jurors prefer to rely on what they “know” in justifying their decisions. In the next example, a juror had told me that he was surprised that he was able to put emotions aside, something

that he said the law required of him. I asked how that was possible:

*Example 3.q*

R: So how, how do you think people sort of, you or other jurors put their emotion aside and you know, what were, how did they actually do that?

J: Well, when you go down, you had to go again, **you had to go by what, what we knew. Not what we supposed, not what we guessed, not what we wished, but what we knew...**

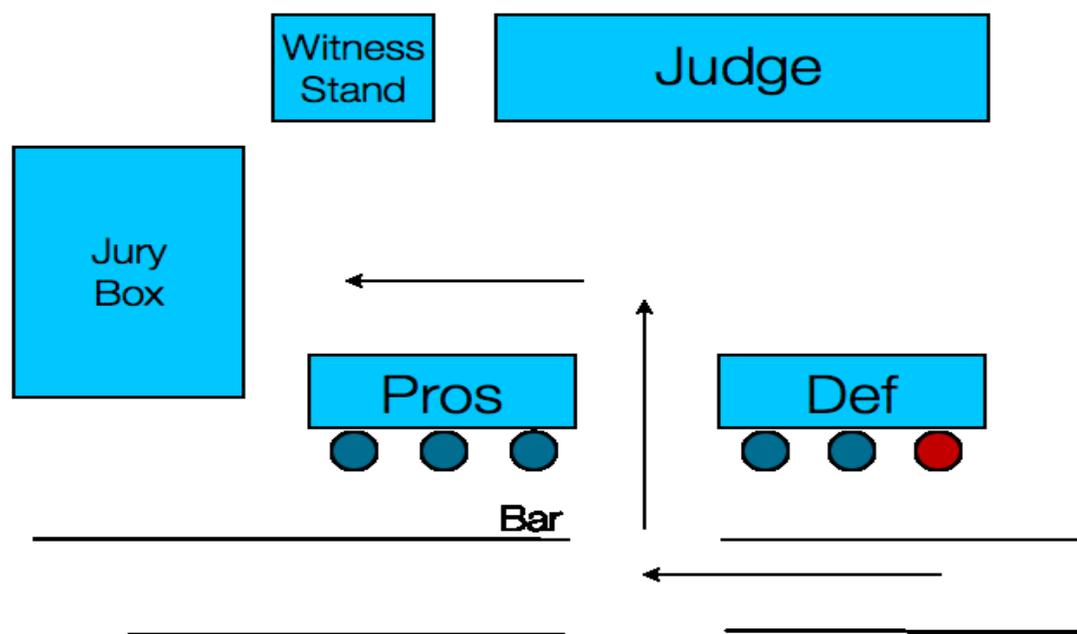
This juror, alongside thinkers at least since the Enlightenment who oppose empathy and emotions to thinking and rationalization, pits emotion against knowledge, claiming that the latter is what the law required him to rely on. Despite legal warnings against relying on any personal feelings, jurors are also informed that they necessarily bring with them into the courtroom their own experiences and knowledge. A judge in one case tells jurors during jury selection, “We come in here with lifetime experience,” which “leaves us with certain impressions, leaves marks on us.” An attorney, when addressing the entire jury panel during voir dire, states that “any person that comes up there [to the jury box] is going to have their own feelings.”

In addition, according to case law the final sentencing question jurors must answer is supposed to be based on “evidence that a juror might regard as reducing the defendant's moral blameworthiness.” Such evidence is further defined in jurors' instructions as revealing the “defendant's character and background.” Further case law permits that jurors' decisions to sentence someone to death may involve mercy, which, at least in lay terminology (and mercy is not legally defined), requires a compassionate

appeal to another's experience. One can see already the correlations between these legal constructs and discussions of empathy outlined above. The practical question here is how can jurors be expected to be rational and unemotional for the first part of the deliberations and then put that aside in the final special issue question to make a “personal, moral judgement”? As I will argue at the end of this chapter, death inclined jurors use this conundrum to their advantage, telling life jurors that they need to provide “evidence” for their decisions, that their life votes are based merely on emotion. If they can't find a rational explanation for their decision in other words, then their opinion has no basis and is invalid.

### **3.9a. Mediation of embodiment in court**

Body positioning within the built environment of the courtroom is designed to allow or disallow jurors certain sensorial access to the defendant. Figure 2 depicts the arrangement of one courtroom in Texas, and is fairly typical in terms of spatial arrangements of persons.



**Figure 2: Set-up of Trial 1's courtroom**

In front of the bar, or the division between the audience and the court professionals, sit two tables next to each other. At one sits the prosecution team, usually 2 or 3 attorneys, and at the other are the 2 defense attorneys and the defendant, shown here in red. The defendant, along with attorneys, usually wears a suit which either his family or lawyers purchased or borrowed for him. He is not cuffed or restrained in any visible way, a deliberate attempt by the court not to have the defendant's appearance sway the jurors. (In most cases he has a restraint on his leg, hidden by his pants, that is either controlled electronically by a guard or prevents his ability to run). In fact, many jurors told me that when they first came into the courtroom for jury selection, they thought the defendant was one of the attorneys. I made the same mistake once as well.

Implicated within this positioning of bodies is the opportunity for eye contact

between the defendant and others in the courtroom. In this particular courtroom, the jury processed directly in front of the defendant as they came in and out, giving the him visual access to the jurors. A number of jurors remarked on the defendant's ability to look at them and attempt eye contact – which many of them avoided – as they walked in and out. Some of the women went so far as to ask the judge to instruct the defendant not to “stare” at them because it was making them uncomfortable. This may seem a minor point, but it was a major topic of discussion within my juror interviews. An element of the trial not caught on record and certainly not part of the “evidence,” the defendant's gaze is present and real in the jurors' trial experiences. In addition, the attorneys, especially prosecutors, often required the potential jurors during jury selection to look directly at the defendant and state whether they could sentence him to death. This in fact made some jurors revise their previous statements that they could give the death penalty and disqualify themselves. Given the examples of jurors' comments on eye-gaze and lack thereof, jurors seem to be constructing regulations regarding the amount and appropriateness of eye-gaze and its communication of a level of one's morality and or remorse.

Not just likeness, but physical proximity and direct interaction with another is also considered an incitement to empathy (Henderson 1987:1586).<sup>19</sup> Jurors' empathic experiences are facilitated by being physically present with another's body, and these experiences shape jurors' empathy with, understandings and judgments of defendants<sup>20</sup>. Husserl's (1989, 1969) notion of intersubjectivity (outlined by Duranti 2010) captures the importance of bodies in our understandings of others:

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<sup>19</sup> Though intersubjective and empathic experience is of course possible without the physical presence of an other (Duranti 2010:10; Heidegger 1996; Husserl 1913).

<sup>20</sup> Chapter 3 covers this issue of proximity and empathy in more depth.

. . . the Body [is] the bearer of the zero point of orientation, the bearer of the here and the now, out of which the pure Ego intuits space and the whole world of the senses. Thus each thing that appears has eo ipso an orienting relation to the Body, and this refers not only to what actually appears but to each thing that is supposed to be able to appear. (Husserl, 1989: 61)

Husserl here describes not just the body of the other, but that of the self as central to our interpretations of the world around us (including other bodies). Through bodies, we come to understandings that are not propositional and rational in content, but are, rather “automatic and often reflex-like” (Gallese 2003:520). Jurors are not disembodied finders of fact – floating minds in the jury room – as the legal system often makes of them, but experience embodied encounters with others in the courtroom, including the defendants, that are often incredibly salient to how they interpret the defendant's actions and motives. In that the physical co-presence of bodies is the basis for empathic experience, jurors do not necessarily have to share common experiences with defendants in order to understand their actions, as some legal scholars have argued (Gobert 1988:278; see also Lutz & White's analysis of Bourdieu's “positioned subject” (1986:415)).

Furthermore, some argue that people are more apt to be empathically aroused by another's emotions in the immediate situation than when the other is distanced by time or place (Hoffman 1993:667). Because trials recreate a situation that occurred somewhere else sometime in the past, there are many trial tactics that attempt to bridge these temporal and spatial divides. These include playing audio tapes of the defendant's confession after the crime, showing videotapes of defendants or victims, and displaying crime scene photos. In trial, the physical presence of the defendant is often laminated onto other depictions of him through these various modalities, and thus understandings of

him based on interactional experience and linguistic and legal framing co-mingle.

The physical presence of the defendant is often marked and made explicit when witnesses take the stand, for those with personal knowledge of the defendant are required to point him out in the room so that the record reflects the person they are talking about and the individual, physical being of the defendant are one in the same. The following example is typical of these question/answer sequences and, in this case, is the second time this witness has been asked to identify the defendant:

*Example 3.r*

A: Okay and **Michael Perry**, just so we get it straight, is **in the courtroom** still.

W: Yes.

A. And he is still **where you pointed** last time, correct?

W: Yes.

A: Can you **point to him again** and describe what clothing he is wearing.

W: He is wearing **khaki jeans and a black long-sleeved shirt**.

A: Let the record reflect **she's identified the defendant**.

These witnesses are thus asked to point out the physical presence of the defendant; many of them physically point to his location in the courtroom, after which attorneys often, as here, ask them to cite some identifying characteristic, such as clothing, for the record.

This is coupled with an indication of the defendant as a particular type of person: “she's identified the defendant.” Thus, in this brief encounter, we have the defendant identified both as an individual by his proper name, clothing, and physical location in the

courtroom, and as a generalized legal type, a defendant.

In the next example, an additional form of identifying the defendant is layered onto those displayed above.

*Example 3.s*

A: ...are you **familiar** with an individual known as **Michael James Perry**?

W: Yeah. **I am familiar with Mike.**

A: Do you see **Michael James Perry** in the courtroom today?

W: Right there [pointing] in a black shirt.

A: Let the record reflect he's identified **the defendant, Michael James Perry.**

Here, the attorney identifies the defendant by his proper name, as in the previous excerpt, but frames the question as one of familiarity, which the witness aptly displays through his shift of reference term from the full proper name to a nickname, Mike. The attorney then reverts to his use of the full proper name, in part for the record, so that it reflects the precise individual being identified. The witness physically points to the defendant and he is identified, as in the above example, as “the defendant.” Here, then, the defendant is identified as a person who shares intimate social relationships, indicated by the use of his nickname, as well as a body in the courtroom and a legal type.

Jurors attune to the physical presence of the defendant by closely monitoring his interactions with others in the courtroom, especially witnesses. In one trial, which involved a defendant with a particularly aggressive personality, one of his previous girlfriends was called to the stand. She had asked ahead of time to be escorted up to the stand by a guard (which is not common), who placed his body between her and the

defendant when he walked her up. A juror from this trial commented on this in an interview. I had just asked him what testimony he found significant in the punishment phase:

*Example 3.t*

The girlfriends' testimonies. Especially the, the one that was, you know was kidnapped and taken out. I mean, I feel terrible for her. After all these years still is a vivid memory to her and a terror. I'm not sure whether **the security guard stood up between them** if that was not posturing on the part of the prosecution or not, but I think she still appreciated it. I mean I think she's gonna sleep a little better.

The witness' fear of being physically co-present with the defendant evokes sympathy from this juror. He recognizes that being in the defendant's proximity can elicit the terror she felt when he kidnapped her in the past. The juror shrewdly recognizes, however, that these embodied interactions can be manipulated by attorneys in order to stir jurors' emotions. Jurors and attorneys alike recognize the rich source these embodied experiences are for influencing jurors' decisions.

Another juror in the same trial reflects on his intense emotional reaction to seeing a victim who survived the defendant's attack (the victim's mother did not), a 9 year-old boy, confront his attacker in the courtroom.

*Example 3.u*

And you know here I was you know, here I was crying thinking you know man, this **poor, poor boy** is coming in to the witness stand **in front of the**

**person** who **just** did this to him and did this to, did this to his mother, you know what, what could be going on in his mind right now it's like, you know, and he did such a great job.

The juror is shocked at how well the boy handles such an emotionally rife and potentially traumatizing encounter, again, sharing sympathetic feelings with the witness who is forced to be physically proximal to the defendant. Interestingly, the jurors invokes temporal proximity to the crime with his formulation, “just did this to him,” even though the crime occurred four years prior to the trial. Similar the above example, in which being in front of the defendant invokes in the present situation the witness' feelings of terror that she experienced when being attacked by the defendant in the past, this juror expressed the sense of temporal proximity that is induced when one is in the presence of another with whom he shared a past, emotionally intense experience.

### **3.9b. The face**

The jurors recognized that the defendant's body, especially his face, was a source for them to judge his emotions, which they cited as important when they were making decisions about his life. As Levinas argues, access to the face is necessarily ethical. This is because the face is vulnerable, it is “exposed, menaced, as if inviting us to an act of violence” (1982:85-86). Through access to the defendant's face, jurors make assumptions about his emotional state and ultimately his moral standing. Furthermore, there were certain emotions jurors expected to see, and the absence of these served as markers of the defendant's inner state, often interpreted as lack of remorse for the crime.

In her brilliant portrayal of signs of remorse and their questionable reliability in

juvenile legal decisions, Duncan stresses the point that the display of “appropriate” feelings is highly consequential in legal decision-making, especially in sentencing (2002:1471). She argues that relying on these expressions of feeling assumes a falsely accurate correlation between outer appearance and inner state (*ibid.*:1499). Nonetheless, as her gleaning of judicial decisions and my juror interview data show, such outward appearances are heavily relied upon in assessing remorse and offenders' moral character.

In the following interview excerpt, a juror commented, as did many, on the defendant's lack of emotional displays in trial:

*Example 3.v*

But he was um, **he handled himself** um, **he was very reserved** in through the whole process. Um, so it was um you- in the beginning **you couldn't read anything from him** at all you know. **And they probably wanted it that way...**And I couldn't tell anything and I um, I a couple of times I cau- I tried to catch my- I tried to, to not be so obvious and try to study him and try to say okay well what, you know **he's a person**. You know what, **what's going on in his mind right now?** You know he's been here all day long, this is only the third you know, first or second session you know, **he's been here all day long and what's going on with him?**

From his observations of the defendant during trial, the juror states that the defendant was very “reserved” and that he “couldn't read anything” from him. Duncan notes similar assessments of defendant's faces, citing one judge who relies on the defendant's “lack of any expression of emotion or remorse,” revealing his inner state as “impassive” and

“amoral” (2002:1498-99).

The defendant's reported lack of emotional display seems to have led the juror to assume a lack of humanity in the defendant, which is a common reaction to a purported display of no remorse from someone who has committed a heinous act (Duncan 2002:1472). The juror in fact needs to remind himself that the defendant is a “person” at all. This relates to arguments, such as Haney's, that being a defendant in a murder trial starts the defendant out at the level of “other.” Other than human, we might surmise, from this juror's logic. This juror eventually recognizes the defendant as human due to the fact that the defendant, just like the jurors, had been sitting in the courtroom day after day, and this similar situation he finds them both in allows the juror to attempt to understand what's going through the defendant's mind at that point.

### **3.9c. Expectations of remorse**

Jurors as well note the inescapable emotionality of legal judgment. For many jurors, an important aspect of determining a defendant's guilt and appropriate punishment involves evaluating defendants' embodied, emotional actions in trial. According to what they judge as emotionless, or non-reactive behavior on behalf of defendants in the courtroom, many jurors judge defendants as subsequently abnormal and less than human. This then serves as justification for sentencing the defendant to death.

The media often singles out defendants' facial expressions (or, most often, the lack thereof), which implies a universal logic recognizable to its reader/viewership: the expectation of an emotional reaction to events such as being sentenced to death or killing another human being. Such lack of expression is often cited when a defendant is read his

sentence or when emotional testimony occurs. For example, the *Dallas Morning News* states the following about a man who had just received a death sentence: “Bess did not appear to visibly react as State District Judge Carter Thompson read the verdict” (2010). In a report of several prosecution witnesses testifying about the victim in another capital murder trial, the *Huntsville Item* states that “Martin [the defendant], dressed in a dark blue suit, was largely expressionless throughout the proceedings” (November 13, 2009). This repeated media attention to defendants' expressionless faces reinforces a notion which many legal institutions and jurors share, that remorse can be read from the face, and that lack of remorse (seen as lack of expression) is an indicator that the defendant is amoral and thus deserves a severe sentence.

The juror in the following example made more explicit the moral implications of the defendant's lack of emotional displays during trial.

*Example 3.w*

Uh, but during that whole trial, he, if you were there **you too saw it, he had no emotion whatsoever**. He was cold as a snake. Now if someone was sitting in a jury box telling the world what a horrible person I was I think I would have **at least been a little bit interested in what they were saying**. **And at least looked at em**. I'm not asking him to do any histrion- I wouldn't ask him to do any histrionics or any, you know. But at least show an interest in what's going on. And he showed none whatsoever. At any point. He was just completely cold. Even when his **kinfolks was sitting right behind him. Just like they were nothing**. So that played a part in it I'm sure.

It did for me anyway. As a point what he, what, you know what's his, what would he do I mean you know, did he show any **human feeling** outside of.

This example illustrates that jurors' judgments about the defendant's moral character are often based on his expected embodied actions within the courtroom, especially in relation to others co-present. This juror characterizes the defendant as having no emotion and being “cold as a snake” because he displayed no interest in the witnesses' testimonies. What would constitute such a display for this juror is left unspecified, but his desire for some sort of embodied display is clear and the absence of such leads him to the conclusion that the defendant lacks any human feeling, questioning, as in the previous example, the defendant's humanity more generally. In addition, the juror expects the defendant to show some connection with his family who is co-present in the courtroom and his lack of such illustrates for the juror the defendant's negative valuation of his family's worth. Results of the Capital Jury Project have similarly shown that jurors tend to believe in a defendant's remorsefulness if they consider him to be loving towards his family (Eisenberg et al. 1998:1620).

Another juror similarly linked the classification of the defendant as abnormal to his lack of emotional displays in trial:

*Example 3.x*

It [the defendant's lack of emotional displays] just kind of reinforced the defense's case to me that, that **a normal person wouldn't've done what he did**, and and and you see this guy that is kind of **non-emotional either direction**, and you see him as kind of as not as a **normal** person then. Not

that he's crazy, but that it's just like, he could, he was **just totally separated from, from what you'd think normal emotions would be in seeing all that and and reliving it** and, I mean like I say his siblings would come in and, and even them just talking about their own upbringing, they would break down and, but he didn't he didn't and he had to hear that over and over and over and over. And and **it never seemed to affect him** and so to me it kind of **painted a picture of someone whose, whose emotions had kinda just been, you know squelched** and, and he didn't he di- didn't know how to react almost.

Here, the juror connects the defendant's lack of visible reactions in court, especially to his family members' emotional displays, to his abnormality, his status as something other than a normal person.

Another juror similarly comments on the importance of the defendant's embodied actions in trial, specifically his lack of engagement with others in the courtroom. In this case, the defendant did testify, which is very rare.

*Example 3.y*

You know, I wanna ( ) but I wanna hear what he's gonna say and **I wanna see**, what **how he's gonna say it**. You know it's like everything was like, that was a pivotal moment for me... I'm sacred, I need help, I wanna change, um I wanna be accountable. Um, I wanna make things right, you know, um that's a totally different, different scenario...And, he was a **he**

**couldn't even look at us.** He couldn't, I mean, and, it was like this isn't for real. This is, it's nothing.

In this example, the juror again conveys a hierarchy of expected actions from the defendant, both verbal and non-verbal. The juror emplaces himself in the perspective of the defendant by voicing him with first-person pronouns, "I'm scared, I need help, I wanna change." Through this emplacement the juror is able to judge the mental states and motives behind the defendant's here hypothetical actions. The lack of even the remotest sign of empathy, the defendant's eye contact, shocked this juror, negating any value he may have invested in the defendant's testimony.

Eye contact indeed served as an often emotional and dramatic marker of humanity for those involved in death penalty trials, especially the families of the victims. In the following excerpt from a *Houston Chronicle* article about victim impact statements, the author describes the victim's father's reaction to the defendant after his sentence was read:

*Example 3.z*

Victim impact statements, now commonplace, were all but unheard-of until Ertman was given leave to speak to Cantu in open court. His stinging denunciation of Cantu, pain evident in each word, reached a climax when Cantu turned away from the grieving father and Ertman yelled, "**You look at me! ... You're not even an animal. You're the worst thing I've ever seen. Look at me! Look at me good!**" (8.15.10)

Here, the father equates the defendant's lack of eye contact with his non-human status. Somehow, the father assumes, a mere glance from the defendant would confirm some

amount of humanity within him, but without this, the defendant is relegated to being neither human nor animal, but “the worst thing I've ever seen.”

The defendants were not wholly unemotional, however, and the jurors' expectations about which emotions are appropriate in which contexts track onto their accounts of emotional displays as well. The following example is illustrative of this point:

*Example 3.aa*

Oh through the trial it was just like, **does he know what he's doing?** It's like, anything that um the prosecutors would bring up, or pictures anything like that, you would, you could see him **smirk** or you could see him going and leaning over to the, to his attorneys and **giving excuses** or **giving a rebuttal** or giving some type of thing to talk against what we just saw. And it was **disgusting**. It was like, you know it wasn't like he **put his head down** and oh, w- was **ashamed** or, you know any **remorse**, no! **It was totally opposite**. It was like he was trying to find it, it was he was attached he was trying to find any way to discredit. And to um, um, get his viewpoint that he was in the right oh but no but (let's) check this out. Or no but look at this. It was **disgusting** it was **terrible**. It really was it it was almost **sickening**.

Here, the juror deems that the appropriate responses to seeing pictures of the crime scene and other references to the crime would be for the defendant to put his head down and show remorse or shame. What he saw, rather, were smirks and attempts to give excuses or rebuttals to what was being presented. These were “totally opposite” what the juror

expected; he thus sets up a clear dichotomy between morally acceptable and morally unacceptable signs of emotion to these stimuli in this context.

This connection between displays of remorse and defendants' humanity is much more complex than the law or jurors assume, however. “[T]he law betrays a psychological naivete,” Duncan writes, “in viewing remorse as the only 'human' response to having committed a serious crime” (2002:1472). However complex the emotional responses to heinous actions might be, however, jurors often rely on a simplistic parallel between lack of remorse and lack of moral fortitude (and in some cases, in turn, a lack of humanity). Jurors also unproblematically link a defendant's demeanor and facial expressions to his inner emotional state, but, as Duncan argues, such a simplistic linkage is problematic, for “our bland, unflinching facade may be but the external manifestation of an inner struggle to avoid the knowledge we feel we cannot bear” (2002:1472). In fact, remorse itself is as much an act of “propriety and etiquette” as it is an evocation of “inner feelings” (*ibid.*:1485).

Moreover, the defendant's emotional displays evoke emotion in the juror himself; he is disgusted and sickened, which is a common reaction to criminal behavior (Nussbaum 1999). Garvey (2000) shows us that disgust and empathy are experienced simultaneously by jurors in capital trials, especially when dealing with emotionally disturbed defendants. In Example 3aa though, it is not the criminal behavior alone that disgusts the juror, but the defendant's mode of reacting to it in the present moment of the courtroom.

Later in the interview, this juror further explained how the defendant's demeanor

in court invoked a reaction of disgust from him:

*Example 3.bb*

His demeanor was just, like I said disgusting it was just, I mean terrible. I mean, he, he would, **he would like (move/leave) his lip and like try to fix himself** like you know **like he was bothered** like he was like uh! How long is this gonna be or what is this you know, **not even any concern** about his, **about what's going on how (severe) this is** ( ). but, he had no ( ) at all. **He really thought everything was okay.**

The defendant's bodily actions, such as fixing himself, served as moral markers for this juror of what the defendant was thinking and feeling, displaying to him lack of concern for the seriousness of the trial and an assumption that the presentation of this crime was “okay,” while for this juror such an ordeal was certainly everything but.

When considering emotions that should or should not be sanctioned in legal decision making, critics often cite disgust as a common but dangerous emotion to be involved. As a particularly moralizing emotion, “[d]isgust can...lead to disproportionate responses,” Lynch argues; “it often seeks removal, even eradication of the disgusting source of threat” (2002:251). This is based in the fact that that which disgusts is not determined along a continuum; there is the disgusting and the pure, and the latter must be kept uncontaminated by the former (cf. Durkheim 1995[1912]). A juror feeling disgust towards the defendant may thus be more inclined towards a severe punishment, such as death, that insures the eradication of the defendant from the social world and thus the juror's. This juror felt such intense disgust that he wanted to avoid any contact with the

defendant throughout the remainder of the trial:

*Example 3.cc*

R: um, did you find yourself loo- looking at him a lot? Or you said you studied him a little bit,

J: I tried to study him I I did in the beginning, um, but at the end, once I re-  
**once I was realizing that all his actions were disgusting me**, it was really hard to pay attention. Because, (.) I mean a lot of emotions are going on in the courtroom. And ( ). and, I wanted to, I really did wanna do my best...you know at that point **I wasn't gonna look at him. I didn't I didn't wanna, interact with him.**

In line with Lynch's (2002) account of moral disgust, according to which people attempt to avoid any contamination from the disgusting threat, this juror cannot even bear to interact with the defendant (which, in this context, involves visual contact alone). To what extent can one consider another's humanity if they will not look at the person or engage in any other kind of interaction? Is a willingness to interact necessary for the consideration of the other as a human being like oneself?

**3.9d. Mediating the defendant's voice**

In addition to body positioning and actions, the defendant's voice is heavily mediated in trial. He is not permitted to address the judge or jury directly unless he is put on the witness stand, which is very rare. His voice is thus filtered the entire trial through his attorneys. Because of this, points at which his voice does come through, such as in his rare testimony, audio-taped phone calls or confessions, or letters he wrote, are privileged

by the jurors as extremely influential for their decisions. In this next interview excerpt, a juror told me the importance of reading a letter the defendant wrote to his brother after the crime and that it contradicted the defense's theory that the defendant was suicidal:

*Example 3.dd*

but, his **own** letter, that bragged upon his outlaw status. That wanted his brother to be sure and save all of his newspaper clippings. That bragged upon dying an outlaw's death. That castigated his brother for not sending him money so he could buy stuff at the commissary. **These are not the words and actions** of a person who's contemplating suicide.

The juror here qualifies the letter as the juror's own, giving it an authentic force as contrasted to other more mitigated forms of the defendant's voice during the trial. The defendant's own voice is given as a resource for understanding the nature of and motivations behind his actions: wanting, bragging, and castigating. Another juror expressed her desire to hear directly from the defendant during trial, but recognized that since her voice was portrayed via videotaped confession, there is not much her testimony could have done.

*Example 3.ee*

R: what made you think that.

J: she had nothing. No, uninterested was almost, just sat there. Not, and she didn't- and then the other thing was that she didn't speak on her own behalf. But, in all of the video testimony they had. What could she have said? That would've helped.

According to another juror, the defendant's voice was a privileged source on which to base his judgment; he was willing to put aside other forms of evidence in its stead. As he explained,

*Example 3.ff*

I was waiting for that waiting to return that change, that different, I was waiting for it **in his eyes** I was waiting for it **in what he was saying in his voice**, in his, **in his demeanor**, I didn't see none of that. And there is no I don't, there's there's, I don't see any hope for him.

Here, the juror looked to the defendant's face, his eyes, his voice, in order to judge his fate. In other words, he wanted to hear from him.

One's voice, one's whole body, is a marker of one's humanity, and thus the ways in which the voice is constrained and recontextualized in the trial setting are crucial for jurors' interpretations and ability to judge his actions. What does it mean to hear the defendant's voice or have his actions and feelings narrated through another? I argue that the voice can be equated to the face, in Levinas' conception, and thus tactics in trial that attempt to conceal and/or mediate the defendant's voice are in effect occluding jurors' access to the defendant as a human being.

Matoesian (2000), in his analysis of reported speech in a rape trial, provides an insightful illustration of how voice refraction is a salient element in legal discourse. Trial discourse in general, Matoesian (2000:879) argues, “rests on a theory of intertextuality, decontextualizing speech from one speech event and recontextualizing it in a new one.” All courtroom discourse, therefore, involves a level of voicing. Marking voicing in a

variety of ways provides for differing displays of “truth” (*ibid.*:882) and authenticity. The “intertextual gap” (Briggs & Bauman 1992) between the reporting context and reported speech can be maximized or minimized in order to construct differing claims of authenticity on the talk being reported.

In an instance of reported speech, as Goffman (1981:149) remarks, one can say there are two animators, the one doing the talking, and an “embedded animator, a figure in a statement who is present only in a world that is being told about, not in the world in which the current telling takes place.” In this kind of double-animating, however, the figure being reported can be brought alive in the present telling, as through a tape-recording, for example, or through the reading of a previously produced document. Direct reported speech, for instance, foregrounds the voice of the reported speaker, thus bestowing “an aura of objectivity, authority, and persuasiveness to the current moment of speech” (*ibid.*). As Goffman (1981:147) reminds us, however, when embedding another’s words in one’s own, “the words are heard as representing in some direct way the current desire, belief, perception, or intention of whoever animates the utterance...[The animator] seems inevitably involved in some way.” Thus, as large as the intertextual gap may seem, the voice of the animator can never be eliminated. Thus, within this model of multiple authorship, *which* voice is foregrounded in an interactional moment is up for negotiation. The animator’s marking of the speech is consequential, but also the relative power or authority of the original author and the medium in which the voice comes through (e.g., a letter written by the defendant versus reported speech by a third person) may also affect the interpretation of the speech event.

Gumperz (1983) illustrates this effect when quoted words of an FBI report are embedded in a larger narrative text. This tactic “[gives] the impression that the entire section of the FBI report, not just the one phrase, reflects [the narrator’s] own words” (*ibid.*:166). Through this process, the attorney manages to distance himself from the ultimate action he is producing (Irvine 1996:149), which is to classify the defendant as a criminal. By voicing a State document, in other words, he “[harnesses the authority of such speech to legitimate [his] own normative stance and to evaluate the speech being reported” (Matoesian 2000:882, Voloshinov 1986). In his analysis of a prosecutor's conveyance of police reports in a Belgian court, D'hondt (2009) makes a similar point. By reading aloud police reports without directly quoting the officers who wrote them, he argues, the prosecutor “emerges as a depersonalized mouthpiece for the institution she represents” (2009:255). This minimizing of the intertextual gap between animator and an authoritative – especially institutional -- author increases the seeming objectivity of what is being reported and decreases any affective involvement of the animator in the telling. It creates, as Bauman & Briggs term it, “generic transparency,” through which the reported event is viewed, imbuing the reporting event with “textual authority” (2009[1992]:227).

An excerpt in which a prosecutor reads aloud from the defendant’s disciplinary records reveals a similar minimizing of this intertextual gap in order to downplay the animator's role in shaping the meaning of what is being reported. After examining his first witness, the prosecutor makes the following request:

*Example 3.gg*

P: Your Honor, at this time I would like to publish these to the jury by reading certain portions from these documents to the jury.

J: All right.

P: With the court's permission may I sit on the witness stand and use that microphone so my voice can be heard?

J: Sure.

P: State's Exhibit Number 69 judgment and sentence from the 174<sup>th</sup> District Court of Harris County, Texas. The State of Texas versus D\_\_\_\_\_ D\_\_\_\_\_ S\_\_\_\_\_. The offense unlawfully, intentionally, knowingly possess a controlled substance, namely, cocaine; it's a third degree felony. He was placed on deferred adjudication. The date of the order is January 26<sup>th</sup> of 1995. He was placed on deferred adjudication. Attached are conditions of probation under the same cause number. One of the – the first condition of probation is commit no offenses against the laws of this state or any other state.

Here, the attorney does something fairly unorthodox and reads aloud from an exhibit. By telling the jury he is reading aloud, he grossly minimizes the intertextual gap between his rendering and the original creation of the documents. This reading therefore, as it foregrounds the voice of the reported speaker (here, writer), takes on an air of objectivity and authority (Bauman & Briggs 2009.:882). In addition, in another unorthodox move, the attorney asks to sit at the witness stand. Thus, not only has he told the jury that he did not author what is being said, but he also manages to take the role of a witness, further distancing his own voice from the telling.

We can see here, however, that the attorney is not merely reading, as he makes such meta-comments as stating the date of the order, prefaced with “the date of the order is,” and describing what is attached to the document. Since the intertextual gap has been so thoroughly minimized, however, it would be extremely difficult for a juror to weed out what speech is directly quoted from the document and what is not, and how much of the document is being quoted. Gumperz (1983) notes a similar effect when quoted words of an FBI report are embedded in a larger narrative text. This tactic “[gives] the impression

that the entire section of the FBI report, not just the one phrase, reflects [the narrator's] own words" (*ibid.*:166). Through this process, the attorney manages to distance himself from the ultimate action he is producing (Irvine 1996:149), which is to classify the defendant as a criminal. By voicing a State document, in other words, he "[harnesses the authority of such speech to legitimate [his] own normative stance and to evaluate the speech being reported" (Matoesian 2000:882, Voloshinov 1986), thus ultimately bestowing on the attorney the authority of the state, or the actual author of the document.

In one of the trials I analyzed, the defendant gave a confession, which was videotaped and played during testimony. In line with the analyses above, a juror recognized that she was not hearing the whole "truth" – that parts of the story were missing. She did not realize this when the tape was initially played, however, but only when evidence of a second crime was raised in the punishment phase.

*Example 3.hh*

I don't remember the exact sequence of things. But I believe that that my determination that he was guilty was made at the point at which the detective took the stand, and kind of played the tape, at least parts of the tape, of the confession. They stopped it when he got into Mr. Burkett's activities and and we didn't even know we were missing anything. Um, but I think at that point just listening to Michael tell the whole story. Um very detailed very straight forward, almost matter of fact. At that point there wasn't any doubt left that he was guilty.

Thus the juror recognized after the fact that while the videotape seemed to give the

“whole story” from the defendant's mouth, relevant pieces were missing. This conveys the authority on “truth” a supposedly straightforward medium such as video can have on the interpretation of what it conveys. It is mediated, however, as shown above, by attorneys who select the portion to play, when to play it, and in what context.

An prosecutor, during voir dire, anticipated this potential manipulation of authorship and unequal authority it can bestow on different kinds of evidence:

*Example 3.ii*

The law says that a statement may be admitted in a criminal case from a Defendant. It doesn't make any difference whether it's written, whether it's recorded, whether it's a tape recorder or whether it's a videotape. They're all equally valid in the eyes of the law

A juror, while discussing the tendency of defendants not to take the stand, recognized the extent to which a defendant's voice is always mediated in trial, even if he himself is speaking:

*Example 3.jj*

And I certainly understand him not taking the stand. You know, now, you know they kept hitting on that. Well you can't hold that against him. Well? I guess evidently a lot of people would, but that was never brought up either. Nobody ever even, you know, everybody said well of course he didn't take the stand you know it would've opened him up to too much. I'm not saying Mr. Lee is the greatest prosecutor ever was, but you know you can make people say things. I mean I, it'd scare me to death to be a witness in a, a

trial, because I know some attorneys, they can make you look like the biggest idiot in 30 seconds, you know.

Remarking on this usually mediated nature of defendants' voices in trial, another juror discussed a defendant's testimony, claiming that because the attorney's control over the testimony was relatively minimal, the "truth" of the defendant's words emerged:

*Example 3.kk*

I thought it was so awesome of Mr. Blanke when he said, this is your chance. Go ahead. Tell, tell the jury why they shouldn't. Vote for you to be killed. Go ahead. This is your chance your opportunity. And I thought it was so amazing, because we were all looking forward to what is he gonna say? What is Mr. Blanke, this you know wonderful attorney, gonna go and, what how is he gonna tear him up? And instead of him doing anything **he just totally left the leash off and said okay, go on. Go for it.** And that was so awesome he did because you saw, **we saw, the true person...**And then it was like it was like oh. Like a disappointment. And then we **hear him talk**, and then it was like oh a disgust. Like, this is terrible. You're gonna expect us to believe what you're saying? He could not, he couldn't bring it to himself. To say sorry. He couldn't.

Thus here, the attorney allows the defendant to speak openly to the jury, rather than being constrained as an adverse witness usually is by leading questions. This allowed the "true person" to come out which, for this juror, was in fact a disappointment.

While decreasing the intertextual gap between animator and author can amplify the aura of objectivity surrounding the discourse being reported, reported speech can serve a perhaps contrastive purpose, which is to bring the animator experientially closer to the author, thus facilitating empathy with them. The following juror, while putting himself “in the shoes” of the victim, speaks for her, depicting what he might imagine her saying while she was being attacked:

*Example 3.11*

I was envisioning the, the scene the crime scene, in the lady's apartment, and I was, I said it probably was an argument and there had to have been a point, there had to be a moment, as with all the other girls, that he's had, that he, that she realized she wasn't gonna get out of there. That she realized, okay this is serious. And so she's, so **she said okay, (wouldn't) stop. Whatever you want.** And he coulda stopped. But he didn't. He didn't stop [banging knuckle on table].

In his empathic envisioning of the victim's experiencing and thought, the juror's use of reported speech brings the victim into the room, so to speak, thus bringing her existentially and emotionally closer to the juror. His anger indeed increases as his story continues on, as we can see as he bangs his fist on the table. As his and the victim's emotional experiences begin to converge, the decrease in the intertextual gap seeks to “overcome the opposition between signifier and signified itself, merging the experience” of the animator and author (Briggs & Bauman 1992:228). This process inverts the usual basis of legal power, which lies in operations of objectivity and generalization. Rather,

the power of this experience for the juror lies in the shared emotion that is achieved in telling the victim's story in this way, ultimately justifying his decision for death for the defendant.

Thus direct quotation can increase the affective valence of an utterance, bringing a reported speaker's emotions into the reporting event (Matoesian 2000:883), indexing the present animator's emotional involvement and moral agenda as well. In this next example, the prosecution is conducting a "victim impact" examination of the victims' sister and daughter. Drama and emotion is crucial to such testimony, for its purpose is to convince the jury of the impact the crime had on the living relatives. Here the attorney asks the witness about a time the defendant was over at her house and he was provoked by a call to his girlfriend (the victim) from a man:

*Example 3.mm*

P: After she said it was G\_\_\_ and her phone rang, what did you see the defendant do?

W: He jumped up from the table and he said, "ooh." He said, "see, I'm going to have to go get me a gun because I'm going to have to kill me somebody. He said, these niggas don't know. I'm a nigga myself and I know how niggas are."

P: Did that scare you?

W: Yes, it did.

In this excerpt of witness questioning, the attorney does not prompt the witness to report speech; he asks merely what she saw. The witness, however, describes what the

defendant said through a direct quotative, which brings the emotion of the scene described to life in the present moment of the telling. Directly reporting such aggressive talk serves the purpose of supporting her own experience of being scared, and the overall point that the defendant is a scary, dangerous man. There are indeed two speakers animated here, as the defendant is brought vividly into the courtroom through the witness' retelling.

In another example, a prosecutor cross examined a defense mitigation witness, a man who ran a school for boys with disciplinary problems, at which the defendant was a student. The prosecutor read from the defendant's school records:

*Example 3.nn*

A: And ask you if there is a notation in there that **he said to staff, I'm not going into fucking OR**. Then he kicked the wall, took off his shoes and threw them at the staff.

W: Correct. Correct.

Again, through directly quoting the defendant with the quotative marker, he said, the prosecutor heightens the emotion of the telling, increasing the threatening implications of the acts he committed. The witness downplays this effect by answering "correct," rather than repeating the citation of the defendant's voice, as he could have by replying "yes he said that."

**3.9e. Defendants' demeanor**

Noticings about the defendant's embodied actions by the jurors also shed light on to what extent they considered him a person at all. As seen above, being human carries

with it certain expectations, albeit culturally constructed, about how to interact with others in certain contexts and, specifically, what displays of emotion are anticipated. In the following excerpt, a juror commented on the defendant laughing along with others in the courtroom:

*Example 3.00*

R:...I'm curious like what impressions you had of the defendant. Throughout the trial or after it, or

J: **He just seemed to have no expression.** Except there at the end, when uh, I think it's [the prosecutor] was, **I can't remember what he said or whatever,** I'm sure I wrote it down in my notes...It's like **I saw him smirk** one time.

Yeah. And the day that [the judge] said okay, we're gonna come back after Christmas, when he meant Thanksgiving, and **we all laughed.** And **he laughed I thought, oh he laughed!** Hhhh cause you couldn't help but watch him...

This juror first expresses the common interpretation that the defendant had no expression during the trial. She then comments about her surprise at the defendant laughing along with the others in the courtroom, first delineating him from the other humans in the courtroom: we all, vs. he. Laughing along with others is a common, human experience, and to be surprised at such an action throws into relief the jurors' assumption about the defendant's lack of humanity. In the trial context at least, she judges him as someone who is not expected, and perhaps not permitted, to laugh in interactional spaces when such a reaction would be ordinary.

Some jurors do recognize that the defendant's demeanor may be due in part to how his attorneys instructed him to act. Many defense attorneys do, in fact, tell their clients to keep their facial expressions and body language to a minimum, usually to prevent any outburst of inappropriate emotion, such as anger or resentment, by their often mercurial clients. In other cases, attorneys encourage displays of emotion, such as crying, to convey a level of sincere remorse to the jury.

### **3.10 Concluding remarks**

It is at least in part the defendant's embodied displays throughout the trial that lead the jurors to contemplate his humanity and thus his right to life. The juror who commented above on the defendant's lack of human emotion draws the following conclusion about his appropriate fate:

#### *Example 3.pp*

That they [the jurors] had to realize that at some point, a person is unsavable. Now it's at different points for different people, and it's different toleration levels for different people who are sitting in judgment, but ultimately, at some point, you have to let it go. They're not savable. They deserve no further consideration. And I think each one on in their own time and in their own way reached that conclusion. What did it I do not know. But that is my opinion. That each one in their own heart and their own mind realized that this person is unsavable. He's a waste of oxygen. Embodied actions such as eye-gaze, emotional reactions to others present and voice are crucial to how the jurors interpret the defendant's moral accountability. This requires that

we view trials as more than a collection of transcripts, but attune to the extra-verbal and interpersonal actions that are carried out in these social encounters.

In addition, part of the reasoning behind the law's and the jurors' attempts to curtail empathic encounters is to make the process of sentencing someone to death more palatable to the jurors. Jurors themselves recognize, however, that when engaged face-to-face with another person, no matter how many institutional regulations are in place to make the decision easier, denying someone their life is no easy task.

*Example 3.qq*

That's the hardest thing I've ever had to do, to look at a man and, you know, know that I'm saying, you know, I don't think you should live.

Thus, this basic source for empathic understanding, the meeting of eyes, causes unease for this juror to give the death penalty. Despite this unease, however, he voted for death. In these examples, jurors point to physical or emotional cues that were conspicuously absent to them in their interactions with or experiences of the defendant to justify their decision to give him death.

The defendant's fate lies, as Levinas would predict, both in the presence and the vulnerability of his face to the jurors. The attorneys' directives for jurors to look the defendant in the eye are consequential and prescient. When faced with this phenomenological shift, many jurors reflect that their thoughts about the death penalty and criminal justice have changed since they filled out the juror questionnaire only weeks or, for some, hours before. This face-to-face encounter, being co-present with the defendant and looking him in the eyes, often leads jurors to disregard the legal rhetoric

about being objective and rational, and simply admit that they could not be good jurors in this situation. Those that do accept the task often rely on the legal authority of evidence and rationality to bar emotion from their decisions. Some jurors in fact use this logic to convince others holding out for life to change their minds. While faced with the presence of another living, breathing, talking, laughing human being, the legal institution provides jurors with the language and attitudes that enable them to restrain their empathy towards this being, in order that they may live with the decision that someone else will die.

#### **4. LIVING WITH THE DECISION THAT SOMEONE WILL DIE: LINGUISTIC DISTANCE IN JURORS' ACCOUNTS OF DEATH PENALTY DECISIONS**

*Soldiers “were able to bring themselves to kill these civilians primarily through application of the mental leverage provided to them by the distance factor. Intellectually, they knew what they were doing. Emotionally, the distance involved permitted them to deny it.” (Lt. Grossman 2009:101-02)*

#### **4.1 Introduction**

Scholars attempting to account for how jurors vote to put another human being to death often argue that jurors put some sort of distance between them and the defendant (Haney 2004, Garvey 2000), through, for example, dehumanization or reducing empathy.

Following the argument of Chapter Three, this chapter explores how jurors create distance not simply between themselves and defendants, but also between themselves and their decisions for death. By arguing that linguistic deixis can facilitate this distance, the chapter will illuminate how empathy with another can be “suppressed, obstructed and misled” (Hatab 2002:255) through language. In the following analysis, drawn from capital trials and post-verdict interviews with jurors, I will illustrate the benefits of understanding empathic relations through linguistic deictic expressions and show how jurors use language to negotiate their proximity and distance to defendants and their decisions in order that they may live with the decision that someone else will die. This chapter argues that deictic reference forms display lack of empathy with defendants, which furthers processes of dehumanization of defendants in death penalty trials.

Empathy and proximity have often been argued to be in direct correlation, especially when talking about killing; the closer physically you are to your victim, it is thought, the more capacity for empathy and, thus, the higher the resistance to end the life of another human being (Grossman 1996). When a juror sentences a defendant to death, it

is often assumed that since people cannot harm others with whom they empathize, the legal process must somehow occlude empathy in order to make the decision possible (Garvey 2000). Haney argues that it is indeed distance between sentencer and sentenced that makes the death penalty possible: “capital punishment thrives under circumstances that push us away from truly understanding those on whom it is inflicted and how” (2004:1559). In this view, capital punishment requires a lack of understanding or empathy with the person being condemned. In that a person's world is always a world with others, indifference towards the other is a derivative and deficient mode of being (Heidegger 1962).

This chapter plays on two conceptions of proximity, one in relation to the physical positioning of bodies in space, the other regarding the linguistic display of proximity to a referent through deixis. Through a close analysis of post-verdict juror interviews and the transcripts of the trials on which these jurors served, this chapter elucidates how jurors use language to negotiate their proximity and distance to defendants and their decisions, in order that they may live with the decision that someone else will die. It investigates how physical and deictic proximity constitute the often affective alignment of the self to others within a shared world or, in the case of language, of the speaker to the referent of the deictic expression. Specifically, it analyzes two types of linguistic phenomena: 1) jurors' and attorneys' deictic reference to defendants (such as *this guy*) and 2) deictic pronouns (such as *this or that*) jurors use when referring to their decisions for death.

#### **4.2 Proximity, empathy and deixis**

The parallelism between empathy and deixis is evidenced in theoretical descriptions of both phenomena. For example, Throop suggests that empathy entails the “visceral and emotional *emplacement* of our being in [various] contexts” (2010:771, emphasis mine), while Hanks states that “[t]o ponder the construction of here-now,” through deixis, “is to ask how the subject *places himself or herself in the physical world*” (1990:6, emphasis mine). Thus empathy and linguistic deixis are both concepts centered around the emplacement of a person within his or her surroundings. Through empathy and deixis, a self, or speaker, aligns herself among others in her world. This is accomplished through a variety of human interactions, including language.

To explain this parallelism further, I must first clarify what I mean by empathy. As remarked in Chapter Three, this dissertation assumes what we might call a stripped-down definition of empathy, one that does not require emotional closeness or sympathy. In Stein's conception, through empathy, the “I” of the other (that is, our perception of the other as an “I”) is brought into the subject's experience in the original subject's place (1989:10). This, however, is not a primordial experience of the other; in other words, we cannot experience the other as we experience ourselves. It is through empathic experience that we come to perceive our living bodies as “here,” while the other is always “there” (*ibid.*:42). This dovetails with Heidegger's conception of empathy as “an attunement disclosing the weal and woe of others, *there* in the world, *with* us, and *in* us” (Hatab 2002:141). The living body thus becomes the primordial “zero point of orientation” (Husserl 1989) for relating to the world around us. While empathically projecting ourselves into the other, however, we “obtain a new image of the spatial world

and a new zero point of orientation” (Stein 1989 43, 61) (though this new zero point is not primordial either). Through this process, we are able to perceive the world in two ways at once, and it is this empathic perspective that, for Stein, is the basis of knowledge of the outer world, including other persons (*ibid.*:64).

In similar fashion, the notion of linguistic deixis has been formed around the idea of a zero point of orientation. The relational features of deixis, which include (according to some categorizations) proximal v. distal and immediate v. non-immediate, all assume an *origo* relative to which they are identified (Hanks 1992:50, Levinson 1983:64; Levinson refers to this as the “deictic centre”)<sup>21</sup>. Thus deictic reference forms, such as *this guy*, do not merely describe the referent, but also its relationship to the format of the utterance, including the speaker (Hanks 1992.:51). Significantly, emotive communication is said to be negotiated through the varying “egocentric orientation[s]” one has towards an utterance, which are achieved through a variety of “deictic proximity devices” (Caffi & Janney 1994:364).

The relationship between proximity and empathy has long been an area of study for psychologists, philosophers, and psychological anthropologists. In their examination of encounters between therapists and patients, for instance, Haase and Tepper (1972) outlined the non-verbal actions that increase a sense of empathy with a patient, such as eye contact, leaning the torso towards and closing the physical distance to your interlocutor. These embodied actions are seen to increase the sense of physical proximity

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<sup>21</sup>Many critics have pointed out that a deictic *origo* (Buhler 1982[1934]) situated from the speaker's point of view misses significant pieces of how language works, specifically the co-construction of meaning produced among a variety of interactants (e.g., Hanks 2005). For the purposes of this chapter, however, I will be considering deixis from its spatially orienting function and the metaphorical uses that have been derived from that.

to the patient and are thus judged as heightening the empathic value of the therapist's behavior. In a more recent study, Lowenstein and Small (2007) argue that proximity, defined in sensory and symbolic, as well as spatial terms, increases one's empathy and sympathy towards another. As an example, they discuss Milgram's (1974) classic study in which subjects supposedly administered electric shocks to others. The immediacy of the victim, manipulated through physical, vocal and tactile access to her, decreased the subjects' likelihood of administering the shocks. These studies all promote an experiential connection between spatial and psychological distance (Forman-Barzili 2005:201). As seen in these studies, the capacity for empathy relies at least in part in our access and proximity to others as mediated through our own perceptual faculties.

Physical proximity does not just facilitate feelings about an other, but also understanding of him. The enterprise of ethnography in anthropology depends in part on the assumption that physical proximity to those studied will increase understanding of the ethnographic other. Geertz (1973) first warned us against this assumption, however, arguing that assuming understanding through empathy is dangerous, for the ethnographer merely projects her own feelings and thoughts onto the experience of the other. Adam Smith's account of sympathy and proximity addresses this point quite poetically:

“I judge of your sight by my sight, of your ear by my ear, of your reason by my reason, of your resentment by my resentment, of your love by my love. I neither have, nor can have, any other way of judging about them.” (Smith 1759:376)

The extent to which physical proximity truly enables understanding of the other is undetermined, however. Smith (1759) posits that understanding of another is facilitated not just by physical, but also cultural and affective proximity. This is based in part on

Hume's (1751) account of sympathy in his *Enquiry Concerning the Principles of Morals*, in which he states, “sympathy, we shall allow, is much fainter than our concern for ourselves, and sympathy with persons remote from us, much fainter than that with persons near and contiguous” (1751:99).

Hume and in turn Smith's conception of sympathy – the intersubjective production of morality – lacks the affective valence that the colloquial meaning of sympathy evokes and thus more closely resembles current notions of empathy. It is worth, however, taking a brief moment to comment on the difference between the two (see Wispe 1986 for the history of both terms), as they are commonly used interchangeably. While empathy (*Einführung*) tends to refer to a projection of the self into a perceived object (Lipps 1903) or being, which simultaneously entails a separation between self and other (Husserl 1989, 1969 Stein 1989), sympathy describes ways in which we are affected and in turn strive to understand or know the feelings of others (Scheler 1954). The notion of sympathy thus propelled later theories of the innate capacities for humans to respond to the emotions of other humans (Wispe 1991, 1986; McDougall 1908; Darwin 1871).

Smith's account of sympathy rests importantly on the concept of proximity, for “physical proximity begets familiarity, which makes affection stronger, understanding more accurate, sympathy likelier, and other-concern more natural and appropriate” (Forman-Barzalai 2005:190). Sympathy and other-concern (which can be likened to Heidegger's notion of “care” 1962) is thus based in our shared physical and social spaces with others. For Smith, this understanding of another is produced through “imaginary closeness” through which we enter the body of another and in some sense become one

person with him (1759:9). In interpreting these ideas of Smith's, Forman-Barzilai questions how cross-cultural understanding of another is achievable, in that the close social relationship based in sympathy that Smith requires is purportedly absent. This harkens back to Geertz's questioning of the utility of physical proximity in attempting to understand an other.

### **4.3 Linguistic deixis and expanding the notion of proximity**

Also reliant on the notion of proximity, linguistic deixis<sup>22</sup>, in its most basic sense, “denotes a region of space by indicating that this region is proximal (or otherwise immediate) to the place in which the form is uttered” (Hanks 1992:47; see also Fillmore 1982, Lyons 1977). This is founded in the more basic linguistic assumption that each linguistic frame, or the relation of the semantics and syntax of an utterance, expresses a different perspective on the event being described. As Fillmore (1977a:72) describes, the choice of a particular verb to describe an event “will constrain us to bring one more of the entities in the event into PERSPECTIVE,” and, thus, while we may have a whole “scene” entailed by the sentence in view, we are, with each linguistic choice, “focusing on just some portion of it” (Fillmore 1977b:87). Thus deictic terms such as this or that, here or there situate a given referent within a spatial universe that is related specifically to the interaction at hand, bringing focus to the particular deictic feature. Deictic forms are categorized according to whether they denote a proximal or distal positioning of the speaker to the object referred to (or something along a proximal-distal continuum).

Linguists have expanded the deictic notion of spatial proximity to include other

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<sup>22</sup> For this category I am referring exclusively to place deixis, as distinguished from person and time deixis, though they are all theoretically linked (Levinson 1983).

dimensions, such as social and affective distance (Ostman 1995). For instance, Duranti describes that in Italian conversation, demonstrative pronouns such as *questo/questa* (this) and *quello/quella* (that) are used instead of personal pronouns such as *lei* (she) or *lui* (he) when referring to people “who are socially or emotionally different, or people with whom the speaker displays lack of empathy or affect” (1984:279). These types of instances have brought about the concept of “emotional” (Ostman 1995, Lakoff 1974) or “empathetic” (Levinson 1983:81; Lyons 1977, 1982) deixis<sup>23</sup>, a linguistic phenomenon in which different deictic terms are used depending on the affective and/or psychological distance or proximity being displayed between the speaker, referent and interlocutor. Thus the choice of a particular deictic term, such as *this* versus *that*, can display the level of empathy or affective involvement an interlocutor has with a referent (Ostman 1995).

Relatedly, the linguistic and psychological notion of “involvement” is used to gloss expressions and relationships that display varying degrees of congruity, shared feelings, etc. among speakers, hearers, and conversational referents; types of involvement include concepts such as Chafe's *detachment* (1983) , Katriel and Dascal's *commitment* (1989) and Grice's (Hubler 1987) *sincerity* (Caffi & Janney 1994:347). Such a framework, Caffi & Janney add, “makes it possible to consider detached communicative behavior as also potentially emotionally relevant” (*ibid.*) or, in other terms, to reveal the link between emotional connections among interlocutors and the linguistic forms they use. Deictic relationships are in fact, they argue, central to emotive discourse. The linguistic category of proximity “constitutes a sort of bridging category between indexicality and emotivity” (Caffi & Janney 1994:364), negotiating the affective

<sup>23</sup> Levinson (1983) argues that empathetic uses of deictic forms are in fact not deictic.

relationships among participants in interaction. Studies on linguistic involvement often cite a cluster of features as representational of these affective links, such as prosody, embodied actions – such as gaze and facial expression – and linguistic forms (*ibid.*:348).

This exploration of differential meanings of proximity can be likened to Heidegger's “existential spatiality” (1962), which is always already present in our interactions with others. Just as linguists argue that deixis navigates not just physical, but psychic and emotional spaces, Heidegger conceptualizes human beings' spatial relationship to entities and persons around us as based not in physical distance, but as being existential in nature:

“If Dasein, in its concern, brings something close by, this does not signify that it fixes something at a spatial position with a minimal distance from some point of the body...Bringing-close is not oriented towards the I-Thing encumbered with a body, but towards concerned Being-in-the-world...” (Heidegger 1962:107)

Heidegger explicates here that bringing a thing or other being close does not involve a spatial relationship between bodies but, rather, entails existential concern for the other, which is grounded in our constant being towards the future, or being towards death. Rendering the relationship between a speaker and an object or person of which he speaks in this way, we can thus envision deictic space as a psychic, rather than physical space in which, through a deictic expression, the person referred to is brought into temporal and psychic closeness (or distance) with the interlocutors. Closeness in this sense is revealed as being wrapped up in our relative care or concern for the entity we bring close.

Ochs & Capps (1995) provide a compelling account of the encoding of existential spatiality in language in their discussion of the deictic “here” as used in personal narratives about agoraphobia. They argue that the speaker's use of “here” creates an

“emotional space,” bringing temporally and spatially remote events into the presence of her and her interlocutors (*ibid.*:61-62). Deixis thus mediates our relationships among us and entities and persons of which we speak by positioning these beings within a “lived space,” which “my interests, cares, and attention define” (*ibid.*:63).

Similar metaphorical expansions of spatial proximity have been made in discussions of empathy and its psychological bases. In his account of the increasing ability of soldiers to kill in modern warfare, Lt. Grossman proposes four dimensions of distance that can affect one's ability to kill another human being: cultural, moral, social, and mechanical (2009:158). Thus socio-cultural elements such as racial and ethnic distance, beliefs in moral superiority, and the social habituation into perceiving a particular group as less than human, can deny empathy with another just as physical distance does, ultimately, in his words, bolstering “psychological distance that is a key method of removing one's sense of empathy and achieving... 'emotional withdrawal’” (*ibid.*:160).

#### **4.4 Linguistic deixis and moral relationships**

The objects of analysis in this chapter fit under the broad category of social deixis, which Levinson defines as encoding “aspects of the social relationship holding between speaker and addressee(s) or speaker and some referent” (1983:63). This chapter will broaden this notion of “relationship” beyond its conventional sense, which refers primarily to social relationships such as hierarchy (as seen in honorifics), examining how deixis establishes certain stances (Goodwin 2007) between speakers and the persons and objects they refer to. These stances constitute moral relationships among participants in

an encounter. It is crucial to remember, as Hanks further argues, that deictic reference is as much about the speaker doing the referring as it is the object being referred to. “He or she is, after all,” Hanks writes, “the sort of person who could and would denote such an object in such a manner” (2005:211). This point is necessary to keep in mind especially when considering my data set, for jurors and attorneys are speaking in contexts in which the value laden judgment of a defendant is specifically what is at stake. Any reference to the defendant, then, must be seen as both a valued commentary on the defendant as well as on the speaker's own opinion and display of self.

Deictic reference, while it often refers to an already existing spatial and temporal universe, can create and/or change relationships between people and objects in the world (cf. Silverstein 1976). Deictic reference can reorient participants in an interaction, establishing or attenuating physical proximity and producing or altering a particular mutual focus of attention (Hanks:1992:67). In that deixis is constitutive of relationships among people and their environments, linguists such as Lyons (see also Benveniste 1966) have commented that deictic relationships in language, or language's relation to context, more generally, is also constitutive of individual selves or subjectivity.

Deixis is an extremely valuable phenomenon for understanding the linguistic components of social and cultural mores, moreover, in that it is, as Hanks writes, “intelligible only in relation to a sociocultural system” (1990:5; see also Silverstein 1976). Deictic terms reveal connections between a speech situation and the cultural context of which it is a part. They accomplish this by situating abstract linguistic positions, such as speaker, hearer, and object among “sites to which power, conflict,

controlled access, and the other features of the social fields attach” (Hanks 2005:194). Thus within the institutional, social field (Bourdieu 1985) of legal trials, social actors' linguistic choices are in part bound by rigidities within that field. The deictic field in this case is embedded within the judicial field (Hanks 2005). The context-specific meaning of deictic terms is allowed across fields because of the autonomy of the terms themselves; their meaning shifts according to the social field in which they are embedded (*ibid.*). In this sense, while overt displays of empathy and emotion are not sanctioned within the context of legal trials, deictic practices may allow for the highlighting of relationships among persons – including empathic ones – within these institutional strictures.

#### **4.5 Demonstrative reference as negotiating distance**

The alignment between linguistic and experiential proximity deserves attention in understandings of empathy and affect; as Catti & Janney point out, the category of proximity “constitutes a sort of bridging category between indexicality and emotivity” (1994:364). The analyses below will attempt to construct such a bridge, illustrating how language can be used to mediate one's emotional and psychic relative closeness with another. Specifically, I will examine instances of demonstrative reference and other deictic expressions as providing distance between speakers and the things and persons of which they speak, namely jurors' decisions for death and capital defendants. By broadening the notion of proximity – both in relations of empathy and deixis – to include emotional, experiential and psychic planes, we can see how linguistic and empathic connections are made and unmade.

My juror interview data are replete with references to defendants, a large portion

of which are accomplished through the form *demonstrative adjective + noun*, such as “this man” and “that woman,” which are a particular type of deictic expression. These demonstrative reference forms merge deixis and reference, in that they don't just refer to a given person, but place him in a particular position within the discourse. The examples in this chapter, drawn from a number of different jurors who served on multiple cases, provide illustrations of this. In each of these examples, the defendant had already been referred to multiple times during the interview, usually with “he,” sometimes by his first or last name, and sometimes by “the defendant.” In many of the cases, the topic of conversation, often explicitly triggered by my questions, was the defendant, and thus the referent was already in focus. The demonstratives described in this section thus are not of the kind that bring a new, unidentified referent into focus, which is often described as one of the main functions of demonstratives in discourse (e.g., Schegloff 1996, Schiffrin 1994, Strauss 1993, Levinson 1983, Ehlich 1982, Fillmore 1982).

In addition, the object of reference – the defendant – was already known to both the speaker and myself, as he had been discussed prior to each of these examples (unless otherwise noted), so mutual knowledge is ruled out as an explanatory framework as well (see Hanks 2005). Hanks in fact refers to this common oversaturation of the referential field, in which the referent is already clearly identifiable, and thus explanations of deictic practice in terms of relaying information or identifying the referent are insufficient (2005:211). Similarly, Schegloff describes the preference for using a name over a noun phrase description when referring to persons in conversation, which augments the point that something specific is being done with these particular reference forms (1996:460).

There are two general preferences for referring in conversation when the referent has already been identified in the conversational context: using recognitional and minimized forms (Sacks & Schegloff 1979). That is, when available, speakers tend to use forms that their interlocutors recognize, and that are minimal in design (e.g., *he* is minimal as compared to *Dr. Steve Black*). When these preferences are violated, then the form becomes marked, indexing that something beyond the referent's identity is being conveyed, namely, the speakers' positioning in relation to the defendant, which includes a choice of what kind of information to reveal about the referent (the fact that the person is a doctor, for instance, as in the above parenthetical example).

The idea of markedness is comparable experientially to Heidegger's (1962) notion of spatiality. Heidegger explains that there are things in the world that can be physically proximate to us, such as the glasses we wear or the pavement on which we walk. We do not experience these things as close to us in a sensory manner, as can be seen in the fact that we can think we've lost our glasses when they're sitting on our nose, or our keys when we're holding them in our hand. Our relationship to these objects can be compared to our perception of entities that are referred to in unmarked ways. Unmarked reference forms facilitate the telling of a story, perhaps, but specific properties of the referent are not made relevant to listeners. When a marked reference term is used however, our attention is drawn to the referent itself, as when we notice a smudge on our glasses as they sit atop our nose. This jars us from our relationship to them as merely facilitating sight (ready-to-hand) and leads us to focus on the glasses as entities themselves and their smudged quality (present-at-hand) (Heidegger 1962).

I should also note that the examples analyzed in this chapter do not include those of “pure deixis,” such as the utterance “put it on *that* table” accompanied with a pointing gesture to a particular table. In this case, the demonstrative adjective *that*, along with the embodied indication, represents a literal space in the speaker's point of view. The examples I have chosen are not of this sort, and thus require an explanatory framework beyond pure, spatial deixis.

In the courtroom context, unmarked forms referring to the defendant include “he,” “Mr. X,” and Firstname Lastname. Though the latter may be marked in ordinary conversation, it is often used in court to identify clearly for the record who specifically is being referred to, since visual cues such as gesture, which aid in the identification of referents in everyday conversation, are not recorded. In that the examples of reference analyzed below deviate from these forms, they are marked. It is in these marked cases, where referential forms are saturated with social meaning, that we see most clearly how deixis is employed in order for the speaker to position him or herself in relation to an object of an utterance. In this sense, Hanks notes that the meaning of a given deictic term derives from its contrast with other terms in the same conversational “domain” (2009). It is imperative, then, to interpret these terms in relation to other reference terms used within their conversational context. In addition, as this analysis will show, the meanings of deictic terms are dependent upon their placement within the experiential field of the utterance as well (see Buhler 1982 for his discussion of “*Zeigfeld*”), which includes the speaker's perception, focus, bodily orientation, and gestures (Hanks 2009, 2005). I argue here that this experiential field cannot be separated from the experiential phenomena

outlined by Hanks, including empathy, understanding, and the like. The interlocking fields of deixis, other language phenomena, social structure (cf. Hanks' social field (2005)) and experience is where the meaning of deictic terms should be located.

#### **4.6 An analytic example of demonstrative reference and proximity**

In her explication of “demonstrative prefaced” reference terms<sup>24</sup>, such as *this man* or *that woman*, Stivers (2007) argues that the use of these marked forms accomplishes particular actions, one of which includes distancing the referent from the speaker and addressee(s) and placing him/her outside the realm of responsibility of the interlocutors. This stems from a common interpretation of demonstrative determiners that claim, for example, that “the speaker is tacitly instructing the addressee to place the referent outside his/her...discourse-cognitive sphere” (Cornish 2001:304). I argue that in my data, demonstrative reference forms do not place the referent outside the cognitive sphere of the speaker and/or interlocutors but, rather, as highly marked reference forms, they bring attention and focus to the referent. The demonstrative, however, casts the referent in a negative light, (Cornish 2001, Duranti 1984), which I argue can still be interpreted within a framework of proximity (thus negative focus does not exclude the analytic category of proximity). This position is counter to prevailing theories on demonstrative reference in two ways: First, many claim that the demonstrative *this*, not *that*, is used to draw the referent into the cognitive-discourse sphere of the speaker and/or interlocutor (e.g., Cornish 2001:312; Levinson 1983:81). I claim, in contrast, that *that* can accomplish the same action, but it does so in an evocation of a relationship of distance (i.e., it brings the relationship of distance between speaker/interlocutor and referent into focus). Second,

<sup>24</sup> I will use the shortcut “demonstrative reference” to refer to these in my analyses.

while the demonstrative *this* is often considered to show identification or emotional closeness with the referent (e.g., Cornish 2001:305, Levinson 1983:81), my data reveals that *this*, just as *that*, can be used to indicate a relationship of distance between the speaker/interlocutor and referent. It seems that the use of the demonstrative itself is an indication of distance, whether or not the *this* or *that* form is used.<sup>25</sup>

#### **4.7 Examples of demonstrative reference as negotiating distance**

Below I will analyze an excerpt from a juror interview that showcases a variety of reference forms in order to demonstrate the contrast among their varying types and the different actions each can accomplish. Working from this example as an analytic framework, I will then more systematically analyze how deictic reference forms are used throughout my data, both in attorneys' language in trial and in juror interviews. I will argue that these reference forms serve to navigate speakers' and interlocutors' often affective relationships to the referent in discourse which, in most cases, is the defendant, often serving to display a lack of empathy with him. I will also analyze how jurors' employment of demonstrative reference forms in referring to their decisions distances them from the experience of their decision, potentially making these experiencing more emotionally manageable. Lastly, using data from prosecutors' opening statements, I will present a continuum of reference forms, including these demonstrative forms, that increasingly lend to the discursive dehumanization of defendants.

##### **4.7a. An illustrative example**

The following example, drawn from a juror interview, illustrates this phenomenon by contrasting the use of a demonstrative prefaced reference term (Stivers 2007) with

<sup>25</sup> I will still explore, however, some other interpretations of using *this* vs. *that*.

reference forms of other types. It is drawn from an interview with a juror who is unique, not in the sense that he voted for death, but because after the trial he became an activist of sorts, speaking in a variety of venues about the need for life without parole, an option his jury did not have. He also visited the defendant in prison after the trial's conclusion and has remained in contact with him, which is extremely rare. He thus has much greater personal familiarity with the defendant than most jurors do. This excerpt illustrates an interplay of relations of physical proximity with deictically marked discursive relationships, and the consequences both have for this jurors' experience of empathy.

*Example 4.a*

But when you're confronted with it, it's not like anything I could have ever imagined because you read newspaper accounts or you watch on TV and **you think**, well **that person**, you know, **they just need to be, you know, eliminated**. And let me tell you, from the graphic pictures we saw, this would fall [laughing] in that category. But, you know, then you realize there's **a real human being**. Did **he** stumble, fall, and even if **he** did, just the mere fact of loading a shotgun and putting **somebody** in that position I mean is that, that's pretty serious!... it was very interesting to meet **Bobby**, and **he's** a very gentle soul, and **we**, as **Bobby** says, **we're** two sides of the same coin. **We** were educated probably within a mile and a half of each other. And, you know, **we** knew the same streets and things like that. When you start talking about it it's like frightening (laughing) **how close we all are**. And **this is as far**

**as you think two people would be.** But then you start to see the similarities.

That's truly interesting.

In this example, the juror's deictic terms mirror his ruminations about physical proximity between people and inevitable similarities that derive from it, which, in his case, allow him to empathize with this particular defendant (spurring, we might assume, his attempts to make contact with the defendant after the sentence). His linguistic choices mark shifts between displaying distance and lack of empathy with classes of people who commit similar crimes and social closeness and empathy with the individual defendant. At first, the juror invokes a normalized view that anyone who commits murder should be “eliminated” and that such an act is not commensurate with “imaginable” categories of actions. In this typological classification, the referent is “that person;” “that” distancing the hypothetical criminal from the juror. In making such a potentially inflammatory statement, that someone be eliminated, this juror also distances himself from the telling, by using the indefinite and generalized subject “you” rather than “I” (“you think...”). This linguistic distancing, accomplished through a decrease in specification of the subject, allows the juror to evade responsibility for the statement and, by extension, for the potential act of elimination (Haverkate 1992:516).

There follows a phenomenological shift, whereby the juror moves from referencing a type of criminal to identifying the defendant as a “real human being,” not merely an unnamed member of the group just alluded to. Immediately following this description, the juror switches from the demonstrative phrase “that guy” to using the pronoun “he”: “did he stumble, fall, and even if he did.” This switch to “he” shifts the

juror's alignment to his new referent – the defendant – and evokes empathy with him. The juror then alludes to the crime, as the defendant loads his shotgun and points it at “somebody.” While the defendant has been individualized, the victim is anonymized here, referred to as “somebody.” The linguistic and experiential closeness thus resides between the speaker and defendant (and, by extension, me as the present interlocutor), while the victim remains distanced through an indefinite pronoun.

The juror further positions the defendant as an actual person, next referencing their face-to-face meeting, by referring to him most intimately with his first name, Bobby (see Rymes 1996). With this name, he invokes Bobby specifically, bringing him into the room, as it were, by reporting his words (“as Bobby says”). He also employs the inclusive pronoun “we” to describe their similar upbringings. Their geographic proximity as children, furthermore, allows the juror to recognize their commonalities and shared knowledge, thus facilitating empathic understanding with Bobby's situation. The juror's repeated use of “we” serves to fortify the empathic relationship established between himself and Bobby. Despite the differences in the moral boundaries of this juror's and defendant's typical actions, prompting the juror to state that “this is as far as you think two people would be,” he finds closeness to the defendant based in their growing up within a mile and half of each other. Their only difference, he claims, is that they were taught differently, implying that the juror was taught right from wrong, something the defendant was not. Had their socialization been similar, the juror questions whether he might have had the capacity to commit a similar act. He concludes with a generalization about humanity based in proximity, that it's “frightening...how close we all are,” extended

the we-relationship between himself and Bobby to that among humans in general.

#### **4.7b. Analyzing demonstrative reference forms**

A systematic analysis of the use of demonstrative reference terms throughout my data reveals the variety of actions they can accomplish, many of which index relative proximity or distance among speaker, addressee(s) and referent. First, as mentioned above, these marked reference forms bring a high degree of attention to the referent (Cornish 2001), serving, in this sense, as intensifiers (see, e.g., Mendez-Naya 2008) of the stance and/or action accomplished through the reference form. Demonstrative reference often serves this function, to “reorient participants to a relatively great degree, creating a reciprocal or common focus of attention” (Hanks 1992:67; Kendon 1985). Ostman similarly argues that using a demonstrative adjective rather than an indefinite article (e.g., *this* man vs. *a* man), pulls an interlocutor into a story, creating greater interest in the referent (1995:270). It is in this sense that attorneys and jurors, when using these forms, draw their interlocutors' attention – whether that be me, a witness, jury, or judge – to the referent. In the vast majority of cases in my data, the demonstrative reference form is used to construct a negative construal of the defendant. In these cases, I argue that the speaker uses this form to intensify his/her negative stance towards the defendant, as conveyed by a deictic index of distance.

#### **4.7c. Examples of repair**

Instances of repair in conversation are highly illustrative in revealing the underlying structures of language use (Schegloff 1979). I will thus first provide some examples of repair into demonstrative reference forms in order to illustrate the

conversational work they can do and their markedness in contrast to the unmarked form “he.” In Example 4.b, a juror responds to my question about when during the trial she started thinking about the death penalty.

*Example 4.b*

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 (body).

This juror comments on the crime itself (“he shot her in the stomach”) and subsequently dehumanizes the defendant, stating “this guy doesn't have a heart.” After using the unmarked pronoun “he” to refer to the defendant, the juror repairs to the form “this guy,” after an initial repair that was abandoned (“the-”), as the subject of the dehumanizing predicate, “doesn't have a heart.” This repair highlights the intensifying function of the demonstrative reference form, and dissociates (Stivers 2007) the juror from the defendant who she depicts as nonhuman, which the unmarked pronoun would not achieve. This may be a moral distancing, in that she does not want to associate herself with such a being. It may also be a cognitive distancing, in that she cannot comprehend a person committing such an act, and thus *this guy* marks cognitive distance between herself and the referent and his associated actions. Either way, this depiction ultimately coincides with her desire to sentence him to death (“so that's when I thought”).

Example 4.c shows another instance in which the referent – the defendant – is removed from the speaker – a juror – through a repair of the referent:

*Example 4.c*

...**he** knowingly and intentionally, **this person** knowingly and intentionally ran into that guard.

In this example, the juror emphasizes the defendant's intentional criminal behavior (which was up for question in this trial more than in any other I studied), that he “knowingly and intentionally”<sup>26</sup> killed the victim. He begins the utterance with “he” as the subject, repairing his start with “this person” as the subject. This repair, along with the repetition of “knowingly and intentionally,” intensifies the juror's negative stance towards the defendant, as well as heightening his affective (here negatively affective) portrayal of the referent. The action of classifying the defendant's actions as criminal and immoral is thus carried out in part through this referential repair and the deictic “this” can be seen as distancing the speaker from these immoral actions.

#### **4.8 Analyses of a variety of demonstrative reference forms and their distancing functions**

Of the more than 60 instances of demonstrative reference to defendants throughout my data, the vast majority work to construct a negative stance<sup>27</sup> of the speaker (and, in turn, the interlocutors) towards the defendant and, as in the previous example, intensify the jurors' negative affective depiction of defendants and their acts. Of those, the majority appear in the course of conveying the defendant as a future danger and, in some cases, expressing fear that the defendant will get out of prison at some point. These types of fears often serve as justifications for giving the defendant the death penalty. For

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<sup>26</sup> These are the legal categories according to which the jurors in this case had to assess guilt of capital murder.

<sup>27</sup> These negative stances were identified through assessing the predicates in instances of demonstrative referents as positive, negative, or ambivalent.

instance, in the following example, a juror justifies his decision for death, specifically explaining his rationale for voting yes to the future danger question:

*Example 4.d*

I would hate to be the guy that turned **this guy** loose because we thought well maybe in 40 years he'll be, **he'll be a good boy."**

Here, the demonstrative reference form occurs in a hypothetical depiction of the defendant if he is let out of prison. The reference form brings focus to a temporally distant referent, at the same time creating distance (most likely moral in this case) between the referenced defendant and the juror as speaker. Interestingly, the juror switches to the personal pronoun "he" in his ironic description of this defendant as a "good boy." This serves to further mark the negative stance indicated in the previous phrase, emphasized by the use of the demonstrative reference form.

**4.8a. Distal and proximal demonstrative references**

The following examples, drawn from several juror interviews, demonstrate prototypical ways in which demonstrative reference is used in my data:

*Example 4.e*

Juror 1: I would hate to be the guy that turned **this guy** loose

Juror 2: we can't let **this guy** loose

Juror 3: you keep thinking, **this guy's** just killed six people

Juror 4: you think well **that person**, you know, they just need to be, you know, eliminated

In the next, a prosecutor utilizes similar forms in trial contexts, both drawn from his closing argument a the punishment phase:

*Example 4.f*

P1: [we] tried to make it much easier by bringing you much, much more evidence to show you just who **this defendant** is

P2: she's still traumatized by what **that defendant** did to her

In the first two excerpts in Example 4.e, jurors express their concern about the defendant potentially being released from prison if they do not choose a sentence of death. This concern loomed large for many jurors, especially in assessing their answer to whether the defendant would be a future danger to society. Additionally, many jurors inaccurately assumed that life without parole still might leave room for the defendant to be paroled in the future, thus convincing them that execution was the only way to assure the defendant would not be released from prison. In these utterances, then, *this guy* marks the juror's negative stance towards the defendant, creating psychic and temporal distance between the juror and the defendant who is here portrayed in a future worst case scenario. Such distancing occurs also when speakers talk about the defendant's unbelievable, for many of them, criminal actions, such as in Juror 3's exclamation: "this guy's just killed six people." In this excerpt, *this guy* similarly marks a negative stance towards the defendant and psychic and/or moral distance between him and the speaker.

On a continuum of deictic proximity, *that* distances the referent further than *this* from the deictic *origo*, often defined as the speaker's inner or affective world (Caffi &

Janney 1994:364). In affective terms, *that* is said to imply emotional detachment from the referent (Lakoff 1974). Thus, in Juror 4's remark, the juror talks about the ultimate denial of empathy towards another, claiming that "that person" needs to be eliminated. The demonstrative "that" here serves to dissociate (Stivers 2007) the juror from the defendant whose death he is promoting. The excerpts in Example 4.f exhibit the heightened degree of distance achieved through the *that* vs. *this* form, especially regarding the speaker's association with (see Cornish 2001) and emotional distance from (Chen 1990) the referent. These examples are shown in sequential order in the prosecutor's argument and thus the transition from *this* to *that* can serve as a rhetorical device through which the prosecutor creates increasing psychic distance from the defendant over the course of his argument.<sup>28</sup> This tactic would potentially bolster the prosecutor's case, allowing jurors to maintain emotional and/or cognitive distance from the defendant, thus making sentencing him to death more manageable.

In addition, in the prosecutor's second utterance, *that defendant* can be seen as intensifying the emotional, psychic and physical distance the victim needs to maintain from the defendant, given the traumatic experience she went through at his hands. In contrast to some accounts of deixis, according to which the demonstrative *that* indexes a referent that is no longer of interest to the speaker (e.g., Chen 1990), I argue the use of *that* intensifies focus on the referent, but in a way that heightens the affective/emotional/moral *distance* from such referent. In this example, in addition to using the heightened distancing form, *that*, the descriptor "defendant", in contrast to

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<sup>28</sup> Section 4.14 below will illustrate the progressive development of distance over the course of one closing argument more fully.

“guy” or “person”, further severs the link between the defendant and his human identity.

#### **4.8b. Demonstrative reference and dehumanization**

Perhaps the most blatant denial of empathy with an other, classifying someone as non-human is often cited as a technique that allows a person to kill another human being (e.g., Grossman 2009). Jurors often talked of defendants as non-human, lacking essential human characteristics, such as a heart or emotions. Demonstrative reference forms often helped to construct these actions of dehumanizing the defendants, as evidenced in the following excerpts from juror interviews.

##### *Example 4.g*

Juror 1: 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.**

Juror 2: a normal person wouldn't have done what he did, and you see **this guy that is kind of non-emotional either direction, and you see him as kind of as not as a normal person.** Not that he's crazy, but that it's just like, he could, he was totally **separated from-** from what you'd think **normal emotions** would be.

Juror 3: you see **this guy** that is kind of **non-emotional** either direction

In these examples, *this guy* can be seen as distancing the juror speaking from emotional connections with the defendant and emphasizing the dehumanizing effects of the related descriptions (“doesn't have a heart,” “non-emotional,” “not a normal

person”). The distance created through the demonstrative reference form, moreover, mirrors the Juror 2's own conceptualization of metaphoric distance: “he was *totally separated from*...normal emotions.” In all these examples, the defendants' lack of emotion is a source of dehumanization is cited as distinguishing him from normal persons.

In the next example, a prosecutor similarly uses demonstrative reference in conjunction with (here, blatantly) dehumanizing discourse about a defendant. This example is drawn from an online news story, which was published the day a jury retired for punishment deliberations. The prosecutor here is being quoted in a media interview:

*Example 4.h*

“You look for some humanity in **this defendant**. You look for some emotion, some heart, some soul in **this defendant**,” said Prosecutor John Jordan. “You can watch it 20 times and you won't find it.” (abclocal.go.com, 5/19/2009)

Here, the prosecutor describes the utter lack of humanity of the defendant, punctuating this by referring to him as “this defendant.” The demonstrative reference form is maintained in order to display distance between the prosecutor – and potentially his entire media audience – and such a being.

#### **4.9 Juror's linguistic and psychic distance from their decisions**

In addition to distancing speakers from defendants being referred to, demonstrative pronouns were commonly used in my data when jurors talked about their decisions to vote for life or death and serve in these instances to distance the juror from his or her decision as well. The following are some examples of this:

*Example 4.i*

Juror 1: **This** is something that that you can really vote yes to, to sentence **this guy** to death.

The next example illustrates well how linguistic deixis maps onto a speaker's emotional and empathic involvement with persons and events:

*Example 4.j*

I never dwelled on it [the death penalty]...until we said he was guilty. And then it it was kind of right there in your face and **now** you had to. And I've thought about it since that's why I say I'm not sure that I could do **that** again.

“Now,” which brings deictic focus to the present time of the juror's trial experience, conveys the in your face attitude towards the death penalty the juror felt when actually faced with the decision during trial. But when reflecting on whether he could handle such an ordeal again, the juror uses the distal demonstrative “that” to refer to the decision to give the death penalty. At this point, the decision is temporally distant from the juror, also distancing the juror emotionally from the gravity of the event that he cannot imagine reliving (Lyons 1981:235).

Another juror, who adamantly wanted to vote for death, reports the speech of one of the minority jurors who wanted life for the defendant (who eventually held out, assuring him a life sentence):

*Example 4.k*

that's kind of the way it came across is that, **this** is a person I know, who's

had a real lousy life, and I don't know if I could, do **that** to them.

Here, in contrast to the dehumanizing examples above, the juror, in voicing those voting for life, uses the deictic *this* to depict empathy with a “person,” as the defendant is described. When she refers to the death sentence itself, the contrastive *that* is used, again creating distance between the decision-maker and her decision.

During the individual questioning portion of the voir dire, attorneys often used similar distancing forms when referring to venire persons' potential decisions. While questioning one such venire person, the following prosecutor describes the situation in which the potential juror sits:

*Example 4.l*

We're now putting you in a situation where it's going to be close and personal. You may be called upon to make **that decision**.

Here, while there are a number of ways in which the attorney could have referred to the decision (e.g., vote for life or death, sentence the defendant, etc.), the demonstrative form brings focus to the decision, while distancing it from the subject called upon to make it.

The distal form “that” is thus often used in when indexing a juror's distance from his/her decision. The following excerpt, drawn from an interview with a male juror whose jury returned a life sentence, serves as an additional example of the implications of linguistic choices for displaying a jurors' perceived proximity (either spatial, emotional, or otherwise), to a defendant or other referent. I had just asked the juror how he was able to separate his own pre-trial assumptions about the defendant from his decision:

*Example 4.m*

I mean, in life we do that. I mean as you go through life you, any kind of a prejudice that you, inbred in you so to speak growing up, as you get a little older you go, I'm not gonna think **that way** and you make yourself, you disassociate yourself. This is a more focused way of doing that. **That guy's** innocent. **And in the back of your mind**, yeah but you think he's probably guilty. No, he's innocent.

This juror explicitly refers to a cognitive distancing he performs in order to separate his own prejudices from his decision-making process, involving both dissociating himself from ways of thinking and putting them in the back of his mind. The demonstrative adjective “that” is used when referencing a prejudicial way of thinking in the context of this dissociation. He then references the defendant with the demonstrative, “that guy,” within this framework of cognitive distancing.

#### **4.10 Agency and demonstrative reference**

In his account of an “empathic divide” between jurors and defendants in death penalty trials, Haney (2004) posits that the less similar jurors and defendants are to one another, the less likely a juror will experience empathy towards a defendant. He further argues that as the similarity between jurors and defendants decreases, jurors are more likely to attribute internal causes to defendant's behavior rather than some external force.

According to attribution theory, causal attributions about others' behavior can be explained in two ways: “internal dispositions and willful choices of the actor, or...external circumstances and conditions over which the actor has less control” (*ibid.*:1580). Thus, as Haney observes, jurors who attribute internal causes to defendants' behavior hold them

more responsible for their actions and punish them more harshly (*ibid.*:1581).

Using this position as a starting point, this section examines demonstrative reference forms, analyzing the grammatical role a given referent serves in an utterance. The analysis began by questioning if the referent – the defendant – occupies an agent or patient role within the action described in the utterance and then compared this against the kind of reference form used. From this equation, I examine if demonstrative reference forms, marking distance between jurors and defendants, correspond with attributions of individual agency in descriptions of defendants' criminal behavior. I will also look at this in terms of jurors' accounts of their decisions to vote for death or life, and how reference forms coincide with jurors' encoding of their own agency in meting out these different punishments.

#### **4.10a. Demonstrative reference and defendants' criminal agency**

In instances of demonstrative forms used to refer to the defendant, the majority of those used when talking about the defendant's *crime* take the agent role in an utterance. In contrast, those used when talking about the defendant's *punishment*, specifically jurors' involvement in it, maintain the patient role. In the cases of talk about the defendant's criminal behavior, the defendant is portrayed as being individually responsible for his actions, which fall under Haney's (2004) category of internal causation. Consider the following examples:

##### *Example 4.n*

Juror 1: **That man's** been *committing crimes* since he was 13 years old

Juror 2: **this defendant** *went on and on* [bludgeoning the victims]

Juror 3: when **this defendant** *left that apartment*

Juror 4: **this guy** *made an escape and hurt somebody*

Juror 5: **this guy's** *just killed six people*

Juror 6: she's still traumatized by *what that defendant did to her*

Juror 7: **this person** *knowingly and intentionally ran into that guard*

In these utterances, the defendant is referenced through demonstrative forms (that man, this defendant, this guy, this person) and conveyed as agent of predicates that portray a number of dangerous behaviors, including committing crimes, bludgeoning victims, hurting somebody, killing six people, and running into that guard. These examples, thus, tend to correspond with Haney's analysis: as jurors establish distance between themselves and defendants, indexing lack of empathy with defendants, as in Haney's framework, they grammatically hold them individually responsible for their actions and, in all of these cases, sentenced the defendants to death, thus punishing them more harshly, as Haney would predict.

Demonstrative reference, however, is not the exclusive reference form used when the defendant is depicted as agent in accounts of criminal behavior. There are some cases, for example, when the unmarked, personal pronoun is used. In addition to distancing the speaker and/or addressee from the referent, demonstrative reference can serve to distance the referent from its predicate, or the action being described. In his exploration of the interpersonal space created through deixis and the conditional tense, Haverkate describes "defocalization," a distancing technique whereby a speaker, through indeterminate reference to himself, distances himself from his role in the actions or state of affairs

described in an utterance (1992:516). For instance, the non-specific pronoun “one” can suppress the identity of participants, thus removing particular individuals from the action being described in an utterance. The same framework can be applied to person reference in my data, especially when considering the determinate pronoun “he” vs. the less specific demonstrative “this guy” to refer to the defendant.

As I have shown elsewhere, prosecutors often use demonstrative forms when referencing defendants, which index their moral distance from defendants and negative stances towards them. However, there are cases in which prosecutors use the unmarked and more specified reference form “he” or the even more specified proper name when referring to defendants. This occurs when the attorneys describe the defendants' intentional criminal behavior. The personal pronoun or proper name, I argue, in line with Haverkate, is used in these contexts to maintain the referent's role in the events being described. Using the demonstrative reference – a less specific form – in these cases would potentially mitigate such a role. Below are some examples in which the personal pronoun or proper name is used by the prosecutors:

*Example 4.o*

The theft of the Camaro. When Mr. Mike Perry admitted to going back to the Stotler residence and stealing the Camaro.

In this example, drawn from a prosecutor's punishment phase closing statement, the prosecutor uses a marked subsequent form, one that is additionally remarkable because of its violation of the preference for minimization in person reference (Schegloff 1979). This form, which comes subsequent to many uses of demonstrative reference forms used

throughout the attorney's argument, such as “this man,” is highly specified, intensified by the use of the first name within a form usually reserved for last name only (Mr. Perry). So why use such a personalized, specified form, when the prosecutor wishes to create interpersonal distance between himself, the audience, and the defendant? This hyper-specified form is used in conjunction with an explicit mention of the defendant's intentional criminal behavior – behavior he admitted to committing. Using an unspecified form in this case would mitigate the defendant's involvement in the action, which would contradict the force and meaning of the utterance – the defendant's direct responsibility for stealing the car and admitting that he did so.

A similar example occurs again in a prosecutor's punishment closing from a different case. As in the previous example, the prosecutor capitalized on the negative stance demonstrative reference forms can index, frequently referring to the defendant as “this defendant.” He switched to the defendant's proper name in the following, however:

*Example 4.p*

What Derrick Jackson has done is not [his family's] responsibility.

Again, in speaking of the defendant's culpability in the crime, the highly specified proper name is used for reference to the defendant. Specifically, the defendant is named as an individual in order to distinguish him as personally responsible for the crime, as opposed to his family sharing in the blame.

A final example of this type reveals the impact using the defendant's name can have on highlighting his culpability. This excerpt is drawn from a prosecutor's

punishment phase closing argument:

*Example 4.q*

you get to know the real Derrick Jackson. And here you get to take into consideration his victims, the impact on the victims' family and society

In attempting to convince the jury of his “real” nature, which revolves around criminal behavior, the prosecutor personally identifies the defendant with his full name. This is a highly unusual practice for prosecutors in general. They tend to use less humanizing reference forms, such as the demonstrative forms described in this chapter, while defense attorneys make an effort to always refer to the defendant by name. In this utterance, in contrast, the victims remain unspecified, further highlighting the defendant's person, and in fact are only specified in the sense of being “his,” thus intensifying his involvement in the acts of killing them.

Examining different reference forms in sequence can shed light on their differential functions within the same discourse segment. In the following example, a juror, talking about his initial impressions of a defendant, switched from the unmarked pronoun “he” to the demonstrative form, “this guy”:

*Example 4.r*

**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.

Here, the form “he” is used in a context of relative proximity to the speaker; the juror

describes his physical encounter with the defendant during trial. However, when speaking of the defendant's criminal and perhaps inhuman acts, the juror uses the more distancing form, "this guy." In contrast to this example, where the demonstrative form distances the juror from the defendant's inhuman actions, other sequential examples can illustrate the use of the personal pronoun and other, more intimate forms, as markers of defendant's culpability for his actions, as described above.

*Example 4.s*

Juror 1: [what if] we turned **this guy** loose because we thought well maybe in 40 years **he**'ll be a good boy.

Juror 2: What's gonna change your mind about how you feel about **this guy**?  
**He** just says **he's** guilty.

In these examples, the demonstrative reference form is first used, perhaps to distance the juror from his own decision about another human being (as will be discussed in the next section): either voting for life and potentially letting him go, or changing his vote to life based on the mitigating evidence. The juror then describes, in the first example, the defendant's future criminal actions, and in the second, his admission of guilt. In both these instances, the personal pronoun is used after the demonstrative form and this switch highlights the defendant's personal culpability for his actions and his taking personal responsibility for the crime.

**4.10b. Agency and demonstrative reference in jurors' penalty decisions**

A large portion of the instances of demonstrative reference used in the patient role

emerge in utterances by jurors about their own sentencing decisions. The following are a few examples drawn from juror interviews:

*Example 4.t*

Juror 1: If *we find* **this person** guilty then it will be without reasonable doubt.

Juror 2: Could *you vote* to sentence **this guy** to death?

Juror 3: Everything **this man** is getting he has earned.

In these examples, the demonstrative form takes on the distancing role discussed in previous sections. Here, jurors discuss their own actions that will eventually lead to the defendant's death. In none of these examples, it should be noted, is the individual juror cast as the agent in these types of formulations. This is typical for my entire data set; very rarely will jurors be placed in agent role when discussing acts of sentencing defendants (see Chapter Five). Juror 1 cites “we,” or him and the other jurors, as the agent who is sentencing “this guy” to death. While he is thus grammatically encoded – not individually, but as a member of a group – as agent in this action, the reference form “this guy” as the patient serves to downgrade the action from a specific person to an unspecified male, thus distancing the defendant from what will be done to him by the juror. In Juror 2's utterance, the defendant again takes the patient role, this time with the agent the generalized “you.” Here we thus have two forms of distancing the juror from his decision, both from leaving himself explicitly out of agent role and by distancing the receiver of the action through demonstrative reference. Juror 3 exhibits this general pattern, though the agency is further mitigated through the lack of an explicit agent altogether, the defendant getting what he's earned from unidentified originators of these

actions.

#### 4.11. Demonstrative reference and positive affect

Though the instances are relatively rare, the demonstrative “this guy” is occasionally used in establishing a positive stance towards a referent. In these cases, the use of the demonstrative as a marked reference term serves to highlight the speaker's affective involvement with the defendant which, in these cases, is positive rather than negative. Ostman notes that the deictic form “this,” as opposed to “that,” can evoke positive affect towards the referent (1995:257). This indeed proved accurate in my data; the distal form *that* was never used in a context in which positive affect was being evoked. Utterances of positive affect towards the defendant that utilize “this guy” often occurred when a juror or attorney was referencing the defendant's life being at stake, as in the following excerpts:

##### *Example 4.u*

Juror 1: And **this guy**, um, I mean if we're gonna err we're gonna err on the side of life.

Juror 2: it obviously makes you think about life and death, and, and you know **this guy** is 28, or however old he was...**this guy** who's got to make his life right with God.

In this context, the deictic *this* can be seen as distancing the juror from the defendant in order to better cope, even in his ex post facto reflections, with the unbearably heavy burden of ending another's life. However, when viewed against its contrastive form, *that*,

*this*, as the proximal deictic form, is generally used when a speaker identifies somehow with the referent (Cornish 2001). Thus we can also view these examples as times when the juror, in talking about the defendant's life, identifies with him, bringing him close, as it were, to himself and the addressee.

This function is further intensified through the form “this kid,” which is used more commonly in the context of positive alignment with the referent than “this guy” or “this man.” By incorporating the diminutive version of the descriptor “guy,” “this kid” further marks identification with and a positively affected stance towards the referent.

*Example 4.v*

Juror 1: **this kid** came from a rough family

Juror 2: what could we have done earlier on in **this kid's** life, you know, what do you do to make sure the other kids don't do that...

Juror 3: You know here he is **this kid's** on, you know, on trial for his life...

Juror 4: well the prosecutors (.) started from **this young man's** very youthful life. In, in which you know he was adopted, they they suggested that the mother might've been on drugs when she was pregnant who knows? How how or what affected him.

Juror 1 expresses sympathy with the defendant, giving an example of evidence that she considers mitigating. By referring to the defendant as *this kid*, she intensifies her positive stance towards the defendant. One could argue that identifying evidence as mitigating against the defendant's death in part requires this positive stance. In the following two

excerpts, the defendant's life is again the topic of discussion; the jurors are expressing uneasiness about harsh sentencing, the first questioning what could have stopped the criminal behavior in the first place, so the defendant wouldn't be in the situation at all, the second reflecting on the trouble with deciding the fate of someone co-present. In both of these examples, *this kid* again intensifies the identification with the referent, ultimately eliciting sympathy for him. Lastly, Juror 4 again describes mitigating evidence, using a similar diminutive form, “this young man,” in discussing the potential ramifications for his life of his mother's drug use during pregnancy.

#### **4.12. Empathy between speaker and hearer**

Deictic forms do not merely express a stance or point of view of the referent from the perspective of the speaker, but include the addressee(s) in some particular way in the expression of this stance. Cornish explains that in the use of demonstrative expressions, “the speaker is tacitly instructing the addressee to place the referent outside his/her...discourse-cognitive sphere,” by which the addressee “is tacitly appealed to as a witness, or as a potential ally in the speaker/writer's argumentative stance” (Cornish 2001:304). The use of a particular demonstrative thus “creates solidarity among participants” (*ibid*:305; see also Strauss 2002). Similarly, Hanks describes how “interlocutors can and routinely 'distance' themselves from one another, and from aspects of their immediate situation, through their choices of deictic forms” (1992:69). The opposite can be true as well, as shown in an example below; the lack of a demonstrative form, used repeatedly in other contexts, can encourage closeness between the speaker and interlocutor(s).

In my interview data, for example, in employing the marked form *this*, the juror may be directing me, as interlocutor, to heighten my attention to the referent and with the form *that*, can proffer a shared understanding and negative stance towards the defendant between himself and me (Cornish 2001). Thus in bringing attention to and distancing defendants and other referents within the discourse context, the jurors are implicating me in their attitudes towards defendants and actions, thus bringing me within their emotional worlds.

In trial interaction, the choice of demonstrative reference form is not merely a function of the speaker's relative distance and stance towards the referent; it depends in part on the interlocutor, indexing the relationship between the addressee and referent as well. For instance, while the prosecutor in a particular case regularly refers to the defendant as “this man” or “this defendant” when addressing the jury or certain witnesses, he refrains from doing so when questioning the defendant's mother. In the former cases, it can be said that the form *this man* serves, as in the preceding sections, to dehumanize the defendant by using an unspecified reference form, as well as indexing a negative stance towards the defendant. In the following example, an prosecutor cross-examines a psychologist serving as a mitigation witness for the defense:

*Example 4.w*

P1: you are not going to tell this jury that this young man took this gun and  
killed a woman

In contrast to this example, when questioning the mother, he does not use such forms because such an action would be an affront to her and would disparage his character in

front of the jury. This demonstrates how socially consequential the choice of a particular reference form can be.

#### 4.13. Examples from other jury data

A brief analysis of data from non-death juries will show that these same patterns of demonstrative reference form use are prevalent in another trial context. These examples are drawn from Douglas Maynard's data of a video-taped criminal jury deliberation, which was made possible by a *Frontline* segment on jury decision-making. The case being decided involved a man with questionable mental capacity who violated his parole by purchasing a gun. While the jury data I collected only involves jurors' tellings about their trial and deliberation experiences, Maynard's examples demonstrate that similar linguistic distancing techniques are at play in the midst of deliberations themselves.

Specifically, these jurors frequently referred to the defendant using demonstrative reference forms such as *this guy* and *this man* in similar discursive contexts as those found in my data. For instance, the jurors use demonstrative reference when talking hypothetically about finding the defendant guilty:

##### *Example 4.x*

Juror 1: if we find **this person** guilty than it has to be without reasonable doubt

Juror 2: it's your decision that **this man** is guilty

In these examples, the demonstrative reference form can be said to create distance between the juror and his or her decision to find the defendant guilty by distancing the

referent – the defendant – from the speaker in these utterances. Stivers (2007) remarks similarly that demonstrative reference serves to place the referent outside the realm of responsibility of the speaker. In these cases, the jurors are mitigating their responsibility (or another juror's, as with Juror 2) for their hypothetical guilty verdicts through this form of action.

An interesting variation on this pattern arises in Maynard's data. This case was exceptional in that jurors contemplated whether to invoke the jury nullification rule, which states that jurors may decide the law used in a given case is not being justly applied, and therefore render no verdict based on the given law. When these jurors discussed this option and the possibility that an injustice could be done to the defendant through rendering either verdict, they often used the demonstrative reference form.

#### **4.14. Progression from direct to indirect reference as a distancing tactic**

This section tracks the forms by which a prosecutor references the defendant in his punishment phase closing statement, analyzing the progression of indeterminacy and distance that is achieved through these differing reference forms. This draws on Carrithers' (2008) analysis of reference to persons in media talk about 9/11 directly after its occurrence. He argues that the terms used began on a level of “inchoateness,” when the media's language (due to their lack of knowledge about the source of the attacks) did not direct listeners to any one meaning of what was going on, but rather presented the information as ambiguous and unpackaged (2008:163). As the days passed after the attack, names became more concretely identifiable, thus producing an effect of increased determinacy of what was going on and who was involved. “What is at first unformed and

unclear,” Carrithers writes, “can become formed, directed, and clearly delineated” (*ibid.*).

Following this framework, I analyze a prosecutor's closing statement during which, I argue, reference to the defendant follows the opposite course, becoming decreasingly specific as the prosecutor comes closer to the jurors' final decision, thus distancing jurors from the defendant and the reality of his potential death sentence. First, the prosecutor continually uses proper names to refer to the victims, consistently specifying their identities and thus bringing them, as individuals, into the jurors' focus. He does not refer to the defendant at all in the first portion of his address, referring to the crime instead and its details, eliding any named offender. For example, he describes the crime scene:

*Example 4.y*

P: it shows you part of what this crime was about, the why this crime was committed. Think back on the pictures of that closet and how there was blood spatter all the way from the hallway...remember the way the drawers looked in **Fred Simmons'** room...

The victim is the only named individual in this depiction, as the defendant's identity in the criminal actions is elided. Throughout the rest of his argument, the prosecutor refers to the defendant in the following ways (this is not a complete list of his references to the defendant, but illustrates the general trend), which progress from more to less specified:

*Example 4.z*

It's opened because **the defendant** is looking for things to take what **Derrick Jackson** has done is not their fault

it's not called the what is best for **Derrick Jackson** phase

was all about **the defendant** getting a fair trial

**the person that did this** scares the hell out of her

**that kind of person** would be capable of doing all of this again

**the person that killed like this** is extremely dangerous

**the person that did this** is not polite

there is nothing shy about **that kind of individual**

**the person that committed these crimes**, there is nothing reserved about

**that individual** at all

There sits in the room with you right now **the most dangerous deadly person**

you will ever know

As seen in this partial list of the prosecutor's reference choices, his argument begins with reference to the defendant either as such or with his proper name, both relatively specified on a scale of determinacy. The definite article “the” is a relatively specific reference form in contrast to less specified markers such as indefinite articles and pronouns (DuBois 1980). The prosecutor then transforms his reference to the defendant, increasingly using less definite identifiers, often in the form of demonstrative noun phrases or descriptive noun phrases, such as that kind of person, that kind of individual, the person that did this and the person that committed these crimes. These forms serve to forsake the defendant as an individual and instead foreground his criminal actions. Even in the final reference, when the prosecutor individually points out the defendant in the courtroom, he concomitantly refers to the defendant in such an unspecified form: “the

most dangerous deadly person you will ever know”. The jury is thus left going into deliberations with identifications of the defendant's crime, rather than his person.

#### **4.15 Concluding remarks**

Returning to the problem posed at the beginning of the chapter, we can see that particular linguistic choices can serve both to facilitate and stymie empathy with defendants in capital trials. Specifically, varieties on person reference, such as demonstrative noun phrases, when used in various discourse contexts, can operate as both distancing and inclusive tactics among jurors, defendants, and me as the interviewer. In addition, demonstrative pronouns can act to distance jurors from emotionally charged events, such as their decisions to sentence a person to death.

If one asks merely about the content of messages, it may not seem that language facilitates empathy and in fact may seem to belie empathetic experience. By examining the relationships forged through the use of specific contextually situated forms, however, one can see the alignments and disalignments established among humans through the use of language. While physical and emotional connections to others can facilitate empathic understanding and feeling, Hanks and Stein remind us that both deixis and empathy are oriented to the speaking and feeling ego; the other is always understood through the self. Thus jurors hold an extreme power load, in that the defendant's character and fate, while partially located in his own embodied actions, is sifted through the jurors' individually situated experiences. These experiences, which includes jurors' wrestling with their own responsibility for sentencing defendants to death, are in part mediated through the linguistic form jurors and attorneys use when referring to defendants.

Deictic expressions, as mediators of proximity among interlocutors, discursive content and context, are thus *sine qua non* for understanding empathic relationships and the link between language and psychological processes more generally. There is a demonstrable parallelism, Caffi & Janney argue, “in the structuration of the intersubjectively shared external world of social processes, and the subjective internal world of individual affective process” (1994:365). In this sense, both persons and their language are subjective: the subjectivity of an utterance is, as Lyons proposes, the speaker's “expression of himself in the act of the utterance and the reflection of this in the phonological, grammatical and lexical structure of the utterance inscription” (1981:240). It is in this sense that language is inseparable from our understanding of the psychological experiences of persons and especially how these are related to and constituted through understanding of others in their experiential world.

## **5. LINGUISTIC AND LEGAL AGENCY IN DEATH PENALTY TRIALS**

### **5.1. Introduction**

The previous chapter examined the role of demonstrative reference, combined with grammatical case, or role, in jurors' stance-taking in regard to their decisions to vote for death. This chapter will provide a more in depth discussion of the variety of ways jurors linguistically mitigate their agency in these decisions or, in contrast, the ways in which their language choices convey their responsibility for such decisions. In addition, it analyzes how jurors, attorneys and judges linguistically encode defendants' agency in descriptions of their criminal acts and how these inform jurors' decisions of guilt and punishment. To what extent do jurors recognize and admit that they are directly involved in a process in which a person may or may not die? To probe this question, this chapter addresses in part how jurors do or do not take responsibility for their decisions in capital trials. This includes not just the act of the decision, which in Texas includes voting yes or no on two special issue questions, but the act of execution as well. The chapter argues that the special issue framework of Texas capital trials allows and in fact guides jurors to palliate their own responsibility for defendant's life and death sentences.

### **5.2. Grammatical agency**

Agency is expressed through a variety of linguistic means, including word order—in English, for instance, agents are typically found in subject position (Jackendoff 1972:32,42)—and grammatical voice<sup>29</sup>--passive voice, for example, gives a perspective

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<sup>29</sup> This refers to the way in which an action is expressed linguistically, as distinct from the discussion of voicing in the earlier section.

of an event that mitigates an actor's agency (Ehrlich 2001, DeLancey 1982). Linguistic accounts of grammatical agency stem from early work by linguists on grammatical frames (though not all authors refer to them as such) (e.g., Gruber 1965, 1967, 1976, Fillmore 1968, 1977a, 1977b, Jackendoff 1972, 1983, 1990, Chafe 1970, Dowty 1989, 1991). The primary question for these scholars was how the people, things, and events in a given utterance are related. That is, how does the specific grammatical construction of a description of events depict who did what to whom, how, and why? As Duranti (1994:120) writes, "the choices that a speaker makes in referring to an event not only support a particular view of the event but also constitute (i.e., both entail and instantiate) a particular stance vis-à-vis the issue at hand." That is, grammatical choices not only reflect the speaker's own view of the event described, but help construct the meaning of the event as it is interpreted in conversation.

In one of the earlier accounts of linguistic agency, Fillmore (1968, 1977a) establishes what he terms a "case" system, in which the basic structure of a sentence contains a verb and one or more noun phrases, which are related to the verb via case relationships (Fillmore 1968:21). Fillmore's (1968:24) notion of case entails "a set of universal, presumably innate, concepts which identify certain types of judgments human beings are capable of making about the events that are going on around them, judgments about such matters as who did it, who it happened to, and what got changed."<sup>30</sup> Fillmore describes the "agent" case as follows: "the 'typically animate' perceived instigator of the

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<sup>30</sup> Similar linguistic frameworks have been proposed, including Gruber's notion of "theme" (1965, 1967, 1976) and Dowty's framework of proto-roles (1989, 1991).

action identified by the verb” (1968:24). The agentive case thus assumes a particular viewpoint about the person's (or entities') role in the action described. The case framework is especially useful when analyzing legal language, for it entails assumptions about causality and motive when assessing a given action and a person's role in the action.

For Fillmore the case frame of an utterance entails “knowledge about the world, beliefs about human nature, assumptions about typical instances of objects, repertoires of stereotypic instances of behavior” (Fillmore 1977b:118). Duranti (1994) indirectly expands this notion by claiming that what goes into our linguistic choices includes not just our classifications of things and events in the world, but also the moral and political norms of a community. I will include this view of linguistic framing in my analysis and analyze linguistic choices speakers make when talking about crime and punishment, which include moral and political ideologies about defendants and their acts.

### **5.2a. What is an agent?**

A grammatical “agent” refers to an entity with a specific relationship to a transitive verb – it carries out the action of the verb. Though this is the basic sense of the term, linguists rarely agree on what precisely constitutes an agent (see Cruse 1973), or whether it should be broken down into constituent parts. Most theorists require an agent to be animate, and most require some sort of volition or motivation. As we saw before, Fillmore’s (1968:24) definition of the agentive case involves a “typically animate perceived instigator of the action,” though, as Cruse (1973:11) points out, Fillmore

essentially apologizes for the wording of “typically animate,” and he never specifies by whom the “perceived instigator” should be perceived.

Jackendoff’s (1972:32) definition adds to this a characteristic of volition, for his agent relation attributes to its noun phrase will or volition toward the action expressed by the sentence. In Mithun and Chafe’s (1999:578) discussion of subjects, objects, and agents, the authors write similarly that referents given as grammatical agents “willfully instigate events over which they have control.” In contrast, patients (those on whom agents act) are not in control, but “feel the effects of events that befall them” (*ibid.*). Gruber (1976:157) similarly inserts intentionality into his definition; for him, the agent is a noun phrase that has the identity of “intender” of an action. Causation is also implied, in that verbs whose subjects must be agents are called “causatives” (*ibid.*:158). Gruber suggests a test for agency, which proposes that agentive verbs can affix purposive constructions such as “so that” and “in order that” (*ibid.*:161). Gruber (*ibid.*:164) complicates the notion of agency a bit by adding another category, that of the “permissive agent.” In this case, the subject is a willful entity, but instead of causing the act, it permits it. As we will see in the analysis below, there are a multitude of ways of encoding agency in English and a corresponding multitude of conceptions of what constitutes an agent and its relationships to a given act.

Duranti (1994:125), like the theorists on which he relies, defines an agent as a “willful initiator of an event that is depicted as having consequences for either an object or animate patient.” In addition, he found that in Samoan, agents marked explicitly as

such were found in speech acts where a party was being held accountable for something. In his later work, he refines this definition to include the following: agents 1) have control over their behavior, 2) commit actions that affect others and 3) commit actions that are evaluated by others (Duranti 2004:453). His conception of agency is particularly relevant to the legal context being investigated here. First, it focuses on the action's effects on another party (see also Lyons 1977, Jackendoff 1990), which is the reason trials are initiated at all. These effects are, importantly, then evaluated. A defendant's future is based on how others interpret the effects his actions had on the plaintiff. Secondly, Duranti's framework highlights a level of accountability inherent in the notion of agency. Accountability becomes significant in jurors' reflections on their own decisions for death. As the analysis will show, many of them balk at being held individually accountable for death penalty decisions and variously encode this in their speech.

These expansions on the grammatical definition of Agent have pushed anthropologists to similarly question their own notions of agency. Ahearn, herself a primary agent in expanding such notions, asks of scholars the following:

“Must all agency be human?...Must agency be individual...or can agency also be supra-individual...can agency be subindividual [?]... What does it mean to be an agent of someone else? Must agency be conscious, intentional, or effective?”  
(Ahearn 2001:112-113)

In addition, Ahearn invites us to consider agency not as an individual property, but as displayed in the “interstices between people” (*ibid.*:129). The talk examined below by jurors, attorneys and judges will illustrate the multi-faceted nature of agency, specifically

that it is often attributed to groups of individuals and non-human entities.

Linguists do not display consensus on what agency means, nor whether it should indeed constitute one unified term. When we think about the notion in terms of social science and then law, it becomes increasingly confounding. As scholars continue to push the issue, however, it seems evident that all are at least indirectly pointing to what it means to be an interested social being in the world, and how our actions affect and are affected by others with whom we live.

### **5.3 Legal and linguistic definitions of agency**

Linguistic and other social science definitions of agency are intimately connected with ideas of intentionality and volition, as well as the effects an agent's action has on others. The legal definition of agency is ironically counter to the definition scholars often give it (cf. Ahearn 2000:12). As defined by *Black's Law Dictionary* (1991:41), an agent is:

A person authorized by another...to act for or in place of him...one entrusted with another's business. One who represents or acts for another...one who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do.

In this sense, agency is defined when someone acts on behalf of another<sup>31</sup>. In contrast, the general linguistic definition is given as someone who is the doer of an event, thus implying that a person's individual actions are what make a subject agentive. Other definitions of agency similarly entail notions of personal responsibility (Duranti 1994).

Ahearn (2000:12), in her discussion of the term as used in linguistic anthropology, writes

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<sup>31</sup> See also Goffman's (1981) discussion of the complex speaker, in which the agency and authorship of a given utterance can be distributed across a number of individuals.

that most scholarly definitions derive from the human capacity to act. This seems to be the basis for the linguistic definition as well, for even those scholars who allow non-human actors agency (such as computers or nonhuman entities), do so in a way that relies on a metaphorical connection to human actions (cf. Duranti 2004).

Though scholarly definitions do not represent a situation like the legal one, in which someone acts on behalf of someone else, Ahearn (2000:13) points out that agency is not synonymous with human will, and that it can often involve complicity with or the reinforcement of the status quo. She asserts that it is “crucial that scholars interested in agency consider the assumptions about personhood, desire, and intentionality that are built into their analyses,” for some theories can assume a Western notion of individualism, while others might deny agency to certain persons (Ahearn 2000:14). It is important to keep this in mind when examining attributions of agency by jurors and others to themselves and defendants, for they are always operating within the power-laden context of the capital trial. As a result, individual agency is inescapably entangled with pressures and ideologies about civic duty, state control, and moral notions of crime and justice and as such is never solely “individual.”

Whether defining it in legal or linguistic terms, attributions of agency are thus always embedded within assumptions and practices of power. In any kind of talk, even finding another accountable for some act is itself an agentive move. “By assigning responsibility to others,” Duranti argues, “speakers are also themselves implicitly assuming responsibility. By engaging in definitions of others' doings, speakers take

stances that may have consequences for others' as well as their own well-being” (1990:659). Thus when a juror finds the state accountable for the death of a defendant, rather than him or herself, this itself is an agentive act on the juror's part that has powerful consequences for the subject of his utterance.

### **5.3a. Mitigated and distributed agency**

Linguists and linguistic anthropologists have developed frameworks outlining ways in which attributions of agency for an act can be mitigated through linguistic means. In Samoan *fonos* (political speeches) for instance, Duranti identifies a variety of linguistic means through which less powerful actors resist accusations by reformulating people's agentive roles in events (1990:655-656). Through reported speech, for example, a speaker can mitigate his responsibility for a given speech act, thus allowing him to say things he might not otherwise be able to say in a particular context (*ibid.*:660). This chapter will identify a number of specific linguistic means through which jurors, attorneys, judges and witnesses mitigate their own agency in death penalty decisions as well as defendants' responsibility for criminal acts.

A related notion, drawn from management literature (e.g., Garud & Karnoe 2002, Girard & Stark 2001, Tsoukas 1996, Garud & Kotha 1994) and derived in social theory from the notion of “distributed cognition” (Hutchins 1995) is “distributed agency.” Attributing agency across a range of human and non-human actors can be seen as another method for mitigating individual agency in an act. Sharing the onus for an undesirable action, such as killing, across a group of people is a common explanation for these acts in

war time and other contexts (e.g., Grossman 1996). This chapter will thus also explore how jurors disperse agency for killing across a number of human and non-human actors.

#### **5.4 Identifying authority for capital sentencing decisions**

The mitigation of juror agency in capital sentences is embedded in Texas' special issue framework. The capital trial process in Texas involves a general tendency not to address the method and practice of execution explicitly. This can be seen most evidently in the structure of the punishment phase jury charge, in which jurors are not asked to vote for a life or death sentence but, rather, are asked to answer the special issue questions: whether the defendant will be a future danger to society and whether anything about his life story can mitigate his sentence. The jurors thus never pronounce an actual sentence on the defendant. The judge does this after the jury's verdict is read (sometimes by the judge, sometimes by the jury foreman). This leaves room for ambiguity as to jurors' actual involvement in the pronouncing of a sentence. One juror comments on this fact, unsure of who is ultimately responsible for the sentence given:

##### *Example 5.a*

Um, and make the recommendation whether we're the final authority or not  
I I think the judge can overrule sentence guide- a excuse me sentencing at  
some point but, I think the jury decides guilt or innocence, and then at least  
makes the recommendation for penalty.

This juror identifies his role clearly in the guilt/innocence decision (“the jury decides guilt or innocence”). When it comes to the penalty decision, however, he concludes that

what the jury is doing when answering the two special issue questions is merely making a recommendation to the judge, rather than deciding on a sentence themselves. In reality, the judge has no discretion in this regard. He merely presents to the members of the court the jurors' sentencing verdict and has no power to overrule it<sup>32</sup>. The structure of the jury charge, however, makes this juror's interpretation possible. Specifically, the charge does not ask jurors to give the defendant a particular sentence, but, rather, to answer the special issue questions. The judge connects the dots, so to speak, when pronouncing the sentence, stating the implications of the decision after it is read.

The following excerpts, drawn from the penalty charge of one of the trials in which I participated,<sup>33</sup> illustrate the ambiguity involved in whether the jury or judge (also called the “Court”) has authority over the final sentence. Below are all the portions of the charge in which punishment is discussed explicitly (in the order they appear on the charge):

1. 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...**

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<sup>32</sup> Judge overrides are legal in only three states: Alabama, Florida, and Delaware. Alabama is the only state in which judges routinely override jury life verdicts to impose death sentences (Equal Justice Initiative, [eji.org](http://eji.org)).

<sup>33</sup> Not all capital jury charges are uniform across the state of Texas (an important analytic point, but I don't have sufficient space to discuss it here). They do have the same format in general, however, and the special issues are always stated with the same exact wording. This example will thus serve as representative of all charges, though not all elements presented here will appear in all charges. I chose this example in particular because it is one of the more exhaustive charges I have come across and a tremendous amount of effort was expended attempting to prevent this charge from biasing the jurors in any way towards death.

2. ...**the Court instructs you** as follows: **The mandatory punishment for capital murder is death or confinement in the institutional division of the Texas Department of Criminal justice for life without the possibility of parole.**
3. Evidence of the background or character or the circumstances of the offense that **militates for or mitigates against the imposition of the death penalty.**
4. ...determining whether or not there is sufficient mitigating circumstance or circumstances to warrant **that a sentence of life imprisonment without parole rather than a death sentence be imposed.**
5. ...the jury is instructed to consider mitigating evidence to be any evidence **that a juror might regard that serves as a basis for a sentence less than death.**
6. You are instructed under the law applicable in this case, if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without the possibility of parole rather than a death sentence be imposed, **the court will sentence the defendant** to imprisonment in the institutional division of the Texas Department of Criminal Justice for life without the possibility of parole.

In a majority of the charge language – in places where sentences are explicitly mentioned – there is no agent depicted as carrying out the sentence. This can be seen in excerpts 2, 3, and 4 above: “The mandatory punishment for capital murder is,” “circumstances of the offense that militates for or mitigates against the imposition of the death penalty,” “that a sentence...be imposed.” In the first of these, the punishment is stated, but there is no indication of it being imposed by any entity, human or otherwise. In the second, the agent

is the offense itself, which is identified as suggesting a particular punishment. An agent may be implied in the construction, “the imposition,” but no agent is explicitly identified. In the last of these, an agent of the imposition of the sentence is again omitted, this time through the use of the passive voice (Ehrlich 2001, DeLancey 1982).

In this charge language, there are two explicit mentions of an agent being responsible for an actual sentence. In both cases, it is the Court: “in order for the Court to assess a proper punishment” (excerpt 1) and “the court will sentence the defendant” (excerpt 6). The juror is mentioned once as engaged specifically in sentencing: “evidence that a juror might regard that serves as a basis for a sentence less than death” (excerpt 5). Here, however, the juror's actual involvement in the sentence is highly mitigated; rather than “assessing” a punishment, or “sentencing” a defendant directly, as the court is charged as doing, the juror “regards” a particular piece of evidence as being a potential “basis for a sentence.” As can be seen in this punishment charge, the court is depicted as the first authority for the actual sentences, while the jurors' involvement in these is highly mitigated.

What jurors are explicitly asked to do is to answer the two special issue questions, as described in excerpt 1: “it is now necessary for you to determine...the answers to certain questions.” In fact, this is the only time the jurors are addressed directly as individual persons through the second person pronoun, “you.” In this case, they are directed to answer questions, not to assess punishment, as the Court is invested with doing, stated directly prior to this construction: “In order for the Court to assess a

punishment, it is now necessary...” (excerpt 1). This division of responsibility for sentencing defendants is confirmed in the language one judge used when reading the sentence after a verdict has been found.

*Example 5.b*

...a jury having answered in the affirmative special issue number 1, also having answered in the affirmative special issue number two, and having answered in the negative as to special issue number 3, I assess your punishment as death by lethal injection.

Here, the jurors are cited as agents in answering special issue questions, but the judge ultimately assesses the punishment. Given this bifurcation of agency for the sentencing decisions, it is no wonder that the juror quoted above was confused about his role in the sentencing process.

Judges, as perhaps the most authoritative representatives of the state to which jurors have access, hold tremendous weight in jurors' decision-making processes. The following juror cited instructions from the court (judge) as the ultimate agent in his decision. The court's power in this regard is so great, that it allows this juror to set his own beliefs and emotions aside, even when reminded that the law also asks him for an individual moral judgment:

*Example 5.c*

J: Based on the evidence I've heard, my moral decision is to follow the lead on **what the court instructs me to do.**

D: It's going to be a moral decision on your part...

J: I realize that would be a difficult one, I don't know, I hope I can remain objective...

Even when not explicitly recognized by jurors, judges can have tremendous impact on how jurors see their duties as described during the voir dire, and on whether they are eventually qualified or not. As Bourdieu (1979) writes in his discussion of symbolic power, “the power of words and commands, the power of words to give orders and bring order, lies in belief in the legitimacy of the words and of the person who utters them, a belief which words themselves cannot produce.” This power asymmetry is exacerbated by the interactional power differential between questioner and respondent, according to which those answering often feel compelled to please the questioner (Amsterdam & Bruner 2001). Additionally, it's generally considered face-threatening and thus is dispreferred to disagree with any powerful authority.

Beyond the individual juror and judge, jurors often cite a non-human, abstract agent as controlling the sentencing process. Following the logic of the charge, some jurors, similar to the one quoted above, cited the state as the ultimate authority in their sentencing decisions.

*Example 5.d*

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 and, it would be the only way I'd feel good about it if we

set him free, it'd be the only way I'd feel good about it if we committed him to murder or life or death. Whatever the state asks, I'm going to rigidly abide by it.

This juror emphatically bestows the responsibility for his sentencing decision on “the state,” a non-specific institutional representation of the criminal laws of Texas. In this account, even if the juror accepts personal responsibility for his decision, he is only doing what the state asked him to do. Many other jurors followed similar logic in talking about their decisions, citing other abstract entities, such as the law, or a general “they” as the responsible agents for the decision that is made. Duranti asserts that in English, subjects and agents can often be non-animate entities (2004:464), which can allow an event that probably involved human agency to be framed like it did not. It can also bestow a sort of metaphorical agency onto non-animate entities. In the following examples from three separate juror interviews, jurors bestow agency on non-human, authoritative entities in discussing their decisions:

*Example 5.e*

Juror 1: But it's not a, deciding that isn't a judgment based on what I feel. It's based on what **the charge** says. It's based on **the law**.

Juror 2: **they** don't want, you know **they** don't want someone who is not a continuing threat to be put to death.

Juror 3: Make a good decision, **not for yourself**, not for, **for what the state of Texas is asking you to do** and **they're** not asking you to put him to death.

**They're** asking you to be very careful about what you decide...

In the first example, Juror 1 attributes his decision to what the charge, or the law says, and is willing to put aside his own feelings in order to honor this authority. In the second, the juror cites the generic “they,” understood broadly as the state, or the lawyers, or some semblance of legal authority, as the source of authority for sentencing decisions. In the third, the juror explicitly denies that sentencing decisions are under the purview of the individual juror, citing the state again as the agent behind these decisions.

In other cases, jurors state that they must regard the victim's family as an authority for their sentencing decision. As the following juror explains:

*Example 5.f*

Yeah. Cause they would've been, and you know if, you know in my point of thinking if **the family** wants to show some leniency towards the attacker, I'm gonna side with the family. You know, but I got the feeling that they wanted the full amount of justice that was appropriate in this case.

In this example, the juror admits to relying on the family's wishes in making his final decision. “The family,” as grammatical agent, is portrayed as having authority over whether the defendant is shown any leniency in his sentence. This construction of agency is especially significant in light of the recent expansion of the victim impact and victims' rights movements, which have increased tremendously the amount and breadth of testimony allowed in capital trials pertaining to the impact of the murder on any member of the victim's family (see *Payne v. Tennessee* 501 US 808 (1991), Maguire 1991,

Friedman 1985). This movement has led to ambiguity for jurors and others regarding who, the victims or the state, are the true prosecutors of a capital case (Gershman 2005).

### **5.5 Jurors' individual responsibility for sentencing decisions**

In contrast to the above examples, in which jurors identified the authority for their sentencing decisions in entities outside themselves, jurors also recognized their individual responsibility for their decisions despite the language of the sentencing charge. The following, drawn from a juror interview, is an extreme example of this type of practical logic:

#### *Example 5.g*

The jury's there to give the prosecutors, the judge, and the state a free ride. Because a man c- uh if somebody's convicted of capital murder, I mean they're accused of it, they can confess to it. But **if the state wants to give him the death penalty, a judge can't do that. It's got to be the jury...**It falls back on the twelve people. I mean to me that's, uh, why we're there. To give everybody else a clean conscience.

In this view, the jury takes the responsibility for a capital sentencing decision, which should lie with state, off its hands and off the hands of its employees. This is not just a functional, but also an emotional load, as this juror expresses. The jury's ultimate role, he argues, is to take the moral burden of such a sentence off legal professionals.

Jurors recognized their responsibility for life and death decisions in less dramatic and more equivocal fashion as well. The following juror's answer to when and how she

started thinking about the death penalty itself during the trial led her to ponder to what degree jurors have ultimate responsibility for their decisions, regardless what the state or the attorneys say. She reflected that from the very start of the trial, she was

*Example 5.h*

thinking, okay is, is this something that that you know can you really vote yes to, to sentence this guy to death. But, and um, and not knowing exactly what the charges would be to us and what the special conditions would be and and **if they just come in and say okay who says yes and who says no or, and knowing it wouldn't be quite that simple but**, but knowing exactly what steps we'd have to go through before **we finally determined that**.

This juror recognizes that despite knowing the decisions are not as simple as saying yes or no to death, jurors hold ultimate authority for sentencing decisions, in “finally determin[ing]” them. She goes on to bluntly state the nature of jurors' decisions, that they boil down to decisions for life or death:

*Example 5.i*

Cause I mean cause you- **that's what you're doing**. You don't even have to worry about whether he's guilty or not. And it was just about **is he gonna die or is he not gonna die**.

Though there is a complexity to charge language, to the process of rendering a decision, this juror states that “what you're doing” in the end is choosing whether the defendant will die or not. In line with this juror, despite the linguistic and/or legal mediations of

their sentencing decisions, most jurors recognized the ultimate outcome of their actions, and thus the grave situation in which they were engaged. The following juror considered my question about this issue:

*Example 5.j*

R: and so, you know, obviously they don't ask you outright, (do you wanna) give him life in prison or death, but was that sort of, did you have a sense that, you know I know that's what I'm doing anyway? Even though you're doing it in this sort of indirect way?

J: I think I think everybody in there that's, at the moment that she read the results of the sentence, I think that's why the tears started in the jury room I mean, you could feel the whole tone of that room change.

Though the full impact of their decision might not have been felt until the verdict was read by the judge at the conclusion of the trial, this juror admits that all the jurors recognized the full extent of the consequences of their vote.

These examples convey the multiple and often confused or ambiguous ways in which jurors view the seat of authority for their decisions in capital trials. Even when jurors recognize their individual responsibility for life or death decisions, ambiguity remains as to who the agent in such an act is. When the juror in Example 4.h addresses death explicitly, for instance, the agent is elided from the construction: “is he gonna die or is he not gonna die.” The following sections analyze more closely the ambiguous and detailed construction of grammatical agency when jurors talk about their decisions.

## 5.6. Voir dire: Learning how to decide

The voir dire – or jury selection – part of a trial is not simply a process of selecting twelve members of a jury, but it is also a context for the judge and attorneys to socialize jurors into the role of serving on a capital jury. It is the only time in which jurors can speak directly to court personnel, and attorneys and judges can speak relatively freely, as they are not bound by the laws of evidence. It is thus a ripe moment for attorneys to initiate and train jurors in their respective ways of seeing the case.

During the voir dire, judges often address the entire panel of prospective jurors before any individual questioning begins. During this time, many judges will instruct jurors on how they should think about their potential roles in sentencing a capital defendant<sup>34</sup>. As can be seen in the following excerpt from one judge's monologue on this issue, jurors received somewhat contradictory instructions on who is ultimately responsible for capital sentences. In line with what we saw in the jury charge above, this judge identified the jurors as responsible for answering special issue questions that direct the judge to sentence in a particular manner, but the jurors do not hold sole responsibility for the sentence.

### *Example 5.k*

If your jury answers yes to question number one and if your jury answers yes to question number two and if your jury answers no to question number three, the law says I have no choice. I have no option. I have no discretion. I

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<sup>34</sup> As with jury charges, what judges say to jurors during the voir dire is up to each individual judge, though there are some limitations as to what they may instruct the jury on (how consistently these are followed, however, is another question) and many of them loosely follow a general script.

must sentence the Defendant to death...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- your evaluation of that evidence- and you use that evidence in answering each of these three questions. Secondly, your verdict. While you, the jury, do not yourselves sentence somebody to life or sentence somebody to death, you may answer these questions instead but you know the result of your answer. Yes, yes and no in that order is a death. Anything else is a life. The third thing is: your answers to these questions are not suggestions to me as to what sentence I should impose. They are not advisory to me. They are not recommendations to me as to what sentence I should impose. Your answers to these questions direct me to impose one sentence or the other.

Upon first read, this passage certainly depicts a complicated network of persons responsible for differing elements of a sentencing decision. As we saw in the jury charge, the juror's sole individual responsibility is to answer yes or no to the special issue questions.<sup>35</sup>

The judge here instructs jurors directly that they are not voting for life or death, for this kind of decision-making would be subjective and thus not up to legal standards,

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<sup>35</sup> This trial occurred before the elimination of the original 1<sup>st</sup> special issue question, which focused on the crime as a deliberate action. There were thus originally three special issue questions.

which in his words require “objective findings” based on the evidence. This is in fact in line with the legislature's reasoning for implementing the special issue questions. They were designed as a response to the Supreme Court's ruling in *Gregg v. Georgia* (1976) that capital punishment, as instituted at the time, was unconstitutional because it followed no unified decision-making framework (see Chapter One for a more extensive discussion of this decision). Despite the nature of their decision-making scheme, however, jurors should realize the result of their decisions, the judge argues, which is a sentence of life or death (“you know the result of your answer”). In terms of the judge's role, he explicitly states that he is the one to do the actual sentencing, though he disavows himself of any choice in this action (“the law says I have no choice. I have no option. I have no discretion”). Thus, while citing himself as the ultimate authority for life or death sentences, the judge bestows ultimate authority on the “law,” as jurors in the previous section were seen to do. He disseminates responsibility back to the jury as well, for rather than a sentence being “suggested,” “advised” or “recommended” to him by the jury, the judge is “directed” by the jury what sentence to impose.

If we approach this passage from the perspective of grammatical agency, we see an even more nuanced picture of the judge's complicated attributions of responsibility in sentencing decisions. As we saw in the charge above, the only context in which a juror is cited as an explicit agent of a decision is in answering the special issue questions: “**your jury answers yes** to question number one and if **your jury answers yes** to question number two and if **your jury answers no** to question number three,” and “**juries make**

objective findings.” When referencing the actual sentence of life or death, the grammatical agent is not the jury, but the judge: “**I must sentence** the defendant to death,” “**me to impose** one sentence or another.”

These attributions of agency are not straightforward, however. In the case of the jury, it is the entire jury, not the individual juror, who is cited as the agent. No individual juror is identified as responsible for a decision. The second person addresses in this monologue are thus specified as being directed to the jury as a whole (“if **your jury** answers yes...”, juries make objective findings,” “**you, the jury**, do not yourselves sentence”).

Furthermore, the judge, while placed as the agent of the act of sentencing, is consistently described as being compelled to do so: “I must sentence the defendant to death,” “your answers to those questions direct me to impose...” In addition, when the judge explicitly connects jurors' answers to their life or death results, the agent is not the juror him or herself, but is his or her answer: “Yes, yes and no in that order is a death. Anything else is a life,” “Your answers to these questions direct me to impose one sentence or the other.” The judge, in one of his first addresses to the jury panel, thus gives the jurors a complicated and potentially confusing picture of their involvement in life and death sentences. The confusion inherent in this picture can be seen in jurors' post-verdict reflections on their roles in the sentencing process.

After the judge addresses the jury panel, potential capital jurors in Texas are individually questioned by attorneys from both sides. As alluded to above, many

attorneys use this as a time to socialize jurors into ways of making sentencing decisions that will benefit their side of the case. This often involves specific attributions of agency – or lack thereof – that jurors should recognize if they are called to make capital sentencing decisions. The following example is drawn from a prosecutor individually questioning a venire person:

*Example 5.l*

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

...

P: 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.

In this example, the juror first conceptualizes his hypothetical decision for death and expresses how hard it would be to have to engage in such an act. The attorney, however, recasts the decision, assuring the juror that he does not directly participate in the sentence, but rather merely answers the special issue questions. The same prosecutor later framed it similarly:

*Example 5.m*

Let me tell you how it works and see if you can sit on a jury that involves the potential assessment of the death penalty, as the Judge told you, after this case goes to the jury. **You don't write life or death. You answer certain**

**questions** and you never get to those three questions unless you've already found the defendant guilty of capital murder.

Here, the prosecutor again assures the juror that his only duty is to answer special issue questions, not to sentence someone to death.

In direct contradiction to this prosecutor's explanatory framework, the defense attorney in the same case approached the issue in the following way:

*Example 5.n*

D:...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.**

J: that's right.

D: just as sure as **if you signed death on the line.**

J: that's right.

In his construction of a hypothetical death sentence, the attorney maintains that the judge is the ultimate agent. He mitigates the judge's agency in the first question, placing the defendant, or the patient of the action, as the subject of the utterance, thus bringing the focus to him, rather than to the agent – the judge. In his second utterance to this potential juror, he cites the juror as the agent in signing the verdict form. However, he inserts an explicit reference to the outcome of the verdict, portraying the juror as not answering special issue questions, but as “signing death.” The defense attorney thus explicitly involves the juror in the execution of the defendant, in contrast to ways in which jurors'

decisions are characterized by others above. In the following excerpt from the same attorney's voir dire questioning, he makes the life and death consequences of the juror's potential decision even more explicit:

*Example 5.o*

D: Let's assume a hypothetical situation you got to the phase of the trial where **you would be considering whether someone lives or dies**, i.e., whether someone goes to prison for life or whether someone goes to prison to await his execution.

This attorney, in the least mitigated fashion, portrays the potential juror as the explicit agent of the defendant's death. The juror's role in the defendant's death is heightened by reference to the execution itself, which is relatively rare in capital trials.

Many jurors have trouble playing such a direct role in a defendant's fate. A major theme in jurors' discussions of sentencing decisions during the voir dire and elsewhere is the extent of their individual, "personal" involvement in a decision. Prosecutors often ask potential jurors during voir dire whether they could "personally" sentence someone to death. This is meant to delineate a venire person's abstract support for the death penalty from the extent to which they believe they could actually be the one to sentence someone to death. Prosecutors are looking to eliminate those who do not think they could be participants in such a sentence, though their beliefs might be strongly in favor of the death penalty. In the following example, a prosecutor asks such a question of an individual venire person:

*Example 5.p*

P: take a look at Mr. Jackson 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.

...

J: No.

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

J: No I don't.

In this example, the prosecutor prods the juror to look directly at the defendant, who is co-present with them in the courtroom. As seen in Chapter Three, seeing another human being physically in front of one can trigger empathy, and thus make killing harder. The prosecutor tests this theory explicitly, asking if the juror could kill this person despite his physical presence. In doing so, he asks whether the juror could “personally participate in a decision where these three questions are answered in such a way that he receive the death penalty.” The juror's agency in the process is highlighted by placing him as agent and subject of the clause, and through the adverb “personally,” but his agency in the

action of sentencing the defendant to death is highly mitigated.

First, the agent is separated syntactically from the action of “ordering the death.” The ordering of actions in this clause that the juror is agent of is thus 1) participate in a decision, 2) these questions are answered, 3) Judge Cherney ordered the death of the defendant. Each action further mitigates the juror's involvement: the passive voice in (2) elides the agent, and the judge becomes the agent of the final ordering of death. Despite this multi-level mitigation of the juror's involvement, he still maintains that he could not be involved in such a process, and he is eventually excused, despite indicating on his questionnaire that he supported the death penalty. These complex constructions of jurors' agency in sentencing decisions are thus in part attorneys' creative attempts at getting around the statutes that limit their attribution of agency to jurors' sentencing decisions and the resultant effects.

Jurors respond to these complex attributions of agency, which cite multiple agents in sentencing decisions. Many of them highlighted their “personal” involvement in sentencing, despite the legal and linguistic means whereby such involvement is mitigated. The following juror reflected on how difficult it was on her to be part of a capital jury:

*Example 5.q*

I said for me it's warranted in some cases and some cases it's not, and I can easily tell people that. But **when you physically have to make that decision.** When when when it is you that has to sit there and say, **I sentence this person to the death penalty** it takes on a whole new role. You know it's it's

it's very easy to say, well yeah I believe in the death penalty. But, until you're in that position to where you have to make that decision. You know, you don't know what that's like. And making that decision is an extremely difficult, you know and I can I can speak for myself and I would venture to say that half of the other jurors at least felt the same way I did. You know that, you know, so many people didn't want to give him the death penalty because they they **personally** didn't want to do it. Them **personally**. You know and that's the hard part is because you **personally** can't make that decision.

Here, she makes the distinction between one's abstract belief in the death penalty and a personal involvement in an actual decision to sentence someone. She comments on the extreme difficulty with being the one to “physically” make the decision, characterizing the decision as an embodied act. She uses the least mitigated form of expressing her personal agency in the decision: “I sentence this person to the death penalty.” She, as an individual, is placed in the agent and subject role of the utterance, and the description of the decision blatantly references death.

The law does not dictate in either direction how a judge or attorney must characterize a juror's role in the sentencing process, from answering special issue questions to actually sentencing of a defendant to death. Jurors thus receive multiple and contradictory accounts of their responsibility for a defendant's sentence. The next section will explore how jurors process these accounts and reflect, in their own formulations, on

their involvement with a defendant's life or death.

### **5.7 Grammatical agency in jurors' reflections on sentencing decisions**

Even among those jurors who recognized their individual responsibility for sentencing defendants, nuances appear in how exactly they expressed such agency. As seen in the previous chapter, how the defendant is referred to can convey a level of distance or proximity between him and the action being conveyed. This section analyzes how descriptions and references to both actors and the actions they're engaged in portray varying degrees of distance from and thus accountability for jurors' decisions.

Significantly, attributions of grammatical agency vary according to what act is being depicted and the manner in which it is described. For instance, jurors place themselves as grammatical agents of their decisions when the death of the defendant is left implicit as the patient of the act. Conversely, when explicitly depicting the act of sentencing a defendant to death, jurors tend to mitigate their own agency in it. They return as explicit grammatical agents, however, in negative constructions of sentencing acts, such as not wanting to put someone to death.

The following example, which introduces analytic themes of this section, includes a variety of linguistic tactics whereby jurors negotiate their agentive relationships to their decisions, such as specific agent/patient grammatical roles, demonstrative pronouns, and euphemisms. This excerpt tracks one juror's reflections on how much the death penalty was on her mind during the decision-making process (prompted by my question on the topic):

*Example 5.r*

So I, no I never dwelled on it. Uh it didn't impact me decision wise or being part of the jury and listening to the whole trial. Until we said he was guilty. And then it it was kind of right there in your face and **now you had to**. And I've thought about it since that's why I say **I'm not sure that I could do that again**. Uh, **I'm not sure I could put somebody in prison for life**.

This juror refers to her decisions throughout the course of the trial in a number of ways: “we said he was guilty,” “you had to,” “do that,” “put somebody in prison for life.” In comparing the linguistic forms of reference to the juror's decisions, one can see specificity expressed on a number of levels. The first, which pertains to the guilt/innocence decision, is a straightforward description; in relation to it the juror places herself as one of a group of agents responsible for the act: “we did X.” She does not mark her individual agency in the act (as in “I did X”), however, which, as related in the previous chapter, is incredibly rare in my juror interviews.

Next, the agent becomes the decision itself (similar to the judge's formulation of jurors' decisions, rather than jurors themselves, as directing his sentence), getting in the juror's face, at which point, “now you had to [deal with it].” Here, the agent is unspecified; it transitions from “we” to the generalized “you,” which further mitigates the juror's individual responsibility for the sentence. Along with this mitigation of the juror's agency comes an elision of reference to the decision; it is not specified what “you had to do.” In fact, the verb itself is left off this clause entirely. In the next utterance, however,

the juror inserts herself back into the agent role: “I'm not sure that I could do that again.”

The predicate, however, takes an extremely unspecified form with the demonstrative “that” (see discussion of the distancing effects of demonstratives in the previous chapter). She then affords that she's not sure she could even assess the lesser punishment, to put someone in prison for life. Here, though her agency in the act (or lack of ability to do the act) remains explicit, (I couldn't do X), this attribution of agency comes only in the negative construction, in which she is not engaging in the act of committing someone to death. In addition, the patient of such an act, the hypothetical defendant, is unspecified and referred to as “somebody.”

To sum up this introductory example and to set up a framework for the analysis below, there is an oppositional relationship between attributions of agency in jurors' sentencing decisions and specificity of reference to the decision. To investigate this pattern further, the following sections specifically examine the extent to which heightened agency correlates with decreased specification of the action, especially in relation to jurors' decisions for death. In the converse, it will analyze which types of actions correspond with mitigated encodings of agency or the lack of an agent entirely and whether these actions are described in explicit, unmitigated formats. I treat forms that refer to death specifically as unmitigated. Lastly, it will ask how encodings of agency and decisions for death correspond with a juror's desire to give a death vote.

### **5.7a. Grammatical agency in jurors' decisions**

Despite the ways in which elements of the trial, including the language of

attorneys, judges and jurors, mitigate jurors' responsibility for their decisions and for defendants' sentences, many jurors candidly and unmitigatedly described to me their agentive role in determining a defendant's sentence. Examples from two juror interviews are illustrative:

*Example 5.s*

*Juror 1*

I still think **we should have given him the death penalty**... I don't think I would have a problem.

I decided **I wanted to give him the death penalty**.

*Juror 2*

[referring to another juror] oh he was I mean he's, I mean it was like **he wanted to just fry him**.

That **I would vote for the death penalty** yes

In contrast to the separation of responsibility for sentencing decisions between judges and jurors as seen in the previous section, these jurors portray themselves as directly involved in imposing a death sentence. Grammatically, they as individuals occupy the agent role in unmitigated depictions of giving death sentences (“give him the death penalty,” “fry him,” “vote for the death penalty”). Interestingly, these examples are drawn from the same case, in which the defendant actually received a life sentence. These jurors, however, were all proponents of a death sentence, but because of one hold-out for life the jury could not come to a consensus on death. Though mere speculation on my part, these

jurors were perhaps more willing to explicitly express their role in hypothetical death verdicts because in the end, they did not actually sentence anyone to death.

These types of constructions are by no means the norm, however. There are other cases when jurors depict themselves in the agent role. These occur, however, in utterances that either predicate the negative action – not giving the death penalty – or express uncertainty or discomfort with giving such a sentence. The following juror interview excerpts provide some examples:

*Example 5.t: Negative action*

We were trying every other possible method of justification for **not sentencing (John/him-listen to this) to the death penalty**  
**I didn't wanna give him the death penalty**, because personally I didn't want to do it.

...why **she didn't want to give the death penalty**

...**she wasn't gonna give him the death penalty**

somebody else on the jury goes, **I'm not putting him to death** for punching some guy in the nose.

...a couple of these people are not, at least **a couple of em, um are not gonna vote to give this man the death penalty**

*Example 5.u: Uncertainty*

(voicing another juror): I just don't know that I could, I just don't know that when it comes right down to it that **I could give somebody the death penalty**

I had, I really had a tough time thinking that **I could give him the death penalty**

it's not something that I'm gonna ever brag about. At a Christmas party saying oh **I gave someone the death penalty**

And in fact it makes me uncomfortable, when people find out. You know?

Um, when they say oh yeah, you were a juror. **You gave the death penalty.**

That's the hardest thing I've ever had to do, to look at a man and, you know, know that I'm saying, you know, **I don't think you should live.**

In all of these cases the jurors placed themselves in the agent role when denying outright their ability or desire to give the death penalty or when expressing discomfort with their decision.

### **5.7b Group agency and anonymity**

Jurors also ostensibly maintained their agentive role in giving the death penalty in a somewhat mitigated form by citing themselves not as individuals, but as members of a group – a jury. In linguistic terms, this often means assigning the agentive role to the jury as a whole, either referenced by “we,” the generalized “you,” or some other descriptor.

The following provide some examples of this phenomenon:

#### *Example 5.v*

Until **we** said he was guilty. And then [the death penalty] was kind of right there in your face and now **you** had to

well it was the day that we had to, um give our, or the night, the day that **we had to make a decision**

I still think **we should have given him the death penalty**

maybe there's some way that this won't happen. Where **we won't give him the death penalty**. Uh, but then when we really started deliberating and going through it, you know going over my notes and everything, you know **we decided that it was**.

**we're gonna be deciding on, something, you know life or death.**

Before **we decide, on this uh, giving him uh, what is it the um death penalty**

In these cases, the decision for death is depicted in both explicit and mitigated forms (e.g., “make a decision” vs. “give him the death penalty”). Jurors, as members of some collective, are placed in the agent role in descriptions of these actions, thus mitigating their individual role in the decision.

Grossman (2009) argues that in wartime, empathy is more easily stymied when one feels part of a group, rather than encountering another one-on-one. When part of a group, the emphasis is less on the individual and individual members are thus provided with a sense of anonymity (*ibid.*:149, 151). Jurors' desire to remain relatively anonymous with regard to their decisions was evident in multiple ways in my data. First was the general reluctance jurors felt to talk to me about their trial experiences, even among those who I ended up interviewing. One juror recounted the anger she felt when she received my letter asking her to be interviewed. This same juror also expressed unease with the fact that attendees of the trial, including the victim's family, would see her around town and visually monitor her during the trial.

*Example 5.w*

Um, you know and I think for the most part I've done that. Just, put it away. You know as, when I got your letter actually I was um, hhh came in and I threw it at my boyfriend and I said, how did she get this information? He's like, I go, this is supposed to be over! And he's like [juror name] you don't have to call her. I'm like no I'll talk to her but, after this it's done! And he's like okay, he's like but really, you don't have to talk to her and I said okay...

This juror expressed a response I got frequently from those I spoke with, whether I interviewed them or not. They questioned how I obtained their information when they thought they would remain anonymous to the public.<sup>36</sup> Many jurors refused to participate for this reason; they were furious that the public had access to their names and did not want any further contact with me. After receiving my initial letter, a juror's husband left an irate message on my voicemail, threatening me to never contacted his wife again. I give these examples not to complain, but to illustrate the fervor with which jurors hung to whatever anonymity they could retain.

A final example of this attitude was seen the hesitation with which jurors approached having to be polled at the reading of the verdict. In capital cases, the attorneys may request that the jurors be individually polled when the decision is read. If they do so, each juror is asked by the judge whether he or she agrees with the verdict given and must respond verbally. Defense attorneys will often request polling sentencing decisions on the assumption that jurors who are on the fence about giving life or death

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<sup>36</sup> As stated in the explication of my methods, jurors' names I was able to obtain were part of the public record. I have kept their names out of any analysis and write-up of that includes them.

may be compelled to give life when faced with the task of having to state in front of the defendant, his family, and the trial audience their decision. With this practice, attorneys are indeed picking up on a common attitude among capital jurors. Several of those I spoke with discussed their discomfort with this practice, as in the following example:

*Example 5.x*

J: But I know a lot of people would've been, not a lot, but there's 2 or 3 that would've been very much happier to just secret ballot the whole thing and never be polled or anything else.

R: yeah. That's tough.

JM1: yeah it is, it it's hard then you know, and, there again I think some of the females had it, felt it the biggest burden from that. Now some of them boy they wouldn't even question you know, they didn't mind standing up and saying it. But others of them, other of them didn't mind voting for it but it (may have) been uncomfortable to say it out loud.

This juror argued against using a secret ballot in the jury room, reminding his fellow jurors that they would most likely have to proclaim their votes “out loud” at the reading of the verdict anyway. This jury did in the end vote for death, despite some jurors' trepidation.

The data in this section reveal that one of the many ways jurors mitigate their roles in giving a death sentence is by conceptualizing themselves not as individuals, but as part of a group of fellow jurors. In line with Grossman's argument that empathy is

easier denied to another when one feels a part of a group that is doing the denying, jurors find much more ease (if any ease is to be found at all) in making decisions for death when they – either linguistically or otherwise – can remain one among many.

Defense attorneys attempted to combat this tendency for jurors to diminish their role in a defendant's sentence through citing membership in the jury as a whole (again, defense attorneys often attempted to disqualify potential jurors by convincing them that while they believe in the death penalty, they could not actually give such a sentence). Throughout trials, from the voir dire to sentencing closing statements, a primary tactic for capital defense attorneys was to continually submit to jurors that they are individual decision makers. By emphasizing that jurors have their own individual vote, rather than the whole jury making the decision, the attorneys hope to convince hold out jurors for life to stay their ground and not fold to the other jurors. The following is typical of this tactic:

*Example 5.y*

J: I would vote, you know, my own feelings.

D: Okay. And that's really important because as you look out into that jury box, you don't see a bench there. You see 12 individual seats. Would you agree with me?

J: Right

D: ...there are 12 judges and they are individuals and a person on trial is entitled to rely on the individual assessment of that individual juror.

Despite impressing upon jurors that a sentencing decision is to be assessed by each individual juror<sup>37</sup>, many jurors reported feeling pressured to come to a unanimous decision and thus did not hold out for their own individual opinions. This corresponds with the constructions above that depict the agents of sentencing decisions to be juries as a whole (we), rather than individual jurors (I).

### **5.8 Jurors' denials of agency and alternatives to referring to decisions**

More commonly, jurors mitigated their own agency in their decisions for death. This occurred in two primary ways: one, by citing some other entity as agent or eliding any agent at all and two, by describing the decision in a mitigated form that did not reference death. In the first case, one resource for expressing an action without identifying an agent is through the passive voice. Through the passive construction of an action, DeLancey (1982:171) argues, a speaker can express a viewpoint with regard to the recipient of an action by placing the patient in the subject position of the passive construction. Jurors often expressed their decision in this format:

#### *Example 5.z*

I felt comfortable with **the decision that had to be made** and that was made

That we were all there six weeks, we were all there hearing the same thing which looking pictures at the same thing, and **the verdict came out this way**

my views of the death penalty are still the same. Um because (.) I think in this case **it was warranted**

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<sup>37</sup> Some states, such as Maryland, have added clauses to their juror sentencing instructions that add a third answer to the mitigation question in order to allow for individual jurors' opinions to be recognized. Instead of answering yes or no, they may also choose the option that states that the jurors could not come to a unanimous decision. The result of this choice would be a life sentence (Mills v. Maryland, 486 US 367, 1988).

Judges also utilize the passive voice when describing sentencing decisions:

*Example 5.aa*

it's the state's obligation to prove a person's guilt beyond a reasonable doubt. If they do and the defendant **is found guilty of capital murder**, then you come back and have the second phase of the trial.

In these examples, the passive voice allows jurors to talk about their decisions without placing themselves as agents carrying out the action or, in the Example 4.z, the judge's formulation of the jurors' agency. The subjects of these passive constructions are “the decision,” “the verdict,” and “it” (referring to the death penalty), and making these the subjects of the constructions orients the action away from the jurors, focusing on the decision that was made. In other words, these subjects draw attention to the outcome of the event (cf. Duranti & Ochs 1990), rather than the process of the decision-making itself.

The following examples illustrate cases in which jurors do not mitigate their depiction of the sentence, that is, they all explicitly reference the death penalty. They do, however, mitigate their agency in the decisions either by eliding an agent in the construction, as in Example 4.aa, or formatting the utterance in such a way so as to make the defendant or crime the subject or agent in his sentence, as in Example 4.bb. This pattern is common; in other words, when jurors speak explicitly of the death sentence, they are more likely to mitigate their own agency in the act. Those utterances in which they do place themselves in the agent role tend to co-occur with mitigated forms of reference to the death sentence.

*Example 5.bb*

I knew that we had to go for two reasons. **Give him life or the death penalty.**

It's very difficult **giving the death penalty to a kid.** Who's 25 or 26, versus someone

Both of those had to be **yes and no for a death penalty**  
In my eyes the only secure place for **him to be was (be on) death penalty**

*Example 5.cc*

And it was just about is **he gonna die or is he not gonna die**

if they're not a continuing threat then **they shouldn't be put to death.**

there were four or five people that were saying no. that he, you know **he shouldn't get the death penalty**

if we would've convinced those 3 ladies **he would've had the death penalty.**

Because I feel like if a person you know just flat doesn't think that **this deserves the death penalty**

Dixon (1994) provides a hierarchy of entities that are likely to be marked as agents, in this order: first person pronouns, second person pronouns, third person pronouns, proper nouns, and common nouns. In this conceptualization the speaker (first person pronoun, I) is most likely to take the agent position. Dixon proffers a reason for this: “a speaker will think in terms of doing things to other people to a much greater extent than in terms of things being done to him. In the speaker’s view of the world...he will be the quintessential agent” (1994:84). Because they differ from this common grammatical framing, utterances such as those above, in which the speaker is the ostensible but not the grammatical agent, are marked. By removing their agency from the utterances above,

speakers (jurors) are bestowing responsibility for death decisions on others. In examples 6 & 9, there is further distance created between the juror and the act of putting a person to death; the defendant is generalized from an individual (“he”) to the generic “they” in the second utterance and is left out of the picture altogether in the last (“this deserves the death penalty”).

A prosecutor's closing argument in the punishment phase of a trial illustrates vividly the tactic of positing the defendant as agent for the decision for death, rather than the juror him or herself.

*Example 5.dd*

P: Now, his hand won't be the hand that writes those answers on your verdict form, but his deeds, his acts and his conduct fill in those blanks for you the way they need to be filled in because he's chosen a path.

While the jurors must ultimately sign the verdict form, the prosecutor underscores the defendant's role in this act, in that his choices and actions lead the jurors to make no other choice than to choose death.

In that it can be used to distance the speaker from what is being referred to, demonstrative reference is often employed to refer to the decision for death. Through this tactic, the speaker (juror) thus distances him or herself, emotionally or cognitively, from the referent (see Chapter Four). Consider the following examples:

*Example 5.ee*

Juror 1: now we have to start thinking a little bit better. It is probably going to

get to **those second, those two questions.**

Juror 2: It probably, I'd say it tore her up more than anybody else, to make **that decision.**

Juror 3: [after I ask about death penalty] to do it yourself, to be one of the 12 that actually makes that decision, is, it's a tough deal.

Juror 4: [voicing another juror] well I kind of just don't want to do **that** at my age. I just don't want to have to make **that decision** at my age.

Juror 5: I think it was [juror's name] like, you know, I am really mad that I have to make **this decision.**

Juror 6 (voicing another juror): this is a person I know, who's had a real lousy life, and I don't know if I could, do **that** to them

Juror 7: I was thinking that maybe he, you know, maybe there's some way that **this** won't happen.

Each of these examples involve jurors expressing their (or another juror's) extreme discomfort with having to make a life or death decision about somebody else. In these discursive contexts, jurors distance themselves or the juror being spoken about through referring to the decision with the demonstrative reference form. In the final two examples, the reference form is reduced to a mere demonstrative pronoun (rather than a demonstrative adjective + descriptor, such as “that decision”), thus further distancing the juror from the actual decision for death by eliding any description of the act referred to.

As examined in the previous chapter, we see that jurors maintain distance from referents – here, their decisions – not just through demonstrative reference, but also through decreasing specificity of reference. In the following examples, the decisions are

referenced through vague descriptors:

*Example 5.ff*

Juror 1: there was one juror who was just very conflicted about **what she knew she had to do**.

Juror 2: And then when we put it together, that's when you say, wait a minute. This is why we're **voting this way**

Juror 3: I think they, at some point they were able to reassure themselves that **what they were doing**, as terrible as it was, was probably the right course to take.

Juror 4: [voicing another juror] I have not had enough life experience to say, to **do this type of judgment**.

Here, extremely unspecified descriptions of death decisions – “what she knew she had to do,” “voting this way,” “what they were doing,” “this type of judgement” – serve to further distance the juror from his or her decision for death.

## **5.9 Concluding remarks**

In sum, this chapter has addressed linguistic means by which jurors distance themselves from their decisions for death. This is accomplished through multiple and combinatory linguistic resources, such as the choice of a particular agent in the description of an action, such as the state, the jury as a whole, the defendant, or a generalized “you” or “they”; the elision of agency in depicting death decisions; and the decreased specificity of reference to a death decision. Few jurors explicitly refer to their decisions for death and unmitigatedly assert their individual roles in such decisions.

These constructions are relatively rare in my data, however.

Legal language, including written jury instructions, attorneys' questioning of jurors and judges' oral instructions to jurors complicate this issue, for they convey contradictory guidelines as to how jurors should conceptualize their own responsibility for death sentences. Jurors are initiated into how to conceptualize their decisions by attorneys and judges during the voir dire process, who attempt, according to their trial agenda, to convince jurors of their relative responsibility for their decisions. In many ways, these sources of legal language urge jurors to treat death sentences as ultimately in the hands of someone or something else. Imbuing oneself or another with agency opens a person to moral evaluation (Duranti 2011, 1983). "To be a full human agent," Taylor writes, "...is to exist in a space defined by distinctions of worth" (1985:3). Eliding one's agency in an act is itself an agentive act, thus placing one in the center of this moral space.

## **6. INTENTIONALLY CAUSING DEATH: LINGUISTIC FRAMING OF DEFENDANT'S AGENCY IN CRIMINAL ACTS**

In Duranti's (2004:455) comprehensive essay on agency in language, he notes that language affirms a speaker's agency by identifying him as one who has the ability to communicate. This "ego-affirming" (*ibid.*) form of agency, however, is significantly limited in a courtroom. The witnesses can only speak when questioned, and he/she is instructed by the laws of evidence to merely answer the question asked. This structure obviously limits to a great degree what witnesses can say. Their ability to communicate in an everyday sense of the word is greatly attenuated. This is made especially apparent in one capital case, when the judge briefed the defendant before his own testimony. As she instructed him, "You don't get to get up here and just tell your story; you understand that?...You only get to answer the questions that are asked of you, do you understand that?" He answered that he understood.

Given that a defendant's agency in his own storytelling in court is highly restricted, his intentionality, responsibility and actions are often conveyed through others. Specific grammatical choices in others' depictions of defendants' actions are highly influential in how jurors understand defendants' agency. The aforementioned point that the particular grammatical framing of an event provides a specific perspective on the event and affords certain assumptions about the action described begs certain questions, such as, how can speakers elide particular elements of scenes? What grammatical structures make this possible? What does this do to how hearers interpret the actions and

persons depicted in the utterance? In probing these types of questions, Duranti claims that linguistic frames are “moral and political statements that classify deeds and their agents according to and against the background of local world views” (1994:169). Following this lead, this section will investigate in what linguistic framings jurors and other legal actors refer to defendants' supposed criminal actions. As such, it will probe the often locally specific political and moral assumptions behind these framings upon which jurors rely when making their decisions.

### **6.1 Agency in criminal trials**

The official frame of agency in a criminal trial is that depicted in the indictment. This is the sequence of causality that all aspects of the trial are oriented towards. It is into this framework that jurors must fit all the evidence they hear and see in the courtroom in determining their decision on guilt or innocence. During criminal trials, prosecutors and defense attorneys present contrasting versions of the defendant's involvement in criminal acts. Language plays a critical role in this process. Thus “[a]gency, understood in an ethnomethodological sense as demonstrable, oriented-to feature of social action, can thus be identified as a recurrent practical concern” for legal participants (D'hondt 2009:252, Dupret 2003).

In the punishment phase of capital trials, the indictment is no longer a legal issue, but it still serves as a background against which to define the evidence and jurors' opinions. In examining courtroom questioning and jurors' depictions of crimes in their post-verdict interviews, I ask how attorneys', witnesses' and jurors' linguistic framing of

agency compares with that put forth in the indictment. The following is an excerpt from an indictment from a capital murder trial. All indictments utilize this format, though the details will change according to the specific type of capital murder charged.

**defendant** “did then and there unlawfully, during the same criminal transaction, **intentionally cause the death of [victim]** by striking him with a deadly weapon, namely, an unknown blunt object; and by cutting him with a deadly weapon, namely, an unknown sharp object; and by striking him with a deadly weapon, namely, an unknown blunt object...”

The criminal indictment uses a specific linguistic framing of agency in order to express causality in the crime: defendant (as subject and agent) intentionally commit a criminal act against the victim (patient). The logic of a criminal indictment, thus, relies on the intentional act of a knowing individual. As we will see in the following sections, legal actors alter this framework of agency to particular ends. These alterations cast the defendant in various lights according to his dangerousness and likelihood to commit future acts of violence.

It should be noted that during the guilt/innocence phase of criminal trials, statements such as “defendant killed victim” are relatively rare (except during opening and closing arguments, during which attorneys are not bound by the same rules of evidence), especially as compared with the penalty phases. This is so, I suggest, because the criminal action has not been proven yet. All the evidence presented by the prosecution implies this agentive sequence as its logical end, but it is not part of the evidence itself yet. The following two examples are typical of how agency is encoded during the guilt phase of a trial:

*Example 6.a*

D: if someone had entered the apartment in between the time that **[victim 1] and [victim 2] were killed** and the time that Mr. \_\_\_ entered the apartment...

P: what's the significance of that?

W: the significance of that is that the victim was still alive **when that wound was inflicted.**

These descriptions of the actions involved in the crime are done in the passive voice, thus eliminating an agent from the action. This is how questioning tends to occur because the defendant has not yet been found guilty of the offense. Jurors recognize this logic in which attribution of agency is delayed, as can be seen in the following jury interview excerpt:

*Example 6.b*

I don't know how much you know about the case itself but there was a there was a, a **brother and a sister that were shot.** And they were both shot three times. And so it was trying to piece well **who was shot first.** You know and no one can tell us that. You know even the bullets can't tell us that. Um, you know was she, was she shot running away was she shot coming in, you know when was the brother shot you know. Why was the brother shot.

This juror depicts the crime as agentless through using the passive voice (e.g., brother and sister that were shot). This can be explained by the fact that the juror is trying to reproduce her experience of receiving evidence during the trial, which, as explained above, would have been presented in this agentless fashion.

If implications are made during the guilt phase about specific criminal acts and how they were carried out, they tend to be done in hypothetical form, with an unknown agent cited as doing the action, as in the following:

*Example 6.c*

P: if **someone came at me with a knife** and I attempted to block the knife and the knife struck my arm or my hand or something, is that what you mean by defense wound?

W: Yes sir.

P: Doctor, if **the person that cut his throat like that was standing**...behind him, is it possible for you to tell which hand that person would have used when that wound was being created?

W: Yes sir.

In these formulations, which pertain to a piece of evidence, that there is a “defense wound” on the victim's body, the agent cited as doing the action is “someone.” The prosecutor would be out of line and objected to if he states, “the defendant came at me with a knife,” for that has not yet been proven. Once the defendant has been found guilty, however, these kinds of constructions become much more prevalent. A majority of the trial examples below are thus drawn from penalty phases, after the point at which the defendant has been found guilty of the capital crime.

## **6.2 The defendant as grammatical agent**

This section will illustrate examples in which the defendant is explicitly marked as grammatical agent. As these examples will show, these types of constructions lend to the portrayal of the defendant as knowingly involved in dangerous acts. In Example 1, the prosecutor is reading to the jury a list of the defendant's prior offenses and prison disciplinary record (he was previously incarcerated a number of times):

### *Example 6.d*

P: September 9, 1995, Defendant, Demetrius Dewayne Smith, refused to report for his work assignment. He pled not guilty; he was found guilty.

In this construction, the defendant is listed as subject and agent of the first sentence (Demetrius Dewayne Smith), thus clearly implicating him as agent in the act of refusing to report for work. The same structure is used in the first part of the second sentence – “He pled not guilty.” In the last clause, “he was found guilty” the agent is actually the court, or the state, who gave him the guilty charge. Through the passive voice, however, the defendant is highlighted by placing him in the subject position, even though he does not occupy the Agent role. As mentioned above, linguists argue that English constructions tend to put the agent in subject position, and thus a deviation from this pattern places focus on an entity other than the agent. This mitigates the state's role in the infraction, for it, as Agent, is not even mentioned. Here we see a counter example to the generalization made in a previous section that the agent in English is almost always expressed as the subject. This complete construction is repeated about ten times during this section of

testimony, thus displaying the defendant repeatedly as the sole and responsible actor in his previous infractions. In contrast, when the defendant is himself questioned about his previous offenses, he highlights the role of the state:

*Example 6.e*

D: How long were you on probation?

W: I think five years.

D: You were on probation that long or were placed on probation that long?

W: Yeah, **they gave me** five years' probation.

The state, referenced by the defendant as “they,” is put into focus as agent and subject of the clause.

Example 6.f comes from the cross-examination of the defendant. Through the repetition of the subject “you” as agent, the prosecuting attorneys built a picture of the defendant as an increasingly dangerous person. This example contains excerpts from the prosecuting attorney’s question to the defendant. They fall within about a two-minute span of questioning.

*Example 6.f*

While she’s at work you’re not working. You’re sitting around smoking dope, right?

You met Howard at Fiesta. You told him to back off because Tammie was yours, right?

You told him to back off because Tammie was yours, right?

You called Howard and threatened Howard. You threatened to kill him. You threatened to kill his mother and shoot up his house, didn't you?

Through the grammatical construction “you did/are doing X,” the defendant is repeatedly cast as agent and subject in a list of increasingly dangerous behavior. In addition, he is made to personally account for his behavior through the prosecutor’s use of the second-person pronoun “you.”

In contrast to the above examples, a defendant’s dangerousness can be mitigated through the grammatical placement of roles and arguments. In the following excerpts, drawn from the same trial, the prosecutor and defense attorney cast the defendant's agency in violent acts in contrasting grammatical frameworks:

*Example 6.g*

P: ...Mr. Perry puts a gun to [witness' name] head, and said I'll help you do it<sup>38</sup>.

D: the date in question is october 24, 2001?

W: which day in question?

D: The date of the incident – the death of Ms. Stotler and Adam and Jeremy?

In the first example, the defendant is cast, as in the above examples, as grammatical agent. In the second, in which a defense attorney questions a witness about a murder, rather than citing the defendant as agent, he elides the agent role by nominalizing the action through the construction, “the death of victim 1 and 2.” These examples showcase

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<sup>38</sup> This example is drawn from a case in which a second crime was introduced during the punishment phase of a trial. The attorneys were thus not limited by the rules of evidence that they would be during the guilt phase. For this reason, the prosecutor could make a statement such as this, explicitly citing the defendant as committing a criminal act, which he could not do during the guilt phase.

well the contrasting grammatical tactics through which those wishing to convey different versions of a defendant's responsibility in criminal actions can do so.

Below are some additional examples of the mitigation of grammatical agency seen in trials. In Example 6.h, the defendant was being questioned by his attorney about the offenses he committed as a juvenile. In contrast to the prosecutor's grammatical placement of the defendant as agent and subject in such events, the defendant mitigated his own agency in them.

*Example 6.h*

ATY: ...You were adjudicated to be a delinquent as a juvenile, correct?

WIT: Correct, sir.

ATY: What was that for?

WIT: Probably multiple things such as burglary of a coin-operating machine such as a Coke machine or something like that, in that nature that I was told I had.

In this example, the defendant (WIT) first lists the charges he received as a juvenile, but does so without a verb to imply that he or anyone actually committed the acts. Instead, he employs a passive clause, "I was told I had," indicating that someone told him these were the offenses he was charged with. This someone is the agent of the clause and is elided from the sentence all together.

The following example is similar to 4 in its elision of the defendant as doer of the offenses he was accused of.

*Example 6.i*

ATY: And why did you go to prison? What kind of case was it?

WIT: Possession of crack cocaine.

ATY: How much cocaine was involved in that case?

WIT: Probably less than one gram or something, I forgot.

In the first line of questioning shown here, the defense attorney repairs his first question, which would have asked for a personal account from the defendant of why he went to prison. In this first question, the defendant (“you”) is the agent and subject of the underlying clause, “you went to prison.” In his repair, the attorney takes the defendant completely out of the picture and asks about the content of the case instead (What kind of case was it?). The defendant is then free to answer the question by merely stating the case type without implicating himself in it. The defense attorney continues the elision of the defendant’s involvement by asking further about the cocaine’s, not the defendant’s, role in the case (how much cocaine was involved in that case?).

### **6.3 Reported speech as expressing agency**

In addition to the grammatical encoding of agency, speakers often use reported speech in order to highlight someone’s involvement in an event (e.g., D'hondt 2009, Duranti 1990). In that a criminal trial is a recounting of past events and given the fact that capital defendants rarely testify on their own behalves, reported speech is especially prevalent in witness' testimony to create a vivid picture of things the defendant did and said. Rules of evidence, including those governing hearsay, constrain its use in certain ways.

Reporting the speech of the defendant can involve a number of implications, especially given who is doing the reporting. In the following examples, witnesses for the prosecution, who encountered the defendant exhibiting violent behavior, use reported

speech of the defendant in order to dramatically bring into focus the defendants' dangerous or threatening actions. In Example 11, the witness is asked to describe an event in which the defendant scared her:

*Example 6.j*

WIT: He jumped up from the table and he said, ooh, he said, **see, I'm going to have to kill me somebody**. He said, **these niggas don't know. I'm a nigga myself and I know how niggas are**.

PROS: Did it scare you?

WIT: Yes, it did.

In the following example, the witnesses described a phone call the victim received from the defendant which the witness overheard:

*Example 6.k*

WIT: Her cell phone was ringing, and she answered it and she handed it to me. And I put the phone to my ear and I could hear him yell, **you think I'm playing with you? You're going to die today, bitch**. And I said, hello, and then the phone hung up.

W: He came up with a gun. The shotgun...

P:...can you tell us what he did with the gun?

W: He put it to my head and **told me that I could pull the trigger if I wanted to die**...He left for a few minutes and then came back and put it back in my face.

P: Go ahead. Tell the ladies and gentlemen of the jury what he did.

W: He confronted her in front of the other kids and cussed her out.

...

P: What was it that Mr. \_\_\_ said to her?

W: **He said fuck you bitch, suck my balls**.

In these examples, instead of merely describing the events, the witnesses invoke the voice of the defendant through reported speech in order to highlight his involvement in them,

and, in turn, his threatening and dangerous personality. Reporting the speech of the defendant allows the witness to place the first-person pronoun, “I” (as referring to the defendant) in the agentive grammatical role in these portrayals of threatening and dangerous actions. In the third example, the witness both places the defendant as agent in the action of putting a gun to her face (he put it to my head), but also invokes his voice as threatening, which emphasizes and makes vivid his role in the action. In the last example, the witness first glosses the defendant's words, “he cussed her out,” while retaining the prosecutor's framing of agency, with the defendant in the agent and subject role. The prosecutor probes further, however, inquiring what exactly the defendant said. In reporting the threatening speech of the defendant, the jury is given a more vivid picture of the defendant as the agent of a violent act. In all these examples, the reported speech foregrounds the defendant’s perspective on the events, bringing jurors into closer contact with his actions, just as putting him as the subject of an agentive act does (Duranti 1990).

These examples can be further explained through D'hondt's (2009) analysis of agency and intertextuality in criminal trials. In contrast to the instances of reported speech outlined above, D'hondt describes prosecutors' accounts of police officers' actions in a context in which defendants were charged with criminal behavior against those officers. As the prosecutor reads from the police reports, she does not specify the police officers as authors of the defendant's utterances. This, D'hondt argues, “serves to minimize the intertextual gap between reporting and the reported event. In this sense, the footing adopted by the prosecutor perpetuates the objectivization of the defendants’ linguistic-interactional conduct as presented in the narrative structure of the incident”

(ibid.:267; see also Bauman & Briggs 2009, Volosinov 1986). Thus the interactional management of reported speech in this context serves to underscore the objectivization of the police officers' actions as fitting into institutionalized classes. Furthermore, the prosecutor's role as a “mouthpiece” of the collective of the state downplays her individual agency in framing the utterances and events conveyed. In my examples above, however, instead of downplaying their roles in the events depicted and decreasing the intertextual gap between reported and reporting events, the witnesses directly attribute the reported speech to the defendant and emplace themselves in the encounters with him that they portray (“I could hear him yell,” “he...told me”). This serves to highlight the defendant's individual, intentional behavior and its incendiary, violent and thus criminal nature. This framing of the defendants' utterances also conveys to the jury the witness', not just the defendants', emotional involvement in the events described (D'hondt 2009.:270), thus highlighting the defendants' behavior as threatening and dangerous.

## **6.4 Mitigating the defendant's agency**

### **6.4a. Passive Voice**

As seen in the analysis of jurors' reflections on their decisions above, passive voice is a common tactic whereby a speaker may mitigate his/her or another subject's agency in a given action. In addition to contexts in which jurors discuss their own agency in their decisions, this linguistic resource is seen in depictions of defendant's purportedly criminal actions and their respective roles in such actions. How agency is framed in these contexts is especially significant because the sentencing process requires that jurors deem the defendant to be a future danger in order to sentence him to death. His involvement in past dangerous actions is central to this finding.

The following example does not pertain to criminal actions, but is a clear illustration of how passive voice can grammatically mitigate a person's agency in an action, and with thus serve as an introduction to this section. This excerpt is drawn from the punishment phase of a trial. During direct examination, a defense attorney questions the defendant's biological mother about putting her son up for adoption:

*Example 6.1*

W: I always wanted to keep the baby. My mother and my stepfather had other plans.

...

D: And what did you decide you were going to do?

A: Michael **was put up** for adoption.

The witness first expresses her desire to keep the baby, which her parents oppose (she was in high school at the time). The defense attorney then asks her what she decided to do, to which she answers: “Michael was put up for adoption”. In this formulation, the witness uses the passive voice to convey the action -- “was put up for adoption” – thus deleting the agent (herself) from the utterance and placing the patient (Michael) in the subject role. This contrasts sharply to another possible formulation, such as “I put Michael up for adoption,” which would bring attention to her role in an agentive act. Through the passive voice, however, she reinforces her earlier point that her parents, not she, were the deciding factor in placing Michael up for adoption.

Throughout the punishment phases of trials, attorneys and witnesses often vary in how they attribute agency to the defendant in dangerous acts. Not surprisingly, defense attorneys will often use mitigated forms, such as the passive voice, in direct contradiction

to a prosecutor's formulation, when describing a defendant's dangerous act. In the following, a former teacher of the defendant's is questioned by a defense attorney about a disciplinary infraction the defendant was engaged in:

*Example 6.m*

D: And that was more between you and [defendant's name].

W: That was between- that was between the three of us and the student that **was being called names at that point.**

D: Even in that incident **[defendant] did not assault anybody.**

W: No. no.

In the witness' description of the infraction in which he and the defendant were involved, the defendant is not singled out at all as an agent, but, rather, the passive voice allows the witness to highlight the patient's (student's) involvement in the act that is portrayed as having no agent. The defense attorney then reformulates the action in the negative, placing the defendant in the agent and subject role. Thus, through his grammatical framing, he explicitly denies the defendant's personal responsibility for dangerous behavior.

In this next example, the father of the defendant is cross-examined by the prosecutor during the punishment phase of a trial. The attorney is going through the defendant's criminal and background records, questioning the father about specific incidents:

*Example 6.n*

P: August 13<sup>th</sup>, 1997, you have Mr. D load a shotgun and point it at you. You don't remember telling that to any counselor?

W: No.

P: So that would be an incorrect statement by the counselor?

W: Absolutely. I never- I don't remember that. Point a shotgun at me.

P: Pointed it at you?

W: I would remember that. Absolutely not.

P: Or your wife, sir.

W: I don't remember a shotgun being pointed at anybody.

P: Okay, so that just did not happen, right sir?

In this colloquy, the father challenges the prosecutor's assertion that the defendant engaged in an act that would very likely convince a jury of his dangerousness; he pointed a shotgun at his own father. In his challenge to the attorney, the father progressively mitigates his son's agency in such an act. In the attorney's first formulation, the defendant is subject and agent of the violent act: "Mr. D load a shotgun and point it at you." After denying its occurrence outright, the father reformulates it: "I don't remember that. Point a shotgun at me." Here, the defendant is removed from the utterance as agent of the action; the agent role is omitted and left implied. After the attorney reiterates this reformulation, "Pointed it at you?", the father further mitigates his son's agency through the passive voice: "I don't remember a shotgun being pointed at anybody." Here, the implied agent is again omitted and taken out of the subject role. Thus, in addition to explicitly denying that the action happened, the father eliminates his son's agency in even the hypothetical act through his grammatical framing.

Sarat (2008) analyzes a collection of clemency petitions, identifying one class of them as seeking the reversal of death sentences because the defendant was not entirely culpable for the crime for which he was committed. He provides an example of one such petition:

“[T]ragically, the direction into which **these people led Billy** was negative. **Roy Charles introduced Billy** to heroin and before long he was heavily involved in shooting up heroin and in taking a variety of other street and prescription drugs ... The other direction into which Billy **was led** was criminal activity. Gradually Billy **was transformed** from a meek, frightened teenager into a person who was not afraid to break into houses, steal property, and commit robberies.” (Sarat 2008:25)

In this excerpt, responsibility for the crime is relegated to “these people,” including one in particular, who is said to have coerced the defendant to commit criminal acts and thus were the agents of leading and introducing Billy to a criminal path. The passive voice is used to highlight this perspective on agency.

The petition's authors go on to describe the crime for which Billy was sentenced:

“On August 23, 1976, at approximately 6:00 p.m., Martha Laura Spinks **was killed by a single shot** from a 38 caliber gun in the office of the furniture store owned and operated by her and her husband, Alge Spinks. Ms. Spinks **was shot** during the course of an **incident involving Billy White.**” (*ibid.*)

Here, again, the passive voice depicts the murder as happening at the hands of an agentless source, as Sarat describes, and the incident is described as only tangentially “involving Billy White” (*ibid.*)

This tactic of omitting the agent from the description of an action, as through the passive voice, is especially difficult for the legal system to deal with, for criminal law requires the general framework of defendant as agent + criminal action + victim as person action is inflicted upon (Conley & O'Barr 1990:48). Deleting the agent from an action and highlighting the patient as the subject of an utterance is thus a direct subversion of this legal logic of causality and responsibility.

#### 6.4b. Other tactics for mitigating agency

During the penalty phases of capital trials, defense attorneys often bring witnesses to speak of a defendant's troubled past, including things like dropping out of school, mental illness, drug abuse, and trouble with the law. Jurors, if they consider any of this evidence mitigating, do so because they believe the defendant's actions were not entirely under his control. For many of them, moral responsibility lies in the purview of choice; if a defendant willfully committed an act and chose to do it with no other force operating on him, then his blameworthiness cannot be mitigated. When jurors speak of what might drive them to mitigate a defendant's sentence, it is because they feel that he did not commit the act entirely per his own choice.

Attributions of agency are central to this type of logic. When presenting their mitigating evidence, defense attorneys and witnesses have sticky terrain to negotiate, for they often must describe amoral acts the defendant committed. They illustrate some creative ways to encode agency in these cases. The following excerpt involves testimony from a man who ran a boys home in which the defendant resided for a time in his childhood.

##### *Example 6.o*

W: the...referral [to the home] was based on the fact that they thought Michael was ungovernable, meaning that his family could not adequately control him without somebody's help and that **he had engaged in some auto theft and some property destruction and had a checkered school past in terms of not doing so well in school.**

...

D: and **the types of behaviors that were seen are** truancy, ungovernable run-

away, is that correct?

W: Right. **Defiance, verbally abusive**, theft of cash, stolen vehicle, property destruction and a couple incidents of self-harm.

Here, we see the introduction of some criminal and potentially violent behaviors the defendant engaged in when younger. In the first passage, the witness, while placing the agent [defendant] in subject position, grammatically distances the subject from the acts committed through extended verb forms: “he **had engaged in some** auto theft...” and “had a checkered school past in terms of not doing so well in school.” The subject/agent he, is distanced from the categorically bad acts, auto theft and doing badly in school, through other verb phrases, had engaged in and had a checkered past. This distancing is made clearer when comparing the alternatives – he stole some cars and he did badly in school – in which the agent and action are directly proximate. The defense attorney sums up his destructive behaviors in a later question, eliding the agent altogether by evoking the passive voice, as seen the above example: “the types of behaviors that were seen.” The witness, in his answer, continues this framework, nominalizing the actions (defiance, theft of cash, etc.), similarly omitting any agent.

### **6.5 Competing accounts of agency**

The process of courtroom questioning has been referred to as the “lawyer witness duet” (Barry 1993). Though this depiction omits other voices and audiences besides the lawyer and witness who often greatly influence the meaning of a given spate of talk, it captures well the negotiation that occurs in creating certain interpretations of a set of events. For instance, the following example, in which a prosecutor cross-examines a defendant,

reveals how the defendant's role in a criminal act can be reconstituted and thus recast between two speakers:

*Example 6.p*

PROS: What type of person is going to go into a house and shoot a woman three times at point-blank range? What kind of person does that?...What kind of person does that, tell me?

WIT: I didn't kill my girlfriend.

...

PROS: Whoever this person is that executed Kristina, just did it to be vicious and mean; is that true?

WIT: I don't understand the mind frame of that person and for what reasons he done it.

The prosecutor knows he cannot ask the defendant, "did you shoot someone three times at point-blank range?" The defendant will merely deny it. Instead, he uses an indefinite descriptor, "type/kind of person," as the agent of these supposed hypothetical crimes committed. The defendant picks up the fact that he, despite the construction of the questions, is the implicated agent and responds, "I didn't kill my girlfriend." In the next line of questioning, however, the defendant uses the distance the attorney has created between him and this hypothetical agent, through the indeterminate agent and hypothetical framework, answering, "I don't understand the mindframe of that person."

## **6.6 Jurors' theories of agency**

In their post-verdict interviews, jurors readily theorized about agency, responsibility, and defendants' roles in the crimes of which they were convicted. Deliberations during the first phase of trials – guilt innocence – are explicitly directed towards questions of agency. Jurors are required to determine whether the defendant intentionally committed

the acts outlined in the indictment. In the penalty phase, a defendant's guilt has already been established; jurors deliberate about the appropriate punishment. Though this phase does not explicitly involve the nature of the criminal act, jurors almost unilaterally assess the defendant's criminal and related intentions in assessing punishment. This is partially so in Texas due to the penalty deliberation scheme. In both special issue questions, jurors are advised that they may take the circumstances of the crime into account when making this decision (special issue #2 cites this expressly). For many jurors, the mitigation question directly relates back to the crime; they see mitigating evidence as any that would excuse the act for which the defendant was convicted (the usual answer to this being that no evidence could excuse such an act).

As seen in jurors' attributions of responsibility for criminal actions, the concepts of rightness of mind, individual action, and choice are central to jurors' notions of criminal agency. While these are central to finding a defendant guilty of a crime, they are often discussed in conjunction with reasons for finding him to be a future danger and for assessing the death penalty. First, jurors often comment that a defendant was, as one juror puts it, "in his right mind" at the time of the crime. In other words, for an act to be intentional, the person should be cognitively sound at the time of commission. A number of jurors commented on this practical logic:

*Example 6.q*

J1: this guy doesn't even cross his mind on what he did. And at the same time, **he was in his right mind** when he did it.

J2: ...there's a lot of people that live like the way he lives. But it was him, he

was old enough, **he was in his right mind**, he did what he did with, with no remorse.

J3: I really had to do a lot of soul searching and say okay, **he knew what he was doing. He wasn't on drugs. He wasn't drunk. You know he was not mentally ill**

In these examples, jurors link a defendant's sound mental state with issues of remorse and their own ability to give him the death penalty. If the defendant had been mentally ill or under the influence of drugs, they would not have deemed him as culpable for his actions.

The mitigation question throws a complicating wrench in the issue of agency. Defense attorneys attempt to convince jurors that they should be more lenient in their sentencing because of particular issues in defendants' pasts, such as abuse, physical injury and drug abuse. While their instructions do not require this, many jurors envision mitigating evidence as directly related to the crime and specifically, as a mitigation of the defendant's culpability (the words of the instruction state that the defendant's "moral blameworthiness" is what is being mitigated). This can be seen in the following interview excerpts:

*Example 6.r*

J1: ...they brought his real mother in and tried to say, you know, **this is why he did this and this, you know but, it just wasn't a good, wasn't a good reason to kill somebody.**

J2: I always thought you couldn't test that [being bipolar] um, to me **it was like an excuse just to, an excuse about what he did.**

J3: ...you're still responsible. **Even if you had a lousy life. At some point you still have to make good decisions.** And um, you know and very much believing that **we're accountable. We have to be accountable for our**

### **actions.**

Thus in these examples, while being under the influence of drugs may mitigate someone's accountability for a criminal act, aspects of his history generally will not. How these jurors formulate the deficiency of this evidence in reducing a defendant's moral blameworthiness contains implicit and explicit notions about intentionality: "it wasn't a good reason to kill somebody," "it was...an excuse about what he did," "you still have to make good decisions...we have to be accountable for our actions." Thus actions, especially criminal ones, require a reason in order to be forgiven or excused and each person is accountable for the actions they engage in. These assumptions are in fact central to American legal notions of intentionality and culpability.

Many jurors argued that this type of evidence regarding the defendant's past was not mitigating because numerous people encounter similar difficulties in their lives, yet they do not commit crimes such as murder. The following examples illustrate this logic, which I found quite common among capital jurors:

#### *Example 6.s*

J1: and a lot of us have experienced or known people who had a lot worse childhood than that, that didn't, you know, go on to do this.

J2: Most people don't murder somebody when they have that kind of a life they do other things

J3: He did come from a family that was all messed up? But like I said who's not messed up.

J4: we've all had bad experiences in life and we've all had to, be responsible for our reactions to...we can choose to be bitter about it or we can choose

to, you know, do something positive with it.

J5: I've got good friends that are bipolar that, one of em's a, you know the director of a behavioral health place and she's...still responsible for her decisions.

Thus we see here a common barrier to considering mitigating evidence “sufficient” to reduce someone's sentence. These examples illustrate also the centrality of choice to jurors' ideas of culpability. Despite one's upbringing and potential mental illnesses, they are still an individual with a will who is free to choose his own course of action. A question vital to defense attorneys is thus, what might propel mitigating evidence to be more than mere excuse? In the words of the jury instructions, how might jurors see mitigating evidence as sufficient to reduce a defendant's blameworthiness? A juror ponders this very question:

*Example 6.t*

where do you draw the line between accountability for your actions and, you know, you you don't stand a chance of making good decisions based on all this stuff.

What jurors are looking for is some indication of control – that individual choice was impeded in the commission of an act. Many explained that they would have found a particular piece of evidence sufficiently mitigating if there was proof of some sort of causality between the mitigating factor and the crime, In other words, that the persons action was caused, not by their individual will, but by some factor external to their intentionality in the moment of the action. Consider the following interview excerpts:

*Example 6.u*

JM1: Nobody said he was of course insane. Nobody said that they guaranteed that **this was what caused all this** and a lot of us either had experienced or have known people who had a lot worse childhood than that that didn't, you know, go on to do this.

MP1: I believe there are circumstances that a person might get into, where **it's not totally within their control**...and I think that's what the mitigation question is intended to ask. Was there some coercion? You know was [co-defendant] the ring leader?...you know was he led down this path by another?

LK3: until you really heard a lot of what the defense had to say, about **how that affects people and you know this, how it affected him**...I didn't really look at him as anything but just some mean guy **that's just randomly out doing things**.

LK3: I guess if the mother had confirmed she was on drugs, and there was some confirming medical evidence that **being on drugs could cause a brain malfunction of not being able to determine right and wrong** I- you know something that that we would have to see as almost irrefutable fact. In order to be mitigating...

In these examples, jurors ponder potentially sufficient mitigation evidence. A missing element to the presentations of mitigating evidence during their trials was what would be perceived to be causation, again stating that the defendant's actions were not entirely due to his individual choice. Because these causal links were left unproven by the defense teams, the jurors did not consider the mitigating evidence to be sufficient to warrant a life sentence for each defendant.

When talking about the crimes committed, overwhelmingly, jurors expressly cited the defendants as agents in their acts (one exception is the excerpt above, in which the juror recounts piecing together evidence during the guilt phase). This should come as no surprise, in that the jurors have found the defendants guilty, meaning they intentionally

(or knowingly, in some cases) committed such acts. In this way, in line with the analysis presented above, the jurors conceptualize defendant's crimes as resultant of their individual choices to commit such acts.

*Example 6.v*

MP1: It was one of those spur of the moment things **they decided** they wanted the car right then and they went back and one went to the front door and knocked the other snuck in the back and **he shot her**.

MP1: He got the car, and then **still killed two people** after he, **he murdered the mother**. And then, afterwards **he went after the son and his friend**.

LK1: **He killed four, uh three innocent people. And the dog**. And before that **he had killed another couple** before that...So it wasn't like, he didn't, **he didn't do it just because he needed something**.

LK3: **it was so calculated** in the way he goes into this house, he kicks the door in and they're all asleep and he goes and **he shoots em** and he flips the light on **he sees it's a kid, shoots the kid**...and how in the world can you not give him the death penalty?

In these examples, we see bold, unmitigated expressions of the defendant as agent in violent acts for which he was found guilty. Each also includes an assessment (Goodwin 2007) regarding the intentionality and individual choice with which the defendant committed the crime and that no reason could account for such a choice: “they decided,” “still killed two people,” “he didn't do it just because he needed something,” “it was so calculated.” Thus the grammatical framings of agency in these examples serve to bolster the assessments of individual intentionality behind the acts. In the last example, we see this logic explicitly cited as the reason to give the defendant death. As publications from the Capital Jury Project (e.g., Eisenberg et al. 1998) have demonstrated, the crime itself is

the primary consideration jurors have when considering a defendant's penalty. Theories about intentionality embedded within these considerations are thus crucial to these decisions as well.

### **6.7 Concluding remarks**

This section has illustrated the theories of agency that undergird jurors' decisions about punishment and their conceptions of their own roles in these decisions. These, which are often contradictory, are inculcated in jurors during the voir dire, before they are even seated on the jury. Attorneys' and witnesses' grammatical framings of agency during the trial further complicate the picture of agency attribution. These framings that jurors are presented with are then integrated in jurors' decision-making, as can be seen in their post-verdict reflections on the process.

As mentioned at the start of the chapter and discussed in Chapter Three, defendants do not get to tell their own stories in court. Their voices are highly mediated, and thus what they did and their intentions behind their actions are conveyed through other people's depictions. Examining exactly how these depictions attempt to capture the defendants' agency in their actions is crucial to grasping how jurors attribute intentionality to defendants, which allows them to render guilty verdicts and, in most cases, informs their penalty decisions.

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## 7. CONCLUSIONS

This dissertation began with a question: how can one human being sentence another to death? We have learned that jurors must negotiate conflicting demands of the capital punishment system. On one hand, they are required to evaluate the worth of a defendant's life, which would seem to necessitate some sort of human connection. On the other hand, legal practices for the most part treat defendants as dehumanized objects. As I have shown again and again, language and embodied communicative practices are the resources employed by jurors for this negotiation. They are used for constructing defendants as particular kinds of persons – namely criminals – and for dehumanizing them. We have seen that linguistic constructions of agency inform jurors' attitudes and judgments about defendants' criminal behavior and their degree of responsibility for such behavior. Particular references to defendants in conjunction with these constructions of agency further implicate defendants in actions that are deemed out of the normal scope of human behavior. Distancing reference forms like “that defendant,” for example, downplay the individual identities of defendants thus, I argue, aiding jurors in sentencing defendants to death.

This process of distancing and dehumanization is further promoted by legal ideologies that extenuate and disregard empathy and other kinds of emotions as possible factors in legal decision-making. My juror interview data have shown, however, that the embodied actions of defendants – such as their interactions with attorneys, their facial expressions and vocal reactions to testimony, and their eye contact or lack thereof with

witnesses and jurors – are very much present in the minds of jurors when considering whether to vote for life or death. These actions, furthermore, serve as data for jurors' judgments about defendants' (non)displays of emotion and whether these coincide with jurors' expectations about what is “normal.” As we have seen, the lack of an expected emotional display can lead a juror to conclude that a defendant is not fully human.

This study has revealed, therefore, that death decisions encompass much more than a mere stymying of empathy (Haney 2004). Jurors must navigate a central tension between legal language and ideologies that conceal defendants' humanity and humanizing encounters with defendants co-present in the courtroom. In sum, this study has shown how language plays a key role in the making and unmaking of defendants into human beings. As a result of the language practices shown here, the lives and humanity of defendants are called into question even before the literal taking of life is effected.

This leads me to a second question: is a juror's death sentence an act of violence? Anthropologists have theorized violence as it is produced and consumed in everyday life and have shown, through ethnographic accounts of “ordinary” practices, how this production/consumption creates certain kinds of subjectivities (Das & Kleinman 1997). This work tends to focus on what Das & Kleinman refer to as “the more subtle forms of violence perpetrated by institutions of...the state” (*ibid.*:2; see also Das 2007, Daniel 1996). In a slight deviation from this perspective, this dissertation has shown that when engaged in an overtly violent state practice – the death penalty – jurors, attorneys and judges conceal and confront their involvement in the violence inherent to this practice.

Linguistic constructions of agency, for example, have been shown to mediate jurors' relationships to their own life and death decisions. When citing the actual act of execution, jurors often displace agency for death decisions onto the state or deny human agency in such an action altogether. Potential jurors, furthermore, often state that they could not sentence someone to death once they had looked him in the eye and thus engaged with him in-person as another human being.

Jurors engage with a subtler form of discursive violence alluded to above – the linguistic dehumanization of defendants. Foucault took a strong position on this, arguing that “[w]e must conceive discourse as a violence that we do to things, or, at all events, as a practice we impose upon them” (1972:229). From this perspective, the linguistic making of persons and reality can in this view be considered a violent act. This study has shown the consequences of the constitutive power of language in deciding a person's fate. In the case of deixis, for one, adverbs such as *here* and *there* or pronouns such as *I* or *we* bring into existence particular, morally valenced entities, including the kinds of persons that are spoken of and their relationships to one another. Deictically referencing a defendant as distant to the speaker and to other similarly moral beings has been shown to constitute defendants as amoral and potentially nonhuman.

Legal contexts amplify the world-making function of language, as it takes place in a realm where judges and jurors make practically consequential decisions about other people's lives. A leading scholar of law and violence, Cover (1993) places this attribute of legal language at the center of what he argues to be law's necessary violence. The

preceding analyses have indeed shown that transforming a human being into a particular institutional person – a defendant – facilitates jurors' making decisions to take his life. This power is enhanced when the construction of a criminal occurs before a verdict has been rendered. Consider, for example, the recent controversy surrounding the New York Police Department's handling of Dominique Strauss-Kahn before his trial had even begun. He was subjected to the infamous “perp walk,” during which he was dramatically portrayed as a criminal before a jury set eyes on him in a country where indicted persons are to be considered innocent until proven guilty.

This dissertation shows, however, through empirically grounded analysis, that language practices used in legal contexts do not merely constitute acts of violence. In rendering death verdicts, jurors are not simply pawns in the machinery of the state. They negotiate their involvement in and attitudes towards this violence in intricate, contrasting ways. Despite the power inherent in legal language, which is seen in the influence of attorneys' and judges' *voir dire* socialization on jurors' thinking about the death penalty, the human encounter in its primordially – the ethical relationship to the other as embodied in his face (Levinas 1987, 1969) – is never fully institutionally suppressed. In his haunting memoir about serving as an execution warden, Donald Cabana writes of his relationship with a particular death row inmate. This serves as a vivid depiction of the human encounter that many jurors struggle with during death penalty trials:

“Connie Ray Evans and I transcended our environment and the roles in which we had been cast. The two of us had somehow managed to become real people to

each other. There were no more titles or social barriers behind which either of us could hide. I was no longer a prison warden, and he had become someone other than a condemned prisoner. We were just two ordinary human beings caught up in a vortex of events that neither of us could control.” (Cabana 1998:16-17)

In capital trials, as in this warden's relationship with a man on death row, jurors deal with both the institutional, dehumanizing discourse of the law and the vulnerability of face-to-face encounters, which may give them pause about sending a man to his death. Thus it is in the intricate, embodied communicative interactions of capital trials that the workings of this particular form of state violence can be seen. On a practical level, while capital punishment remains a legal reality, lessons from this study provide insight into ways to curtail its implementation.

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