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# How a judge's *voir dire* can teach a jury what to say

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**ABSTRACT.** A common questioning event in the legal setting is the judge's *voir dire* (interview) of prospective jurors to determine their beliefs and predispositions about such matters as capital punishment. This paper analyzes the *voir dire*s of 14 prospective jurors in a death penalty case in a midwestern US city. In four of the 14 interviews, linguistic analysis of the judge's questions reveals that he is actually guiding the jurors, probably unintentionally, in how to respond. The linguistic factors that lead to this conclusion include question sequencing, semantic marking, escalation of semantic intensity, face-threatening, interruption, rephrasing and evaluation. The power asymmetry of the interaction, the pressures of time and unskilled question-asking may be the sources of the judge's problem. Whatever the sources are, however, the evidence is clear that the judge's questioning style caused some jurors to change their position on the death penalty during their *voir dire*s.

**KEY WORDS:** contingency question sequence, death penalty, evaluating, face-threatening, interruption, mitigated disagreement, rephrasing, semantic intensity, semantic markings, *voir dire*

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## BACKGROUND OF THE CASE

A common questioning event is the *voir dire* of prospective jurors for trial. Judges often carry out such *voir dire*s themselves and, in some cases, do so from a partially prepared script. In a recent case in the Midwest, a man had been tried and convicted of first-degree murder. In this particular jurisdiction, separate jury panels are then convened to determine sentencing, particularly to decide whether or not capital punishment is inflicted.

The following discussion concerns the *voir dire*s of 14 prospective jurors by one judge. (The names of all actual persons and places are changed here, to preserve confidentiality.) I was asked by the attorneys for the defendant to analyze these *voir dire*s in order to determine whether or not the judge's questions were prejudicial to the defendant.

Although questions are commonly thought to be independent of answers, questions influence answers in many ways. The most obvious example of this is the 'leading question', which in content or form causes

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the answer to conform to the underlying presupposition of the question. Linguistic categories of questions include open-ended questions ('tell me about it'), *wh*-questions (who, what, where, when), yes-no questions (ones in which a yes or no answer is required), alternative-choice questions (which offer options) and tag questions ('you did it, didn't you?').

Of these question types, tag questions exercise the most influence on an answer. Yes-no questions admit no qualifications, influencing the answer to the extent that a simple yes or no answer is required whether or not such an answer can adequately represent what a respondent really wants to say. Alternative-choice questions limit the range of potential answers. *Wh*-questions provide more self-generated responses, and open-ended questions provide still more freedom. Institutional questioning (classroom questions, doctor-patient exchanges, courtroom procedures and employment interviews, for example) places a premium on efficiency and, in doing so, focuses on what people say in response to questions and, perhaps necessarily, underlines the power asymmetry of the interaction. Interrogation in law enforcement has come under careful review for excesses and misuse of questioning strategies (Shuy, 1993).

A conversation's success depends not only on what people say but also on their approach to the interaction. People necessarily adopt a cooperative principle when they talk. They try to get along with each other by following certain aspects of conversation such as being relevant, brief, orderly, unambiguous, as informative as necessary and truthful (Grice, 1975).

Although it is commonly thought that content (what is said) is the most crucial aspect of conversation, the social interaction of participants is equally crucial, since social interaction triggers the cooperative principle (Grice, 1975).

In a question-answer adjacency pair, therefore, two processes are at work: information is being exchanged and a social relationship is being created, maintained or, in some cases, weakened. There is no question but that people who answer questions usually try to please the questioner. This is at the heart of the cooperative principle. The person who asks a question establishes social power, since a question can, and often does, threaten the face of the responder (Brown and Levinson, 1978). Face-threatening is clearly associated with accusing, warning, insulting, complaining, testing and threatening. Most people experience face-threatening throughout their schooling when teachers test their knowledge with questioning. Police interrogation is another example of the face-threatening act of the question-answer adjacency pair. Much of the parent-child interaction is, unfortunately, equally face-threatening. In all of these examples, the questioner has asymmetrical power over the answerer.

The above description of the question-answer adjacency pair is not intended to be critical of the social interaction for which examples have been given. It is presented, instead, to point out the potential for influence of the question on the answer. Research on eyewitness testimony clearly verifies this. When asked how fast a car was going when it 'smashed' into

another car, witnesses estimate a speed of 10 miles an hour faster than when they are asked how fast the car was going when it 'ran into' the other car (Loftus, 1979). When eyewitnesses are asked if they saw 'the broken glass' at the accident, many agree that they did even though there was no broken glass present. The suggestibility of questions is a well-established phenomenon, illustrated by tag questions and even by the words used in the question itself.

#### THE CONTINGENCY QUESTION SEQUENCE

It can be determined, from empirically analyzing the *voir dire*s in this case, that Judge Jones used two different series of questions, depending on the answers the jurors provided. These will be referred to as Column A and Column B question sequences, the major differences stemming from the jurors' answers to questions 1 and 2. Appropriate answers signal continuation in Column A. Inappropriate answers signal continuation in Column B. (See Table 1.)

The question series used by Judge Jones has a generally consistent structure, covering four basic areas concerning the death penalty:

- opposition or support for death penalty (Q1, Q2);
- the degree to which support or opposition for death penalty extends (Q3, Q4);
- whether or not support or opposition to the death penalty would affect consideration of mercy (Q5);
- whether or not support or opposition to the death penalty would override evidence and instruction (Q6).

From the *voir dire* evidence analyzed here, it is apparent that the Judge has devised a contingency question series. That is, the same essential questions are asked of all prospective jurors but the questions vary systematically, depending on the answers, in a branching structure.

For those who do *not* oppose capital punishment (Q1), the question series systematically probes from broad to narrow:

- Q2: believe in or support?
- Q3: belief prevent making impartial decision?
- Q4: belief automatically impose death penalty?
- Q5: belief cause to refuse mercy?
- Q6: belief cause to disregard evidence and Court's instructions?

For those who say that they do not support the death penalty, however, the question series is less systematic, as we will see.

#### THE JUDGE'S USE OF THE QUESTION SEQUENCE

In the 14 *voir dire*s analyzed here, 10 jurors rather straightforwardly were given the Column A sequence (Jurors 1, 2, 3, 4, 6, 7, 9, 10, 11, 14). Jurors

TABLE 1. Judge's questions

Column A	Column B
1. Are you conscientiously opposed to capital punishment?	1. Are you conscientiously opposed to capital punishment?
2. Do you believe in or support the death penalty?	2. Do you believe in or support the death penalty?
[If yes] ↓	[If no] ↓
3. Would your support of the death penalty or inclination toward capital punishment prevent you from making an impartial decision on the issue of punishment for the Defendant's conviction of murder in this case?	3. (* hypothetical—this question was never asked) Would your opposition to the death penalty or disinclination toward capital punishment prevent you from making an impartial decision on the issues of punishment for the Defendant's conviction of murder in this case?
[If no] ↓	[If no] ↓
4. Is your support of or inclination about capital punishment such that you would automatically impose the death penalty regardless of the evidence and the instructions of the Court?	4. Are you so opposed to the death penalty that you would not vote for the death penalty under any circumstances?
[If no] ↓	[If no] ↓
5. Do you favor capital punishment so strongly that you would refuse to consider mercy for the Defendant in this case regardless of the evidence and the instructions of the Court?	5. (not relevant)
[If no] ↓	
6. Are you irrevocably committed before this trial has even begun to vote for the death penalty regardless of the evidence and instructions of the Court?	6. Are you irrevocably committed before this trial has even started of the question of punishment to vote against the death penalty regardless of the evidence and facts and the circumstances?
	[If no, ask questions 3, 4 and 5 over again from Column A]

No. 4, 10 and 11 hedge their answers somewhat, with 'I don't think so', 'probably so' and 'to a certain extent', but they nonetheless express their support for capital punishment after Judge Jones poses the question through a tag question, 'You do believe in or support the death penalty, is that correct?'

Two aspects of Judge Jones' *voir dire* of prospective jurors call into question the influence of his questions in the mindset of the jurors: question sequence and question wording.

It is assumed that the purpose of Judge Jones' *voir dire* is to determine the extent to which prospective jurors' positions for or against the death penalty will influence their ability to follow the Judge's instruction and the evidence in the case.

Although linguists make no claim to any ability to determine truthfulness of answers, linguistic analysis of questions does enable one to determine the ways in which questions can influence responses. For example, if the purpose of questioning is to determine which of two possible positions a person may hold, questions which focus on only one of such positions give prominence to that position and provide clues to the respondent that this is the proper expected position. The way the Judge's question series is constructed works quite well for those who say they believe in support or are inclined toward the death penalty. But for those who, at some point, indicate that they do not believe in, support or incline toward the death penalty, the question series does not function as well, for the reasons of semantic marking and escalating semantic intensity.

#### SEMANTIC MARKING

If a series of questions focuses on only one of the possible positions, the other, unfocused position loses in prominence and provides clues that this is *not* the expected position.

The six questions in the Judge's Column A question series mention either 'capital punishment' or the 'death penalty' seven times. Alternatives to this focus, such as 'life imprisonment', do not occur. But even in the *voir dire* of No. 5, when the Judge switched to his Column B question series, the words 'death penalty' are used three times in two questions.

Semantically marked forms, certain concepts or things that are identified primarily by their marked forms, are the ones that stand out or have prominence. In this case, 'capital punishment' and/or 'death penalty' are marked forms. That is, these terms represent a concept that has few, if any, functioning polar opposite terms. One might suggest 'life punishment' or 'living penalty' to fill this semantic gap, but such terms are unknown. It is not the Judge's fault that the terms of reference in the law of this matter are marked forms which require utterance even when representing their opposites. Many English words have several alternative ways of representing their semantic differential. For example, 'happy' has a morphologically distinct opposite, 'sad', but the 'un-' prefix, 'unhappy', can also be used. Researchers who use a semantic differential questionnaire design avoid 'un-' prefixed polar opposites for exactly the same reason: the use of 'unhappy' is semantically colored by its base form, 'happy'. 'Sad' is the much preferred choice for such questionnaires.

What this means is that the terminology of choice between capital

punishment/death penalty vs its opposite, 'life imprisonment' (or neologisms such as 'life penalty' or 'life punishment'), has not yet developed in everyday usage. The reason this has not happened may be that death is the ultimate marked form for human beings.

#### ESCALATING SEMANTIC INTENSITY

By semantic intensity, I refer here to the continuous use of terms relating to the originally used terms but which upgrade such terms in intensity. An analogy can be found in comparative–superlative adjectives: good, better, best. When intensifying words are used as anaphoric references to a less intensified word, the result is the escalation of semantic intensification.

*Believe in, support, inclination, favor*

The Judge uses verb compound and noun compound constructions connected by 'or' in ways that can be understood in two quite different ways:

Q2: Do you *believe in* or *support* . . .

Q3: Would your *support of* the death penalty or *inclination toward* capital punishment . . .

Q4: Is your *support of* or *inclination about* . . .

The conjunction 'or' carries three possible meanings:

- alternatives (eat or sleep);
- synonyms (free or unfettered);
- indefiniteness (two or three).

At issue here is whether the Judge meant 'or' to signify alternatives or synonyms. Evidence that the terms are used as synonyms includes the following:

- The Judge uses other synonyms in this question series. For example, although question 3 associates 'death penalty' with 'support' and 'capital punishment' with 'inclination toward', question 4 employs only the term 'capital punishment', indicating that the Judge uses 'death penalty' and 'capital punishment' as synonyms.
- A common way to express alternatives is to use the conjunction 'and' (aid and abet, freedom and justice) whereas synonymy is limited only to the use of 'or'. If the Judge had wished to express alternatives here, he could have said 'believe in *and* support', 'support of *and* inclination about'. He does not.

The linguistic evidence here indicates that Judge Jones used these compounds as synonyms. But whatever his intention may have been, the fact remains that they are interpretable as synonyms by any listener by means of the Judge's use of the conjunction 'or'.

This analysis is important because, beginning with question 3 and con-

tinuing in question 4, a very significant distinction is made. Those who have agreed that they do not oppose capital punishment (Q1) and who agree that they believe in or support capital punishment (Q2) have, to this point, expressed only mild conceptual positions. One can, for example, *believe in* and *support* the concepts of reducing the budget deficit, saving the environment or providing equal educational opportunity but still not be *inclined toward* it, as we learn from even a cursory reading about everyday politics.

Common definitions of an 'inclination' involve having a preference for, a leaning toward or a disposition toward. One can believe in or support a cause, a political candidate or a religious belief, for example, without preferring it. People can, for example, believe in and support their church, their marriage partner, their choice of president and many other things while still preferring something or someone else.

Therefore, in questions 3 and 4, a conceptual 'belief in' or 'support of' capital punishment is presupposed as a 'preference for' in the Judge's questions. These terms can be viewed as a semantic continuum (see Table 2).

TABLE 2. Semantic continuum of terms

<b>mild</b> belief in	<b>stronger</b> support of	<b>stronger</b> inclination	<b>strongest</b> favor
Q2	Q2		
		Q3	
	Q4	Q4	
			Q5

That the term 'inclination' is used by Judge Jones to indicate 'preference' is clear by his question 5, where he uses the term 'favor'. One can believe in or support the same illustrative causes noted earlier without favoring them (one can believe in euthanasia, higher taxes or smoking restrictions without favoring them).

The point here is that the *voir dire* question sequence escalates the meaning from 'belief in' to 'favoring' at the same time that the jurors have been given to understand that they are synonyms. To be sure, some jurors may have meant to express their favoring of capital punishment from their first response to 'believe in' but others may have felt trapped by the escalating semantic usage and found no way out. That is, having previously agreed that they believed in capital punishment, they now found the definition changed to inclination toward. Rather than appear to be inconsistent, many people simply go along with the revised terminology, following the cooperative principle of conversation.

In contrast with the cumulative and escalating change of meaning of 'belief in' to 'favor' in the Column A questions asked of jurors who say that they are for capital punishment is the single verb 'oppose', in the Column B questions to jurors who say that they are against capital punishment.

*Opposed to*

When juror No. 5 says that she is opposed to the death penalty, Judge Jones turns to his contingency questions of Column B. A comparison of terms used in Column A with those in Column B is instructive. Those who say yes to the question about whether or not they 'believe in or support' the death penalty are then given further questions escalating these terms to 'inclination toward/about' (Qs 3 and 4) and 'favor' (Q5). But juror No. 5, who said no to question 2, is given only the term 'opposed to' in the next question ('Are you so *opposed* to the death penalty that you would not vote for the death penalty under any circumstances?').

At issue here is the lack of equivalence of terms used for the mild to strong representation of the juror's position. Whereas the Column A question sequence begins with 'belief', moves toward 'inclination' and arrives at 'favor', the Column B question sequence contains no such semantic escalation. It moves directly from 'belief' (Q2) to 'oppose' (Q4). That is, the Judge's questions gradually increase the semantic intensity and strength of those who believe in or support the death penalty but do not do so to those who say that they do not believe in it or support it. These jurors are given only categorially strong terms to respond to. There are no questions using terms such as 'inclination to oppose' or 'disfavor' the death penalty.

*Voir dres 5, 8, 13, 12*

Of considerable interest here, however, are Judge Jones' *voir dres* 5, 8, 12 and 13, which are analyzed individually, as follows.

*Voir dire No. 5.* When No. 5 responds (to Q2) that she 'doesn't think' she believes in or supports capital punishment but asks for a clarification, the Judge asks, 'Are you opposed to it?' To this, she responds, 'Well, to be truthful with you, I have to say yes.'

This response is the signal for the Judge to go to the questions of Column B. He does so but he does not follow the sequence of the Column A questions, beginning with question 4, 'Are you so opposed to the death penalty that you would not vote for the death penalty under any circumstances?' To this, the juror responds, 'No, I don't have that type of feeling.'

The Judge then asks Column B question 6: 'Are you irrevocably committed before this trial has even started on the question of punishment to vote against the death penalty regardless of the evidence and facts and the circumstances?' To this, the juror interrupts and responds, 'No I haven't given that thought or any decision of any kind in my mind as of now.'

Curiously enough, Judge Jones then abandons the Column B question series given to those who oppose capital punishment and asks the Column A questions designed for those who do support the death penalty. He asks, in succession, questions 4, 3 and 6. The juror answers 'No' to all three questions.

Apparently the Judge took the juror's 'No' response to his Column B question 6 as evidence that this juror supported or was inclined toward the death penalty, whereas what she actually said was that even though she was opposed to the death penalty, she did not have any thought or decision about voting against the death penalty as of now. It is difficult to imagine how such a response could be taken as *support* for the death penalty. Rather than continuing his Column B questions, however, the Judge switches to his Column A series, designed for those who favor the death penalty.

*Voir dire No. 8.* Juror No. 8 stated that he was not conscientiously opposed to capital punishment (Q1) but that he did not believe in it or support it completely (Q2). Nevertheless, Judge Jones' questions from that point on presupposed that this juror *did* support the death penalty or was inclined toward it (Column A Qs 3, 4, 5, 6).

It is difficult to imagine how the response to question 2, 'Not completely', could be taken as belief in or support for the death penalty; inclinations for or favoring. All the Judge has learned is that this juror is not conscientiously opposed to it (Q1) but that he does not completely believe in it or support it (Q2).

*Voir dire No. 13.* In many ways this *voir dire* appears to be straightforward and uncomplex. The juror answers all questions with 'yes' and 'no' answers that would indicate that she does not oppose the death penalty, that she supports the death penalty under some circumstances and that her support of, inclination about and favor of capital punishment would not influence her vote.

During her following *voir dire* by the prosecutor, however, this exchange takes place:

Q: ... if, after you heard all the evidence concerning this case, you were of opinion that the death penalty was the appropriate sentence, do you believe that you could cast a vote to impose the death penalty to put the accused to death by electrocution in the electric chair?

A: No sir.

Curiously enough, the prosecutor dropped the issue at this point, despite the fact that the juror's response contradicted her earlier answer to the Judge.

When the defense attorney asked this juror follow-up questions in the same *voir dire*, the following exchange took place:

Q: You had indicated that you support the death penalty?

A: If it's warranted.

Then later, the following exchange took place:

Q: I'm asking you about your attitude about the death penalty, and having any feelings to favor the death penalty.

A: I don't really favor the death penalty. I would rather there be no need for a death penalty, but since there are needs for it, sometimes it's necessary.

On redirect, the prosecutor asked again:

*Q:* Why do you favor the death penalty?

*A:* I think with some circumstances it is warranted.

It is difficult to know, from the entirety of this *voir dire*, exactly what this juror believes or supports. She does not favor the death penalty so strongly that she would refuse to consider mercy (the Judge's question), she could not vote for the death penalty in the current case (the prosecutor's question) even though she told the Judge that she could support the death penalty (Q2). Next she tells the defense attorney that she does not really favor the death penalty even though sometimes it is necessary. Finally she adopts the prosecutor's words about favoring the death penalty in her response that under some circumstances it is necessary. One possible explanation of this apparent inconsistency of answers is that this juror does not personally favor the death penalty and would not be able to vote for it but she nevertheless understands that it is sometimes necessary and she does not especially mind if other people vote for it even though she would not do so herself.

If the latter interpretation is correct, and if other jurors hold similar positions, then the Judge's *voir dire* questions fall short of capturing a potential juror's personal beliefs. Jurors can apparently believe in something, support it and even be inclined toward it or favor it in the abstract, while at the same time not being able to believe in it, support it, be inclined toward it or favor it enough to act upon it personally.

*Voir dire No. 12.* This *voir dire* begins with confusion, caused both by imperfect questioning and by less than fluent responses. The following is a segment by segment analysis of part of this exchange.

*Judge:* First of all, let me ask you are you conscientiously opposed to capital punishment? Do you understand the question?

*No. 12:* Yes.

Here the Judge inelegantly asks two questions. No. 12's response would normally be considered to come under the conversational maxim of the 'recency principle' which avers that when asked multiple questions, people tend to respond to the most recent, that is, last one. If the recency principle held here, his response would indicate only that he understood the question. But No. 12 gives other ample evidence that his communicative abilities are not particularly normal. From this exchange it is therefore not clear whether or not he is conscientiously opposed to capital punishment.

What is clear follows: He does not support capital punishment and does not believe in the death penalty.

*Judge:* Alright you're not—

*No. 12:* No sir.

*Judge:* —opposed to capital punishment. Do you support or believe in the death penalty?

*No. 12:* No sir.

*Judge:* You do not believe in the death penalty?

*No. 12:* I don't believe in the death penalty.

To this clear and rather forceful response, the Judge appears to be confused. He had apparently understood No. 12 to say at first that he was not opposed to the death penalty but now he hears him saying that he does not believe in it. The exchange continues:

*Judge:* I'm not sure that you understand my question. If you don't believe in it does that mean you're opposed to it?

*No. 12:* Not exactly. You told me I was opposed to that, I—

Here the Judge explicitly expressed what he considers to be an anomaly in No. 12's response. The Judge does not permit the possibility that his own question may have led to the anomaly, however, and places the 'misunderstanding' on the prospective juror. The Judge then probes No. 12's understanding of 'not believing in' versus 'being opposed'. The answer may have eventually explained what No. 12 meant, but it was, unfortunately, interrupted by the Judge before it was completed. As a result of this interruption, we will never know what No. 12's 'not exactly' might have been intended to mean at that point in the exchange. One clue, however, is found in the words he utters after 'not exactly'. He says, 'You told me I was opposed to that, I—.' Either he perceived that the judge had *told* him that he was (or should be) opposed to the death penalty or he ineloquently substitutes 'told' for 'asked if'.

The Judge makes no comment or clarification of these words, quickly interrupting to recapture what he actually had asked in his first question. He then quickly restates that question, perhaps remembering the ensuing confusion:

*Judge:* The first question was are you conscientiously opposed to it. Let me restate this in another way. Do you have any moral, ethical or religious scruples or personal beliefs against the death penalty?

*No. 12:* Well, I'm, uh, religious, I mean, I'm, you know, deacon. I don't—

It is not uncommon for the questioner, upon sensing confusion, to rephrase the question with different words. The Judge's rephrasing goes beyond the more general use of 'opposed to' to the underlying areas of thought upon which such opposition might be based. He offers four such underlying areas: moral, ethical or religious scruples and personal beliefs.

No. 12 selects 'religious' as the target of his answer but ignores the other three areas. His answer is unfinished, however, when the Judge interrupts him for the second time, quite possibly because No. 12's words are stumblingly presented. Because of the interruption, however, we can never know what No. 12 might have said at that time after his 'I don't—' sentence began. The Judge then continues his questioning:

*Judge:* But would your religious beliefs make you opposed to capital punishment?

*No. 12:* No, I don't think not. I don't think not.

Assuming that No. 12's inelegantly phrased response can be interpreted to mean 'No I don't think so', we have learned here only that his religious

scruples are not the source of his disbelief in capital punishment. On the other hand, we have learned absolutely nothing about how his moral or ethical scruples or his personal beliefs might affect his opposition to the death penalty. Once categories of a probe are established, it behoves the questioner to explore all of them. The Judge does not.

Apparently satisfied that although No. 12 does not believe in the death penalty, he does not oppose it, the Judge then turns to other questions in his *voir dire*.

*Judge:* Would your support of the death penalty or inclination about capital punishment prevent you from making an impartial decision on the question of punishment for the Defendant's conviction of murder in this case?

*No. 12:* No sir.

From this question it becomes clear that what to this point we could only *assume* to be the Judge's perception of No. 12's answers was actually what the Judge perceived. It is clear that the Judge believes that No. 12 has said that he supports the death penalty and is inclined toward capital punishment, which he has not. What No. 12 *has* said is that he does not believe in the death penalty and that the source of this position does not stem from his religious scruples.

Nevertheless, the critical aspect of this exchange centers on the words 'impartial decision'. Nobody wants to think of themselves as partial or biased. Whether or not No. 12 comprehended or heard the first part of the sentence, which misstated what he had actually said to this point, we can never know. What *is* clear is that No. 12 agrees to be impartial.

#### CONCLUSIONS

The questioning sequence used by Judge Jones has much to recommend it, despite the terminology problems leading to semantic marking, noted earlier. This phenomenon is essentially beyond his control and is largely a problem caused by the semantics of law. The need to determine a potential juror's beliefs about capital punishment through *voir dire* is essential for the administration of justice, however, and the approach with branching questions based on jurors' answers to questions 1 and 2 is a structurally fair and useful technique.

A problem arises, however, with the escalation of semantic intensity found in the Judge's words 'belief in' (Q2), 'support of' (Q2, Q4), 'inclination' (Q3, Q4) and 'favor' (Q5). As noted earlier, belief in a concept does not necessarily imply favoring it in specific actions. The question structure begins with more abstract beliefs, then moves to more specific actions. However, in real life, once a person commits to an abstract principle there is no reason to believe that that person will consistently apply that principle in specific situations. But to say otherwise would be face-threatening here. Jurors would appear to be whimsical or inconsistent to admit that their verdict would be automatic, partial or merciless in spite of

their expressed belief. Evidence of this is found in the Judge's confusion when such apparent inconsistency does arise, causing him to treat responses like No. 5's 'I haven't given that thought . . . as of now' as evidence that is favorable to the death penalty. Even when No. 8 says that he does not believe in or support the death penalty completely, the Judge accepts this response as categorical support for capital punishment. Even though juror No. 13 gives brief consistent responses to the Judge's *voir dire* questions concerning her belief in, support and favoring of the death penalty, subsequent direct and cross-examination reveals inconsistent answers on that topic.

These three *voir dire*s pose perplexing problems, some related to the Judge's perceptions of the meaning of the jurors' answers, some leading us to suspect that the jurors are, at times, inconsistent, and some leading us to note the effect of the escalating intensity of the terms used in the questions themselves.

The *voir dire* of No. 12, however, is the most troublesome of all, for it is fraught with communication problems. The Judge asks multiple questions. He misunderstands No. 12 while, at the same time, believing that No. 12 misunderstands him. He interrupts No. 12 before he can complete his response. He rephrases the question that he believed No. 12 to have misunderstood and, in so doing, the Judge segments the question into four parts and No. 12's response to only one of these four parts goes unnoticed by the Judge. Most troublesome of all, however, is the fact that even though it is finally clarified that No. 12 does not believe in the death penalty but does not oppose it, the Judge proceeds with his questioning from Column A, a series of questions devised for jurors who support, are inclined toward or favor capital punishment.

The Judge's questions never bring out what it means to No. 12 to believe in the death penalty while to still not oppose it. A range of possibilities exists. No. 12 may mean, for example, that he would not object if others vote for the death penalty but he personally could not. Or he may mean that even though he does not believe in it, he could vote for it under certain circumstances. These two interpretations are the polar extremes. There may be other modifications intended by No. 12 that fall between these extremes. The crucial point here is that the Judge's questions never uncover No. 12's position. Instead, the Judge's following questions assume that when No. 12 agrees that he does not oppose capital punishment, he is indicating that he supports, is inclined toward and favors it.

If No. 12's disbelief in the death penalty means that he could not personally vote for it even though he does not oppose others voting for it, the Judge's subsequent Column A questions concerning No. 12's support, inclination toward and favoring can only refer to No. 12's support, inclination toward and favoring of *others* who choose to vote for the death penalty. No. 12 has made it perfectly clear that he does not believe in it. Having said this, it would be otherwise ludicrous to be asked about his support, inclination toward or favoring.

Earlier it was noted that questions frequently influence answers. People

who ask questions have power over people who are asked questions. This power asymmetry is exacerbated here by the social status difference between judge and average citizen. Consciously or unconsciously, question-askers often teach question-answerers what the desired or expected response should be. Even though the tag question (leading question) is the most obvious way to do this, there are also many other ways. The *voir dire* of No. 12 is replete with such events, as follows:

1. *Misunderstanding*. The Judge believes that No. 12 has said that he does not oppose capital punishment, even though No. 12 never said this. Evidence of this can be seen when No. 12's 'No sir' is uttered before the main verb in the Judge's sentence is said and cannot, therefore, be a response to it.
2. *Face-threatening*. When No. 12 next states that he does not believe in the death penalty, the Judge expresses confusion at what he perceives to be No. 12's inconsistency. No. 12's response, 'Not exactly. You told me I was opposed to that, I—', is a mitigated denial of the type commonly found in conversation where it is face-threatening for a speaker to disagree with a powerful authority. The mitigation is No. 12's 'Not exactly'. His effort to explain his disagreement assigns power to the judge ('You told me that I was opposed to that'), indicating that the Judge's teaching had already taken effect.
3. *Interruption*. The Judge then interrupts any further explanation No. 12 might have intended by his uncompleted sentence beginning with 'I—'.
4. *Rephrasing*. The Judge then attempts to rephrase his initial question about opposition to the death penalty but the rephrasing gives No. 12 an opportunity to avoid face-threatening the Judge with his disagreement with what, by now, No. 12 must believe that the Judge expects or wants. No. 12 addresses only the religious scruples part of the Judge's four-part question, ignoring ethical, moral or personal beliefs. He appears to be saying that he has no religious scruples against capital punishment with his response 'No, I don't think not'.
5. *Evaluating*. The Judge then positively evaluates No. 12's response, 'Alright', and asks if No. 12 supports or believes in the death penalty. No. 12 first responds with a clean 'No sir'. But later, when the Judge repeats his question, No. 12's response is hesitating and somewhat unclear: 'Well, if in this area I think that, uh, no. It should be, uh, necessary.' It is in instances like this that a tape-recording of this *voir dire* could have been helpful. With only a written transcript to go on, we are at the mercy of the court reporter's accurate hearing and recording of No. 12's actual spoken words. No. 12's 'It should be, uh, necessary' might well have been 'It should be unnecessary'. Such a rendition would be consistent with everything he has said thus far (i.e. 'I don't believe in the death penalty').
6. *Inaccurate restatement*. The Judge then attempts to clarify what he believes he has just heard: 'You say if it's necessary?' There is nothing in No. 12's previous answer that attaches 'if' with 'it's necessary'. His 'if' attaches to 'in this area I think that, uh, no'. That is, No. 12's 'if'

associates with his 'no', indicating that he does not believe in the death penalty.

Nevertheless, No. 12 agrees with the Judge's erroneous clarification. The question here is: why does he agree at this point, having attempted to disagree up to then? Did No. 12 suddenly change his position from being against the death penalty to favoring it? Or was he gradually shifting his answers to conform with what he thought to be the expected or desired responses? From this point on (Qs 3, 4, 5 and 6) No. 12 gives only simple 'no' answers to the Column A questions.

Evidence that No. 12 adjusted his answers to match what he perceived to be expected of him can be found in two sources: (1) his increased mitigation of disagreement after his unmitigated, explicit disbelief in the death penalty was uttered earlier; and (2) his consistent beliefs about capital punishment that appear in his direct cross-examination.

(1) *Increased mitigated disagreement.* Once the Judge says 'I'm not sure that you understand my question' and challenges No. 12's perceived inconsistency, No. 12 mitigates his response:

- *Not exactly*, you told me I was opposed to that—
- *Well*, I'm, *uh*, religious, *I mean* I'm, *you know*, deacon.
- No, *I don't think* not. *I don't think* not.
- *Well*, if in this area *I think* that, *uh*, no.

Speakers mitigate their answers for a number of reasons, not the least of which is an increasing understanding that their position is untenable. This occurs especially when there is an asymmetry of power in the conversation.

(2) *Direct and cross-examination.* The prosecutor then reintroduces No. 12's belief in the death penalty:

Q: If I understand you correctly and please correct me if I misstate something. If you are convinced that the death penalty was the right thing to do, you would be able to vote for it, is that correct?

A: If I think it is the right thing, yeah, right.

Here No. 12 continues to assert a position about capital punishment which is contrary to his answers in the first part of the Judge's *voir dire* but consistent with his later answers. On the other hand, during cross-examination by the defense attorney the following was said:

Q: You indicated in response to Judge Jones's questions that you were in favor of the death penalty. That you—

A: Saying I was in favor of it?

Q: Yes sir.

A: No, I didn't. Did I say I was in favor of it?

Q: Maybe I misunderstood you.

A: No, I didn't say I was in favor of it. I said if it was necessary—

Q: Okay.

A: —figuring on the events.

Q: Okay.

A: Gotta do something for that.

If the Judge was unclear about this, it is apparent that the defense

attorney was equally unclear. Here we learn that No. 12 believes that he has held fast to his disbelief in capital punishment but that he agrees with the position, first uttered in response to the Judge's clarification, that he would support it if it was 'necessary'. Here No. 12 categorically denies favoring it and his last utterance 'Gotta do something for that' comports with his earlier statement to the Judge, 'You told me I was opposed to that'. Somewhere in this process, undoubtedly in the Judge's *voir dire*, No. 12 has become convinced that it is necessary for him to go along with capital punishment, which he does not believe in (though not on religious grounds), when unknown (and unstated) circumstances make it 'necessary'.

It is difficult to know exactly what people mean when they say they believe or do not believe in something. In No. 12's case, he expresses a willingness to take an action which is contrary to his belief if he has to. The question here is whether he would have expressed a willingness to vote against his belief if he had not been led to such a position by the way he was questioned. The subordinate in dialogue with a superordinate often makes adjustments in earlier positions that become increasingly untenable. It is often a matter of saving face in an unknown set of circumstances. This is not to say that the superordinate participant, in this case the Judge, deliberately led the subordinate participant. Such phenomena occur quite easily and unintentionally, especially under circumstances of ineloquent respondents, time pressures and cross-cultural interference. Intentionally or not, however, a Judge's *voir dire* can most certainly teach a juror what to say.

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