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Citizenship and punishment: Situating death penalty jury sentencing

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Abstract

Although capital punishment in the United States is subject to much social scientific scrutiny, there has been little ethnographic study of death penalty trials. This is not only an empirical lacuna, but also a theoretically and politically important one: by failing to take capital trials as primary objects of inquiry, the practices of lawyers, witnesses, judges, and others are viewed as products of, rather than implicated in, the institution of criminal justice. Based on an ethnography of fifteen death penalty sentencing trials across the United States during 2007, 2008, and 2009, this article seeks to understand the role of juries in capital trials. While judges customarily make sentencing decisions in American criminal cases, capital cases require jury sentencing. Key to understanding this unusual requirement is the recruitment of potential jurors into a role I term *punitive citizenship*. Through the process of choosing ‘death qualified’ jurors for trial, capital jurors are asked to call upon their own moral positions in conjunction with their responsibility to the collective to decide on appropriate punishments for defendants who are singled out for capital prosecution by the state. This ensures that capital jurors take personal responsibility for the punishment decision. The article argues that this process blurs the lines between state and citizen action, solidifies the types of homicides that are designated worthy of capital punishment, and allows the state to neutralize some of the historic problems with state-sponsored death sentences.

Keywords

culture, death penalty, ethnography, sentencing, trial

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Introduction

Although capital punishment in the United States is subject to much social scientific scrutiny, there has been little ethnographic study of death penalty trials. Legal scholars offer histories, analyses and criticisms of many legal components of death penalty trials, but ethnographers¹ have barely explored the site. This is not only an empirical lacuna, but also a theoretical and political one. The complex social world and phenomenology of the trial is an oft-overlooked site of analysis for criminologists. By failing to take this as a primary object of inquiry, the trial practices of lawyers, witnesses, judges, and others are viewed as *products of*, rather than *constitutive of*, the institution of criminal justice (Rock, 1993). This is especially important when studying an institution with the symbolic strength of capital punishment. Actors craft even the most potent of social systems, and studying actions and their meanings gives us new purchase on how practices and institutions are co-produced.

Death penalty sentencing trials are exceptional sites in which to study the practices of punishment decision making in the US criminal justice system. In the vast majority of criminal cases in the United States, an offender's sentence is decided without a trial. Most are instead negotiated between prosecution and defense as part of a plea agreement. For the small percentage of criminal cases that do go to trial, the judge, who may or may not hear evidence regarding the offender's social history, sentences the offender in large part according to state and federal guidelines. In order for a state to pursue the death penalty however, the United States Supreme Court requires not only a trial, but also a sentencing decision made by a jury (*Ring v. Arizona*, 536 US 584 (2002)).² If a defendant is found guilty of capital murder at a trial where the death penalty is a possible punishment, the jury reconvenes and hears testimony about the 'character and propensities of the offender' from prosecution and defense witnesses. The jury then votes on whether the offender deserves death, as argued by the prosecution, or life in prison as argued by the defense.

This article attempts to make sociological sense of this exceptional involvement of juries in criminal punishment decision making, asking: how is capital jury sentencing produced in practice? Are there factors that take place in practice that help explain the institutional form? Drawing on ethnographic observations of death penalty sentencing trials around the United States, I found that a key element of capital sentencing trials is the recruitment of jurors into a role that I call *punitive citizenship*. This recruitment cultivates and selects jurors who express a willingness to make a personal, moral punishment decision in the name of the State. I theorize that this form of jury sentencing allows the State to carry out a controversial procedure by sharing responsibility with the citizens who participate, blurring the boundaries between the actions of states and citizens. This suggests that controversial state actions may be made more tolerable in general by blurring the lines of responsibility, and that this blurring is one of the social functions of capital jury sentencing.

Background

US death penalty trials, pre- and post-Furman

Modern death penalty sentencing in the United States is structured by a series of Supreme Court decisions begun more than three decades ago. Today, in order for a death sentence to be imposed, an aggravated murder must be committed in one of the 34 states where capital punishment is legal; the murderer must not be under 18 (*Roper v. Simmons*, 543 US 551 (2005)), or mentally retarded (*Atkins v. Virginia*, 536 US 304 (2002)); a district attorney must decide to pursue the death penalty; and a jury must decide that the offender deserves the death penalty rather than a lesser sentence. This modern form began its development the late 1960s, when countries throughout the western industrialized world were abolishing capital punishment. In the United States, many states had abolished the practice, and the remaining states varied greatly in the level of autonomy jurors were given in deciding convicted murderers' sentences.

In 1972, a national ban on the death penalty was temporarily established through the Supreme Court decision *Furman v. Georgia* (408 US 238 (1972)). *Furman* argued that racial bias against African-Americans directly influenced the imposition of the death penalty; judges and juries were more likely to impose the death penalty on African-American defendants than on white defendants. While the Court was unwilling to find specific racial bias, it did find that capital punishment was imposed upon a 'capriciously selected random handful' rather than those who most deserve it, thereby violating the Eighth Amendment's ban on cruel and unusual punishment. To remedy this, states created new schemas for capital sentencing, meant to prevent arbitrariness. Solutions varied from state to state, but generally required that juries consider evidence about the offender's social background:

The respect for human dignity underlying the Eighth Amendment... requires consideration of aspects of the character of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the ultimate punishment of death... [to prevent defendants being treated as] members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty. (*Woodson v. North Carolina*, 428 US 280 (1976): 303–305)

The Supreme Court's insistence that juries consider the character of the defendant has solidified the role of lay people in making capital punishment decisions in trials across the country. If a defendant is found guilty of capital murder at a trial where the death penalty is a possible punishment, a second 'penalty phase' follows. The penalty phase is meant to provide jurors with information about the defendant's character so that the sentence is appropriate not only to the crime, but also to him as a person.³ While penalty phase trials are familiar in their form – opening and closing statements, defendant's council table and prosecution table, objections, bench conferences, and witnesses called to testify, for example – their content is less

familiar to the criminal justice system. For days, weeks, or months and to differing degrees of effectiveness depending on the relative skill and effort of the participants, prosecution and defense use a variety of tactics that they think will persuade jurors to link the defendant's particular character to a lesser or greater punishment. Testimony might be taken from physicians, friends, and family of the defendant, survivors of the victim, psychiatrists, psychologists, statisticians, religious figures, prison guards, and others, called by both prosecution and defense. The testimony of these witnesses can be used for opposite ends, depending on whether it is used by the prosecution or the defense. A physician might explain a defendant's impairment at the time of the crime, or might suggest that the defendant will always be a danger to others. A clergyman might testify that the defendant has found God and is therefore salvageable or testify that the family of the victim has a spiritual need to see the death of the defendant.

While the history of the *legal* rebuilding of death penalty sentencing post-Furman is well documented (see, for example, Banner, 2003), we know little about how the *practices* have been built. One piece in understanding why jurors were more tightly integrated into capital sentencing to solve the problem of guaranteeing the defendant both individual consideration and equal protection (as opposed to another solution), involves asking what this form accomplishes. Scholars of capital punishment suggest that the death penalty has functional, cultural, and political roles in modern USA (Garland, 2009). The death penalty is used rarely but carries great symbolic weight. In 2002 for example, over one million Americans were convicted of felonies, more than 14,000 homicides were recorded, 155 people were sentenced to death, and 71 were executed.⁴ Despite this, capital punishment makes up a disproportionate proportion of the United States Supreme Court docket (Latzer, 2002; Liebman, 2000), inevitably requires a position from local and national politicians, and remains actively divisive in national public opinion and policy debates (Ellsworth and Gross, 1994; Jacobs and Carmichael, 2002; Jacobs and Kent, 2007; Langer and Brace, 2005; Messner et al., 2006; Mooney and Lee, 2000; Soss et al., 2003; Stack, 2000; Unnever and Cullen, 2007). Questions about whether the death penalty acts as a deterrent (see, for examples, Fagan and West, 2009; Yang and Lester, 2008), and whether it is inherently racist (Baldus and Woodworth, 2003; Baldus et al., 1998, 2009; Liebman, 2000; McAdams, 1998; Radelet and Pierce, 2009) are two of today's most enduring debates about the system's function. Debates about why the United States is the only industrialized western nation to retain capital punishment invites cultural, political, and historical theorizing about the USA's 'exceptionalism' (Garland, 2005; Greenberg and West, 2008; Hood, 1996; Lynch, 2002; Sarat, 1999, 2002; Steiker, 2002; Whitman, 2003; Zimring, 2004).

The everyday working of the institutions that constitute the death penalty system has been shadowed by the interest in theorizing the whole, and this is especially true of death penalty trials. The United States Bureau of Justice Statistics collects extensive data on homicides, arrests, and prison sentences for convicted murderers; advocacy organizations, such as the Death Penalty

Information Center and Human Rights Watch, have extensive information on the people on death row and state execution processes; and the National Center for State Courts records all types of criminal sentences, but no national organization tracks when or where death penalty trials are happening around the country, nor their results. A few states and localities have begun to require such information, but there is no national compendium of information about death penalty trials in the United States.⁵ Without this information we cannot make systematic claims about death penalty sentencing trials, and trial practices remain disconnected from the larger role of capital punishment. This study remedies this in part by observing selected capital sentencing trials in order to begin to identify common practices.

Methods

Because a lone researcher cannot undertake a comprehensive survey of national capital trial practices, I used a systematic sample of trials for observation. In lieu of any definitive population from which to sample, I used newspaper accounts of US capital trials compiled by the American Judicature Society.⁶ These provided a sketch of where capital trials take place around the country. By combining this with previous findings suggesting that trial outcomes vary by county demographic differential (Eisenberg, 2004; McCarthy, 2005), level of funding available for indigent defense, and race of victim and defendant (Allen and Clubb, 2008; Baldus and Woodworth, 2003; Baldus et al., 1998; Bright, 1994, 1995; Brundage, 1993; Fleury-Steiner, 2004; Liebman, 2000; McAdams, 1998; Ogletree, 2002; Tabak, 1994; Vick, 1995), I chose selectively a number of state and federal death penalty sentencing trials for tracking and observation, with the goal of maximum variation. During 2007, 2008, and 2009, I observed three federal and 12 state trials in Connecticut (one) Pennsylvania (two), New York (two), Virginia (one), Louisiana (three), Texas (five), and Illinois (one). Trials ranged from several days to several weeks. In total this amounted to more than 600 hours of observations of the jury selection, guilt/innocence, and penalty phases of capital trials in 15 courtrooms.⁷ The data and analyses culled from these observations are the first ethnographic data compiled from multiple capital trials across the country. They are preliminary in this sense, and are meant to open doors for further exploration.

In the following sections, three major practices that structure jury participation in death penalty trials are described. First, in every state the population of homicide defendants must be greatly reduced to a group who are deemed most appropriate for capital juries to try and sentence. Second, the population of potential jurors is reduced to select jurors who are deemed appropriate. Third, jurors and offenders meet in proceedings that link the decision-maker closely to the decision through personalized testimonies and individualized deliberation schemes. These practices vary somewhat from state to state and courtroom to courtroom, but are generally captured in the examples described below. Taken together, they accomplish a rare but weighty event in which lay people are recruited into the role of

punitive citizenship. This functions not only to satisfy the Supreme Court requirement of individual consideration and equal protection for the defendant, but also to ease some of the cultural discomfort with the death penalty more generally.

Making capital trials

'The worst of the worst': Making capital defendants

The first step in producing capital trials in any state is selecting which homicide defendants will be tried capitally. In the public sphere, death penalty advocates frame capital defendants as the 'worst of the worst' of violent offenders. The legal criteria dictate that the death penalty is only on the table when an aggravated murder is committed in one of the 34 states where capital punishment is legal, and the murderer is over 18 and does not suffer mental retardation.⁸ Given that there are many times more aggravated homicides committed in the 34 states than there are capital defendants, those worth pursuing capitally must be identified according to some extra-legal criteria. As with all US criminal proceedings, it is primarily the prosecutors who decide under what circumstances charges are pursued. There are no national data describing even the most basic information about capital trials, so we cannot easily compare the population of aggravated murderers to those tried capitally. We know that an uncommonly high rate of murder in the United States involves young African-American men, aged 18–24, as both victim and offender, usually who are acquainted with one another before the incident (Fox and Zawitz, 2009). The dual epidemics of killing and incarceration of young black men arguably constitute the worst public safety problem in 21st-century USA, and prosecuting these capitally could arguably serve the goal of deterrence. But these are not the types of murders most likely to be tried capitally. Which murders are capital jurors most likely to be asked to sentence?

To answer this question in lieu of national statistics, I conducted a content analysis of one year's worth of newspaper accounts of capital trials as a proxy.⁹ Though media accounts are no substitute for official data on capital trials, they can be used to provide preliminary information that would not otherwise be available. The compiled accounts enabled me to create a sketch of the types of defendants that jurors are asked to sentence. Narrative analysis (Riessman, 1993) revealed four types of master frames repeated. Note how the language shapes the social types depicted:

1. An African-American or Latino man in his teens or 20s commits a murder in the street or other public settings such as a convenience store or fast food chain. The sale or use of drugs is often involved, and there are often multiple victims who are 'innocent' strangers. This category includes 'cop killings', and the accused are sometimes referred to as 'thugs'.
2. A slightly older white or non-white man commits a sexual act on a woman in conjunction with a murder. The victim and defendant might know one another

- or have met in passing, and the woman is usually taken from a 'safe' place such as her home or place of work.
3. A man breaks into a home at night and commits a murder or murders in the course of a burglary. The victim or victims are often elderly or otherwise vulnerable, and the race/ethnicity of the defendant and victim are usually the same.
 4. Either a man or woman commits an 'intimate' murder when a family member or person involved with an immediate family member kills multiple victims of the same family. It is rare to have a single homicide in this category. Children are often killed.

In all four types, the defendant is portrayed as poor and heterosexual, and usually male. Given that poor, non-white men are most likely to be involved in homicides, this is not initially surprising. But taken together, the four types specify situations beyond the most common type of murder, which generally involves two young men who are known to one another. Instead these four narratives describe what we might refer to as culturally 'normal' capital murders. In the course of non-capital criminal justice sentencing, culturally 'normal' criminal acts lead to 'normal' sentences not accounted for by legal code (Sudnow, 1965). This is also true for death penalty cases according to these preliminary data. The definition of the worst types of violence is culturally contingent in any society, indicative of a collective sensibility (Aijmer and Abbink, 2000; Stanko, 2003, Žižek, 2008). By examining the narratives that accompany the cases selected to be tried capitally, the cultural criteria for the worst violent offenders are evidenced. 'Normal' capital murders – the murders that most often qualify for capital punishment trials – are depicted in the media as thugs, marauders, perverts, or enraged cuckolds, suggesting these are the types of murders that are culturally most abhorrent. Capital jurors are not asked to punish the most common type of murderer – young men who kill other young men – that could arguably serve the purpose of deterrence.¹⁰ Instead, they are asked to punish the 'worst' as depicted in the above narratives. Capital jurors are recruited into state punishment processes defined by cultural rather than pragmatic crime reduction categories.¹¹

Making capital juries

The second practice common across capital trials is the selection of capital jurors from a pool of potential jurors, or 'venire people'. Jurors in capital trials not only decide whether an offender is guilty or innocent of an aggravated murder; they also decide what punishment the offender deserves if found guilty. Picking jurors to participate in a capital trial therefore requires a separate set of procedures from those used to pick jurors on an everyday criminal trial. In non-capital criminal trials, potential jurors answer questions about whether they know any of the parties in the case, have associations with the courts or police departments, or have medical reasons that prevent them from being in court all day, for example. But capital

jury selection requires that capital jurors are open to both life in prison and death by execution as a punishment for the accused. This makes for a strange and often lengthy proceeding referred to as 'death qualification', in which potential jurors must state categorically that they can consider a life or death punishment for someone well before they have declared him guilty, before they have even been seated on the case.

Capital defense lawyers and prosecutors routinely talk about how cases are won and lost at jury selection, before any evidence is officially presented to the jury. As one defense attorney told me, he lost several cases early in his career because he did not know how to 'cut' a jury:

I shudder every time I think about how many times I got it wrong... One that haunts me is the case where we had – put together a fairly compelling story of our client's life. Killed a two-year-old, beat her to a pulp. But we had two jurors that were holding out [for a life sentence]. Then we had a guy on the jury who said well, if we just give him a life sentence, he'll be out in 15 years, so they come back and they voted for death. First of all, they had misinformation, but the other thing is we didn't... empower them to hold out against the other jurors.

As this quotation illustrates, picking a jury can be as pressure-filled and haunting as what outsiders might consider the 'main' portion of the trial. In addition to looking for jurors who are sympathetic to their positions, lawyers are also working with such complex concepts as education and empowerment, as we will see further below.

Jury death qualification in the US criminal justice system has its roots in the early 20th century. Quakers were categorically not permitted to participate in proceedings that might lead to the death of another human being. This meant that venire persons had to be questioned about their religious beliefs before being seated on murder trials, as automatic death sentences used to follow from murder convictions. But it is only in the modern era of bifurcated capital punishment trials that we have a national standard for probing potential jurors to assess their qualifications. During the past three decades, the United States Supreme Court has issued multiple opinions prescribing to what extent a juror must 'believe' in the death penalty in order to serve on a capital jury, with the clearest definition in an early case requiring all jurors be 'willing to consider all of the penalties provided by state law' (*Witherspoon v. Illinois*, 391 US 510 (1968)). By observing the practices that accompany this procedure however, we see that capital jurors are not chosen for their ability to see both sides alone.

Days or weeks before the date of trial, depending on the organization of the court, dozens of jury summons are sent through the mail to venire persons. On the given day, they descend in mass and are given questionnaires to fill out. These are sometimes lengthy – up to 20 or 30 pages – and include questions about political affiliation, religious preference, education, media consumption, previous knowledge of the case, and personal history with the criminal justice system. In addition,

the questionnaires include inquiries into death penalty attitudes. The most general might ask, 'What are your feelings about the death penalty?' But they can also be very explicit, with questions that generalize from the specific details of the case. For example, in a case of involving an African-American defendant, one question asked:

Regarding the death penalty, which of the following statements most accurately represents the way you feel?

- I feel that the death penalty is applied fairly against minorities.
- I feel strongly that the death penalty is applied fairly against minorities.
- I feel that the death penalty is applied unfairly against minorities.
- I feel strongly that the death penalty is applied unfairly against minorities.
- I have no opinion whether the death penalty is applied unfairly against minorities

Upon completion, each venire person is given a number that corresponds with his or her numbered questionnaires. The completed questionnaires are copied and go to the prosecution and the defense for consideration. A number of venire persons will be dismissed immediately because of some problem with their answers. The remaining venire people are brought into the courtroom. Having received the questionnaires, judges and lawyers begin questioning potential jurors individually with the intention of dismissing all but the 12 to 15 people who will eventually act as jurors and juror alternates. At first, this makes for a confusing spectacle. Prosecutors, rather than trying to convince possible jurors to potentially vote for the death penalty, try to eliminate those that might not. This can make prosecutors sound like they are against the death penalty. Here a prosecutor asks a venire person about her questionnaire:

Prosecutor: Ma'm, I see you call yourself a Christian here. Does this affect your ability to impose the death penalty in any way? For example, I might believe as a good Christian that only God has the right to judge another human being.

Venire person: No sir, I believe that a person has to be responsible for his actions. He's got to answer to his fellow man on earth before he answers to God in heaven too.

Prosecutor: Okay, good, good...

Conversely, when a defense attorney in a different case questions a venire person who seems likely to be sympathetic to the defendant, she probes further.

Defense attorney: Suppose the defendant was shown to be a Mexican national here without papers. How do you feel about illegal immigrants? Do you think they should have the right to take up all of our time here? Or should we just deport them?

Potential juror: I really don't have a blanket opinion.

Defense attorney: Well, do you speak Spanish?

Potential juror: I grew up in Texas so I know all the bad words.

(Everyone laughs...)

This reverse-questioning technique not only assures the court that the venire people can consider both life and death sentences, it also works to find jurors who are comfortable enunciating their positions, and sticking with them despite opposition. After satisfying himself that the venire person above is comfortable with the death penalty in the abstract, the prosecutor moves closer to stand next to her and lowers his voice to a more intimate tone:

Prosecutor: Now (pointing to a small woman sitting off to the side in one of the rows of audience benches who looks to be in her 60s, and is washed out in a bluish skirt and tan blouse), are you going to be able to sit there and look at his family, look at his mother through all this? Are you going to be able to look at his mama and tell her that her son deserves to die?

Venire person: Uhhh... (hesitating)

Prosecutor: (Shaking his head, turning away from the venire person on the stand, and talking broadly to the jury pool again) Well, considering that is part of the job here. Part of the job.

The prosecutor later moves to dismiss this potential juror. The defense attorney in the second case takes a similar tack, trying to confirm that a different venire person is comfortable making a decision, even if it is unpopular:

How would you feel having been told by other jurors that all immigrants should get the worst punishment? Okay? No one can tell you that you are wrong in your choice of which religion to belong to, right? This decision is just like that. It is a personal, moral decision.

In case after case, the more aggressive lawyers dismiss jurors who do not demonstrate a commitment to exercising their own moral judgment. The more lackadaisical lawyers try to do the same, asking pro forma questions like, 'Are you gonna stick by that?' or 'Is anyone going to be able to talk you out of that?' and it is difficult to tell whether the venire persons' noncommittal 'uh-huhs' are heartfelt. Regardless, the jurors who are eventually empanelled have committed to not only participate in the proceeding, but also have displayed the willingness to take personal responsibility for their opinions. Jurors who cry or are otherwise unable to commit to being able to sentence the defendant are routinely dismissed.

Having a ‘stick to your guns’ attitude (as one prosecutor put it), is not problematic per se. Previous research suggests that death qualified jurors are more likely to issue convictions than non-death qualified jurors (see Bowers et al., 2009 for a recent compilation of relevant studies), but more research would be needed to see whether a juror who begins with a committed attitude is also more likely to convict. Regardless, the present study’s finding signals particular attention paid to recruiting jurors who are willing to take personal responsibility for making a punishment decision. This is the second practice common to capital sentencing trials: they employ lay people who are (or who say they are) committed to their own moral positions and willing to judge those that the State chooses. This emphasis on juror responsibility and independence continues in the evidentiary and deliberation phases of capital trials.

The meeting: Hearing evidence and making the capital decision

The third component of capital jury trials comes after jurors have convicted an offender of a capital crime. When the jury reconvenes for the second round of evidence and decision making, referred to as the ‘penalty phase’, arguments as to whether the death penalty itself is problematic are no longer allowed. That debate has been silenced in death qualification. Only material that helps link the particular characteristics of the offender to the appropriate punishment is given into evidence. This can be a lengthy and greatly varied set of procedures, which cannot be enumerated here. Evidence generally falls into three categories: evidence about the offender’s past; evidence about the damage caused to victim’s survivors; and evidence about the offender’s potential actions in future. Testimony as to a defendant’s prior bad acts, criminal record, or lack of remorse, for example, are presented as aggravators, meant to encourage juries to vote in favor of death. Evidence as to a defendant’s difficult childhood, mental illness, religious conversion, or previous good acts is presented as mitigation, in an attempt to sway juries toward a life sentence.

This most often comes in the form of personal stories from witnesses who testify about their interactions with the defendant. Of the more than 200 witnesses that testified in the penalty phases of the cases that I observed, approximately 70 percent presented such testimony. These ranged greatly in content, from neighbors and cousins talking about the defendant’s childhood home conditions to teachers and physicians talking about prison behavior. Here a defense attorney elicits a story from one of the defendant’s ex-teachers, attempting to show the defendant’s more human side:

Defense attorney: Do you remember anything special that Leonard did for you when you were his teacher?

Witness: He, in the homeroom class he gave me a birthday party. I didn’t know it was him. It was a surprise party but some of my coworkers knew Leonard organized it. It was a nice party. Parents sent food in, gifts. . .

Defense attorney: Were you touched by that?

Witness: I was very touched. The principal allowed it because Leonard went through all the movements. He went to the proper people to get their permission. He made sure that I was occupied enough not to find out. He was a good organizer and basically he led the students to do this, showed a lot of respect, you know, and concern.¹²

In a similar vein, though with opposite purpose, family members of the victims testify about the harm that the defendant has done.¹³ Here a victim's mother testifies about her experience learning about her daughter's death:

She called me a couple of days before she got killed, she said, Mommy – the phone rang, must have been about 11:30 – that was unusual. I started not to answer it, but when I heard her voice on the answering machine, Mommy, I pick up the phone. She says, I just called you to tell you I love you. . . . Next thing I knew, the detectives was at the door and they was telling me she was shot.

Stories such as these make up the majority of the testimony at capital penalty phases. I heard stories about birthdays, high school proms, hunting, dance competitions, church choir practice, child rearing, child abuse, family dinners, and neighborhood shootings. Most often reserved for sentencing judges, such personal testimonies are rarely presented to criminal jurors in the US sentencing context.

Having listened to such unusual evidence, capital jurors are then asked to perform another unorthodox task. When jurors are asked to decide punishments, most commonly in civil torts cases, they are set up to be addressed in objective terms, usually in a cost/benefit analysis, often resulting in monetary penalties. For example in a typical tort law case, a plane has crashed, investigators have found the engine proving the manufacturer was negligent, and a jury assigns value to the damage done. Capital jurors however are not given such a clear framework. Rather than a strict set of laws to decide whether someone deserves the death penalty or not, the Supreme Court's post-*Furman* jurisprudence requires that each juror consider his or her own moral position as well as the defendant's social biographical information as they see fit. 'Guided discretion', as this is generally referred to, is so unusual to the US criminal justice system that it 'effectively inspired new growth industries in legal doctrine-making' (Weisberg, 1983: 328). Most states attempted to reach the balance between individual consideration and equal treatment required by the Supreme Court by giving juries a set of aggravators and mitigators that they are supposed to apply to a given case. Capital juries can weigh these factors as they see fit: they might disregard mitigators they do not think should matter, such as the school teacher's testimony above, or find aggravators to be unnecessary to consider, such as the victim's mother's anguish above. Rather than following a strict set of legal evidentiary requirements as jurors do when deciding the guilt or innocence of a defendant, jurors are expected to use their moral consciousness in

conjunction with the evidence given. (For a fuller treatment of the development of guided discretion, see Bowers et al., 2003.) This emphasis on subjective jury sentencing is exceptional in a society largely committed to finding economic solutions to questions of injury. Though judges are asked to make subjective findings in criminal sentencing cases, death penalty sentencing is the only nationwide venue in which a committee of lay people with no prior training is asked to participate in such a task. This is the third component of practices common to capital jury sentencing: citizens are asked to hear and evaluate evidence in a manner usually reserved for judges.¹⁴

Discussion and conclusions: Situating capital jury sentencing

Taking these three sets of practices together, how can we make sense of this unusual proceeding? Guided capital jury sentencing is a project of the late 20th and early 21st centuries, shaped almost entirely during the three decades after the Supreme Court's 1976 decision reinstating the death penalty.¹⁵ The institutional apparatus of late 20th- and early 21st-century criminal justice in which capital sentencing developed looks very much like it did during most of the 20th century, but the deployment, strategic functioning, and social significance of the apparatus has been transformed (Garland, 2001). While death penalty sentencing was legal and indeed quite active prior to the late modern period, the post-*Furman* era has instituted a shift in how Americans decide who deserves the ultimate punishment. One of the most important changes in the post-*Furman* era is the standardization of jurors' roles in death penalty sentencing. What do this study's findings tell us about the role that jury death penalty sentencing plays in the late modern criminal justice system?

First, jurors are not asked to punish the most common types of homicide offenders, but those that conform to particular cultural narratives, as we saw above. In this way, assigning punishment – regardless of whether the punishment is life or death – functions not just as a tool to punish individual offenders, but also a tool for solidifying collective cultural meaning. An orderliness of the world is established by putting people and events into categories, and blame activates a distinction between a worthy 'us' and an unworthy 'them' (Tilly, 2009). The process of assigning one of two extreme punishments to the 'worst' of violent offenders suggests that death penalty sentencing trials provide a process by which society, when it is doing the extreme act of sentencing its worst offenders, is establishing that it has the categories right. In this sense, the actions of capital sentencing jurors support the framework of meaning sustaining the culture of control – recruiting 'good' citizens to judge dangerous ones.

Second, the unique practices that comprise individualized jury selection and guided deliberations point to a complementary role for capital jury sentencing. Non-capital offenders in the contemporary criminal justice system are generally sorted and sentenced from a distance, usually using an economic style of reasoning; part of the mechanism of mass incarceration is to simultaneously categorize and

dehumanize (Garland, 2001). But capital jury sentencing trials eschew a distanced, economic logic. Rather than dehumanizing decision-makers and offenders, the processes of capital jury death qualification, personal story-telling, and guided discretion ties jurors more personally to the punishment decision than in any other arena of criminal sentencing. Taken together, the practices of solidifying the cultural category of the 'worst of the worst' and tying jurors personally to this categorization create the role of *punitive citizenship*. Through the deliberate cultivation and selection of jurors who say they can take responsibility for an ultimately subjective decision – personal to those who decide and to those who are punished – punitive citizens agree to make individual moral punishment decisions in the name of the State. Those unable to commit to participation are excluded. The rest are asked to form a personal judgment and then donate this judgment to the collective.

The significance of this role comes into bold relief when examined in historical context. Arendt's (1963) famous analysis of the Eichmann trial demonstrated how state actors eschewed particularized responsibility for lethal actions, believing themselves to be following state rules rather than making their own judgments. On the stand, Eichmann describes having had no 'choice' within the institutional directive: he did his duty, he obeyed orders, and he obeyed the law (Arendt, 1963). By displaying the ideology of a bureaucrat rather than that of a monster, he distanced himself from the atrocities he took part in. Real political action, Arendt postulated in response, requires action without pre-given structure, judging a given situation on its intrinsic characteristics, much like a person preferring one flower to another. This exposure of self is the strongest political act that one can make, and it is this strong political choice that is asked of capital jurors. Rather than being asked to submerge their convictions in favor of strict legal doctrine, the capital jurors' directive is to make an active decision based on personal and immediate response to the evidence given. They are not instructed to consider 'what *should* I make of this?' but instead 'what *do* I make of this?' In this sense capital jury selection look less like the quasi-legal rationality of Kantian philosophy and more like a procedure based on the aesthetic philosophy that interests Arendt.¹⁶ Rather than blindly take part in a brutal and cruel set of practices – as Arendt's Eichmann did – capital jurors instead are asked to participate carefully and consciously in a set of highly structured ones.

Social studies of legal systems suggest that the recruitment of capital jurors into punitive citizenship has consequences beyond capital courtrooms. Legal proceedings are generally divided into two categories: those that are present in everyday practices and those that are used when 'trouble' presents itself (Sarat et al., 1998). Everyday laws regulate the practices that we rely on to go about our daily social lives, and 'trouble' law deals with conflict that comes about when norms are disobeyed or one person's actions are incompatible with another's (Llewelyn and Hoebel, 1941). When there is social 'trouble', legal institutions can be used to clean up social messes. As such, these types of

legal arenas can be especially good sites to see in bold relief norms that society has a stake in protecting. Death penalty sentencing is an extreme type of the 'trouble' case, meant to protect the sanctity of human life by severely punishing those who take it. But by attending to the practices that make up the recruitment of citizens into a punitive role, a second kind of 'trouble' is revealed. The death penalty itself is problematic for western liberal democracies of the 21st century. Most countries have abolished it; half the states within the United States do not use it; and when it is used, it is always challenged in courts and in the public sphere. It is controversial in public opinion, state policy, and the media. When actors invest unusual focus in a social drama of their own making – such as with the extensive attention given to capital jury cultivation and selection – socially substantial issues are at play (Evens and Handelman, 2006). The social function of capital jury sentencing from this perspective might be to neutralize cultural unease by sharing the responsibility of sentencing with citizens. By recruiting jurors into the role of punitive citizenship, the State is blurring the lines of responsibility, making the controversial state action more tolerable.

In this sense, the post-*Furman* standardization of capital juror participation looks to be part of the shift from pre-modern to modern practices of punishment. By recruiting capital jurors, the highly controversial institution is in at least one aspect, disciplined. Both juror and offender are party to a set of procedures that belongs more closely to Foucault's (1975) modern regulatory institutions such as the school, the prison, or the mental hospital than to the pre-modern scaffolding meant to brutally exhibit the State's power. Replacing the spectacle of sentencing is a rationalized, quiet procedure that works not only on those that are witness to it, but that exists in conjunction with other technologies of discipline to regulate the population at large.¹⁷ By attending to the persistent inequalities in the American capital punishment system, scholars have learned much about the institution's retention of its pre-modern qualities of cruelty and discrimination. But in order to fully understand the social role of post-*Furman* capital trials in the late modern US criminal justice system, we must also attend to capital trial practices that do more subtle work. The disciplinary qualities of juror cultivation and participation are some of the many dynamics of capital punishment to which we cannot have access unless we attend to capital trial practices.

We cannot know whether the Justices who decided *Furman*, *Greg*, and their progeny intended to firm up jurors' role in capital sentencing in order to quiet concerns about the institution more generally. But we can interrogate the consequences. Doing so in this case sheds light on several new areas of inquiry. First, if the modern criminal justice system recruits punitive citizens as one means of taming the troubled institution of the death penalty, future research might ask where else citizens are recruited in the criminal justice system. How are jurors recruited in non-capital cases that are otherwise problematic, for example? Second, does citizen recruitment help states accomplish unpopular tasks in other situations? Is there a difference between the ways soldiers are

recruited during times of more and less popular wars? Are citizens recruited by state actors when police violence occurs? What more can we learn from the intersection between state and citizen action in controversial institutions? Finally, what might death penalty sentencing look like without juror participation in sentencing? Are there other ways of guaranteeing that the defendant receives both individual consideration and equal protection? Could the death penalty institution survive in the post-*Furman* era without the recruitment of punitive citizens?

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Notes

1. Sarat (2002), writing about his observations of a capital trial, is a notable exception.
2. There are occasional exceptions to this rule. For example, Ohio allows a defendant to be sentenced before a three-judge panel. There is also on-going litigation in Delaware, Florida, and Alabama about whether judges should be allowed to override jury sentencing decisions.
3. I use the masculine pronoun throughout because the vast majority of capital defendants are male.
4. Bureau of Justice Statistics, *Felony Sentences in State Courts, 2000*, Bulletin NCJ 198821; Federal Bureau of Investigation <http://www.fbi.gov/ucr/02cius.htm>. In the last several years, numbers of death sentences and executions have been decreasing. For a discussion of why, see Bowers and Sunby (2009).
5. I confirmed this with others in the field, including representatives from the Death Penalty Information Center and the Department of Justice.
6. 233 news reports from 2005, compiled from the American Judicature Society Capital Case Data Project, available at: http://www.ajs.org/jc/death/jc_death.asp.
7. The technique of 'systematic' rather than random sampling was done in accordance with the National Science Foundation's *Qualitative Research Design and Methods: Strengths, and Shared and Unique Standards*, http://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf. See in particular page 12. Further information on case selection is available from the author.
8. Exactly what constitutes an 'aggravated' murder varies from state to state. This statutory determination of death-eligible homicides is itself a process laden with symbolic capital (Simon and Spaulding, 1999; Kirchmeier, 1998, 2006).
9. The articles I used were compiled by the American Judicature Society Capital Case Data Project and David McCord. McCord (2005) makes a similar argument about the use of this data as proxy.

10. This is especially interesting when taken in juxtaposition to studies suggesting that non-white offenders convicted of murdering white victims are more likely to be executed than any other group (Baldus et al., 2009). Further research would be needed to compare offenders at trial to offenders at execution. We might ask: is a different demographic population tried for capital murders than that which receives a sentence of death? What does the population of offenders who are tried capitally and given life sentences by juries look like? These are some of the questions that can only be filled in with national data on capital trials.
11. Simon and Spaulding (1999) make a similar argument about the cultural uses of state aggravating factors. This is not to suggest that the selection of capital defendants is dictated by cultural variables alone. Structural considerations, such as funding allocation, are likely contributing factors. We cannot know why these defendants are tried capitally as opposed to other defendants, without further study.
12. The names of all trial participants are changed to protect privacy.
13. Victim impact testimony has become a major component of capital sentencing trials since 1991, when the Supreme Court issued its controversial decision *Payne v. Tennessee* (501 US 808 (1991)).
14. Jury sentencing in non-capital criminal cases, however, is also occasionally used.
15. This is not to say that this is the first involvement of jurors with sentencing. In fact juries have been involved in punishing criminals since the late Middle Ages. But the standardized form of jury sentencing that I describe is new in the late 20th century.
16. Interestingly, evidence from interviews with capital jurors suggests that they may or may not internalize this responsibility. Some jurors tend to minimize their roles after the fact (Bowers and Foglia, 2003), while others find the process emotionally traumatic (Antonio, 2006; Bienen, 1993).
17. Garland (1990: 134) describes such techniques as ‘epitomizing’ wider social forms, not because they are typical, but because the general form of modern power is ‘revealed in the full unbridled operation’ in the penal institution. Capital juror participation does not conform, however, to the usual disciplinary technology in one important aspect. Rather than rendering human emotion irrelevant to a cold and distant state apparatus, as most disciplinary technologies tend to do, death penalty sentencing binds active human subjectivity more tightly to the punishment process.

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