**Death Qualification after Wainwright v. Witt and Lockhart v. McCree**

William C. Thompson

*Law and Human Behavior*, Vol. 13, No. 2. (Jun., 1989), pp. 185-215.

Stable URL:
http://links.jstor.org/sici?sici=0147-7307%28198906%2913%3A2%3C185%3ADQAWVW%3E2.0.CO%3B2-8

*Law and Human Behavior* is currently published by Springer.

---

Your use of the JSTOR archive indicates your acceptance of JSTOR's Terms and Conditions of Use, available at http://www.jstor.org/about/terms.html. JSTOR's Terms and Conditions of Use provides, in part, that unless you have obtained prior permission, you may not download an entire issue of a journal or multiple copies of articles, and you may use content in the JSTOR archive only for your personal, non-commercial use.

Please contact the publisher regarding any further use of this work. Publisher contact information may be obtained at http://www.jstor.org/journals/springer.html.

Each copy of any part of a JSTOR transmission must contain the same copyright notice that appears on the screen or printed page of such transmission.

---

JSTOR is an independent not-for-profit organization dedicated to and preserving a digital archive of scholarly journals. For more information regarding JSTOR, please contact support@jstor.org.

http://www.jstor.org
Wed Jun 13 17:36:42 2007

*Law and Human Behavior, Vol. 13, No. 2, 1989*

# Death Qualification After *Wainwright v. Witt* and *Lockhart v. McCree**

**William C. Thompson†**

Death qualification is a procedure that occurs during the jury selection phase of capital trials. During death qualification, potential capital jurors are questioned closely about their views on the death penalty, and those whose views are considered incompatible with the duties of capital jurors are excluded from the jury.[1] Death qualification is controversial because it results in the exclusion of a significant number of potential capital jurors solely because of their unwillingness to impose the death penalty.[2] These jurors are qualified to decide guilt and innocence and would not be excluded from noncapital juries; they are considered unsuitable only for the penalty phase of capital trials. Because the guilt and penalty phases of capital trials are tried before the same jury, however, these jurors are excluded from capital trials altogether. Thus, in capital trials, unlike other criminal cases, the issue of guilt and innocence is decided exclusively by jurors who have stated a willingness to impose a death sentence.

Critics of death qualification have argued for many years that death qualified jurors (those who survive death qualification) are more conviction-prone than those who are excluded, and therefore that death qualification produces juries that

* I would like to thank Claudia Cowan, Phoebe Ellsworth, Gilbert Geis, and Samuel Gross for helpful comments on an earlier version of this article. Requests for reprints should be sent to William C. Thompson, Program in Social Ecology, University of California, Irvine, California 92717.

† University of California, Irvine.

[1] *See generally,* Schnapper, *Taking Witherspoon Seriously: The Search for Death Qualified Jurors,* 62 Tex. L. Rev. 977 (1984); Haney, *Examining Death Qualification: Further Analysis of the Process Effect,* 8 Law & Hum. Beh. 133 (1984).

[2] Empirical studies suggest that between 11% and 17% of the people who qualify to serve on juries in noncapital trials would be disqualified from serving on capital juries because of their unwillingness to impose the death penalty. Fitzgerald and Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes,* 8 Law & Hum. Beh. 31 (1984); Field Research Corp., Fieldscope Report: Attitudes Toward the Death Penalty Among the California Adult Public (1981). Recent changes in the legal rules governing exclusion of potential jurors during death qualification may make the number excluded even larger. *See* Note 110 *infra* and accompanying text.



0147-7307/89/0600-0185$06.00/0 © 1989 Plenum Publishing Corporation

are more conviction-prone than the juries that try other criminal cases (including noncapital murder cases).[3] A number of empirical studies have supported this conclusion, and in recent years this research has come before a number of appellate courts in litigation concerning the constitutionality of death qualification.[4]

During the past four years there have been two important developments in litigation on death qualification. First, in 1985, in the case of *Wainwright v. Witt,*[5] the U.S. Supreme Court changed the standards for determining which jurors should be excluded from capital trials during death qualification. Previously courts determined which jurors should be excluded based on standards initially set forth in Witherspoon v. Illinois.[6] The *Witt* opinion abrogates the *Witherspoon* standard and expands the class of individuals who may be excluded from capital juries because of their feelings about the death penalty.

The second important development was the Supreme Court's 1986 decision in *Lockhart v. McCree,*[7] which rejected a major challenge to the constitutionality of death qualification brought by litigants who had relied heavily on social science evidence to support their claims. The *McCree* opinion was a serious blow to those who sought to use social science research to challenge death qualification. The opinion not only rejected available research as unconvincing, it declared that the results of such research are irrelevant to the constitutional issues raised by death qualification, and hence that the research would not have proven a constitutional violation even if it had been convincing.

This article discusses the effects of *Witt* and *McCree* on constitutional litigation concerning death qualification, focusing particularly on the role of social science in that litigation. After briefly reviewing the death qualification issue, this article will (a) analyze the Court's opinion in *Lockhart v. McCree,* focusing on the Court's treatment of social science, (b) evaluate, in light of *McCree,* the future role of social science in litigation on death qualification, and (c) discuss the new standard set forth in *Witt,* describing the way this standard differs from the old *Witherspoon* standard and discussing possible research strategies under the new standard.

---

[3] *See, e.g.,* Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute a Denial of Fair Trial on the Issue of Guilt?,* 39 Tex. L. Rev. 545 (1961); White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries,* 58 Corn. L. Rev. 1176 (1973).

[4] *See, e.g.,* Hovey v. Superior Court, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980) (detailed and sophisticated review of research available at that time). Some of the most important studies, along with articles commenting on judicial reactions to this research, were published in a special issue of this journal. *Death Qualification,* 8 Law & Hum. Beh. 1 (1984); *see also,* Berry, *Death Qualification and the "Fireside Induction",* 5 Ark. L. J. 1 (1982); Levine and Howe, *The Penetration of Social Science Into Legal Culture,* 7 Law & Policy 173 (1985); Finch and Ferraro, *The Empirical Challenge to Death Qualified Juries,* 65 Neb. L. Rev. 21 (1986); Ellsworth, *Unpleasant Facts: The Supreme Court's Response to Empirical Research on Capital Punishment,* In K. Haas & J. Inciardi (Eds.) Challenging Capital Punishment (1988). (discussing the use of social science in connection with litigation challenging the constitutionality of death qualification).

[5] 105 S.Ct. 844 (1985).

[6] 391 U.S. 510 (1968).

[7] 106 S.Ct. 1758 (1986).

## THE CONTROVERSY SURROUNDING DEATH QUALIFICATION

### The Purpose of Death Qualification

In most states that have a death penalty, capital trials are conducted in two phases. First, the jury hears evidence on the issue of guilt. Then, if the defendant is found guilty of a capital offense, the trial enters the penalty phase, during which the jury may hear additional evidence before deciding whether to sentence the defendant to death or some other penalty.[8]

Before being seated as a juror, each member of the venire swears to apply the law and view the facts of the case impartially.[9] Courts recognize, however, that jurors in capital cases may have trouble being impartial when the law and facts support a decision inconsistent with their personal convictions about the death penalty.[10] Although jurors are expected to put their personal convictions aside, some may have such strong feelings about the death penalty that they are unable or unwilling to follow their oath. The purpose of death qualification is to identify and exclude such jurors from capital trials.

The jurors who are excluded during death qualification fall into two partially overlapping categories. *Guilt nullifiers* are those whose feelings about the death penalty render them unable or unwilling to be impartial when deciding guilt or innocence in a capital case. *Penalty nullifiers* are those who are unable or unwilling to be impartial during the penalty phase of the trial.[11] The two categories partially overlap because some potential jurors are both guilt nullifiers and penalty nullifiers, but a significant number would nullify only on penalty.[12]

In some instances nullifiers are easy to identify. A potential juror who flatly states that he could never vote in favor of conviction if the defendant might get the death penalty would clearly be excludable for cause as a guilt nullifier. A potential juror who states that her personal beliefs would prevent her from ever voting to impose the death penalty, regardless of the evidence, would clearly be excludable for cause as a penalty nullifier. In other cases, however, the matter may be less clear. Some potential jurors may be unsure or conflicted on these issues and may, as a result, equivocate or give ambiguous and conflicting answers.[13] A central

---

[8] In a few states that have the death penalty (e.g., Nebraska and Arizona), the trial judge, rather than the jury, decides the penalty in capital cases. In these states death qualification is performed solely to identify and exclude jurors who would be unable or unwilling to be fair when deciding guilt because of their feelings about the death penalty.

[9] *See generally*, 2 W. Lafave & J. Israel, Criminal Procedure 21.3 (1984).

[10] Schnapper, *supra*, Note 1.

[11] A nullifier is a juror who refuses to follow the law when deciding a case. Because those who are excluded during death qualification do not become jurors, they are not, strictly speaking, nullifiers; they are better viewed as potential nullifiers. The terms *guilt nullifier* and *penalty nullifier* were coined for ease of exposition in this article and are not commonly used in legal parlance, although some courts have used the generic term *nullifier* to refer to guilt nullifiers.

[12] *See* Note 127 *infra*, and accompanying text.

[13] *See, e.g.*, the excerpts of the voir dire of veniremember Pfeffer set forth in O'Bryan v. Estelle, 714

issue surrounding death qualification, then, is whether or not such individuals should be excluded for cause. In a borderline case, where it is unclear whether a juror would be a nullifier or not, should the courts err on the side of exclusion or inclusion?

## The Witherspoon Standard

Before the *Witherspoon* decision in 1968, the courts erred on the side of exclusion. Judges followed the simple expedient of excluding any juror who opposed the death penalty in any manner, on the assumption that this procedure would eliminate all possible nullifiers and thereby assure that every capital juror was able and willing to follow the law. This blanket exclusion also eliminated many jurors who were not nullifiers,[14] but this was of little concern to the courts of that era. In their view, eliminating all nullifiers was necessary to satisfy the State's interest in an impartial jury, and loss of some non-nullifiers was a necessary cost of achieving impartiality. At that time, a jury was considered impartial if it was composed of *individual jurors* capable of impartiality.[15]

Critics of the blanket exclusion[16] took a different view of what constitutes an impartial jury. They argued that the blanket exclusion undermined the impartiality of capital juries because it eliminated a segment of the jury pool inclined to favor the defendant. The critics argued, in effect, that jurors who favor the death penalty are more likely to favor the prosecution and that jurors who oppose the death penalty are more likely to favor the defense. Hence, the systematic exclusion of death penalty opponents produced a jury biased in favor of the prosecution. Under this view, the impartiality of a jury depends on its *aggregate* propensity to favor prosecution or defense as well as the impartiality of individual jury members.

The *Witherspoon* court, agreeing with the critics in part, held the blanket exclusion unconstitutional on the grounds that it produced a jury that was biased against the defendant during the *penalty phase* of a capital trial. The court concluded that a jury from which all opponents of the death penalty were excluded would not be impartial when deciding the issue of penalty, but instead would be "uncommonly willing to condemn a man to die."[17] The court found it "self-evident that such a jury falls woefully short of the impartiality to which defendants are entitled under the Sixth and Fourteenth Amendments."[18]

It is crucial to note that the Court did not question the fairness of the *individuals* who served on such juries. The Court did not argue that supporters of the

---

F.2d 365, 379 (5th Cir. 1983); *See also* voir dire excerpts from various cases presented by Schnapper, *supra* Note 1 and Haney, *supra* Note 1.

[14] Jurors who were capable of following their oath notwithstanding their opposition to the death penalty were removed from the jury under the blanket exclusion.

[15] *See generally,* Schnapper, *supra* Note 1; Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data,* 8 Law & Hum. Beh. 7 (1984).

[16] *E.g.,* Oberer, *supra* Note 3.

[17] 391 U.S. at 512.

[18] *Id.,* at 518.

death penalty are less-than-impartial as individuals. In the Court's view, such juries were unfair because they lacked a balance of viewpoints, not because they contained individual jurors who were unfair. Thus, the *Witherspoon* Court adopted the aggregate view of jury impartiality promulgated by critics of death qualification.

Under the aggregate view, there is a conflict between the State's interest in seating only impartial *jurors* and the defendant's right to an impartial *jury*. If the state is allowed, during death qualification, to challenge for cause all jurors who oppose the death penalty on the grounds that they might be nullifiers, then impartial jurors who are favorable to the defendant may also be eliminated. On the other hand, if the state is not allowed to challenge death penalty opponents, then nullifiers may be seated on the jury.

The *Witherspoon* decision resolved this conflict in a way that gave priority to the defendant's rights over the State's interests. In place of the blanket exclusion of all jurors opposed to the death penalty, the *Witherspoon* court suggested, in language that has been cited frequently in subsequent cases, that potential jurors be excluded only if they make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."[19] The first prong of this two-pronged test is designed to eliminate penalty nullifiers; the second, to eliminate guilt nullifiers. By allowing exclusion only of those who make it *unmistakably clear* that they could not follow the law, the *Witherspoon* standard assures that questionable jurors are included rather than excluded from the jury.[20] Since errors of exclusion work against the defendant while errors of inclusion undermine the State's interests,[21] this strict standard tries to assure that any misclassifications that occur during death qualification compromise the state's interest in eliminating nullifiers rather than the defendant's right to an impartial jury.

## The Conviction Proneness Issue

The *Witherspoon* decision was based on the Supreme Court's belief that a blanket exclusion of jurors opposed to the death penalty produces an unfair jury during the *penalty phase* of a capital trial. In *Witherspoon* the court also considered and rejected a second argument—that death qualification produces a less-than-neutral jury on the issue of guilt.

> The petitioner contends . . . such a jury . . . must necessarily be biased in favor of

---

[19] *Id.*, at 522 n. 21 (emphasis in original).

[20] *See* Schnapper, *supra* Note 1, 981–993.

[21] Errors of exclusion are instances where non-nullifiers are mistakenly removed from the jury. These errors work against the defendant because they remove jurors who oppose the death penalty (but nevertheless are capable of impartiality). The *Witherspoon* court assumed that these are the very jurors most likely to favor the defendant during the penalty phase of the trial. Errors of inclusion are instances where nullifiers are mistakenly allowed to remain on the jury. These errors obviously undermine the State's interest in seating only jurors capable of impartiality.

> conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts and return a verdict of guilt.[22]

To support this position, the petitioner in *Witherspoon* offered preliminary drafts of three unpublished social science studies that suggested that jurors who favor the death penalty are more likely to convict than those who oppose it.[23] Although the Supreme Court found this evidence "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt,"[24] the court left this issue open for future empirical challenge and even suggested a possible remedy, should such an empirical challenge succeed.

> The question would then arise whether the state's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.[25]

After *Witherspoon,* controversy centered on the exclusion of jurors who came to be known as *Witherspoon* excludables. *Witherspoon* excludables were individuals who failed the first prong of the *Witherspoon* test but passed the second, that is, jurors who were penalty nullifiers but not guilt nullifiers.[26] In order to protect the state's interest in a jury able to follow the law at the penalty phase, such jurors were excluded from capital trials altogether, even though they were qualified to sit during the guilt phase. Critics of the procedure[27] argued that death qualification under *Witherspoon* produced a conviction-prone jury because *Witherspoon* excludables tend to be more favorable to the defendant than death qualified jurors. According to this view, death qualified juries are "less-than-neutral with respect to guilt" because the population of jurors composing death qualified juries tends to be more conviction-prone than the total population of individuals who meet the standard of fairness for the guilt phase.[28] Implicit in

---

[22] 391 U.S. at 516.

[23] The studies were Wilson, Belief in Capital Punishment and Jury Performance (1964), and early, incomplete versions of H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (1968), and Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias and the Use of Psychological Data to Raise Presumptions in the Law,* 5 Harv. Civ. Rts.–Civ. Lib. Rev 53 (1970). For additional discussion of the court's reactions to these studies see Gross, *supra,* note 15.

[24] 391 U.S. at 527.

[25] *Id.,* at 520 n. 18.

[26] *See* Gross, *supra,* Note 15.

[27] *See, e.g.,* White, *supra* Note 3; Bronson, *On the Conviction Proneness and Representativeness of the Death Qualified Jury,* 42 Colo. L. Rev. 1 (1970).

[28] Opponents of death qualification recommend two possible alternatives. The first is a bifurcated trial in which different juries try guilt and penalty. *Witherspoon* excludables would be eligible to serve on the guilt jury but not the penalty jury. A second option is to add a number of alternate jurors who would sit through the guilt phase of the trial. If the defendant is convicted, a new voir dire could take place and the same jury could be qualified, with *Witherspoon* excludables removed, to hear the penalty phase of the trial.

this view is the assumption that juries drawn from the total population of eligible, qualified jurors constitute the *standard of neutrality* against which death qualified juries should be compared.[29] This assumption is, of course, consistent with the aggregate view of impartiality adopted by the *Witherspoon* court.

Three types of empirical research support the conclusion that death qualified jurors are more conviction prone than those excluded under *Witherspoon*. First, surveys show a strong correlation between attitudes toward the death penalty and a cluster of other views about criminal justice issues.[30] Those favoring the death penalty tend to hold proprosecution attitudes, and those opposing it are more prodefense. Compared to those who oppose the death penalty, for example, people who favor it tend to be more trusting of police and prosecutors and tend to believe harsh penalties are the solution to the crime problem. Those who oppose the death penalty are more likely to support procedural protections for defendants and to take other traditional liberal positions on criminal justice issues. Hence this survey research indicates that death qualified jurors are more likely to hold attitudes favoring the prosecution than *Witherspoon* excludables. A second line of research, employing jury simulation studies, shows that people who favor the death penalty are more likely to vote guilty in simulated trials than those who oppose capital punishment.[31] This research indicates even more directly than the attitude studies that death qualified jurors are more conviction-prone than *Witherspoon* excludables. Finally, two studies in which actual jurors were interviewed posttrial about their feelings concerning the death penalty and about their voting patterns in criminal cases also noted a positive association, across a variety of cases, between favoring the death penalty and favoring conviction.[32]

## Judicial Reactions to the Empirical Studies

During the 1970s, lawyers began using some of the early studies in this emerging literature to support an argument that death qualification creates a jury that is less-than-neutral with respect to guilt and thereby violates defendants' Fourteenth Amendment right of due process.[33] The use of social science to support a due

---

[29] Gross, *supra* Note 15.

[30] *E.g.*, Fitzgerald and Ellsworth, *supra* Note 2; Bronson, *supra* Note 27; Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict?*, 3 Woodrow Wilson L. J. 11 (1981); White, *supra* Note 3.

[31] Goldberg, *supra* Note 23; Jurow, *New Data on the Effects of a Death Qualified Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971); White, *supra* Note 3; Cowan, Thompson, and Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberations*, 8 Law & Hum. Beh. 53 (1984); Thompson, Cowan, Ellsworth, and Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 Law & Hum. Beh. 95 (1984); Louis Harris and Associates, Inc. Study No. 2016 (1971).

[32] H. Zeisel, *supra* Note 23; Moran & Comfort, *Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment*, 71 J. Appl. Psychol. 146 (1986).

[33] *See generally*, Gross, *supra* Note 15. A second constitutional attack on death qualification is that it violates defendants' Sixth Amendment right to an impartial jury. The Sixth Amendment has traditionally required that a jury be drawn from a full cross-section of the community and has proscribed

process argument was initially unsuccessful. Some courts held to the pre-*Witherspoon* view that an impartial jury is simply a jury composed of *individuals* who say they can be impartial.[34] Under this view the aggregate propensities of the jury to favor prosecution or defense are irrelevant, and therefore the social science research, which deals only with aggregate propensities, is also irrelevant.[35]

Other appellate courts found the initial research insufficient to prove that death qualification produces a conviction-prone jury.[36] They rejected the survey data on the grounds that attitudinal differences are meaningless because jurors' attitudes do not necessarily relate to their verdicts.[37] They rejected the simulation studies on the grounds that such studies were not sufficiently realistic to reflect actual courtrooms.[38] They criticized studies of both types for failing to distinguish death qualified and *Witherspoon* excludable subjects in a manner precisely comparable to the way these groups are differentiated in an actual trial.[39] Finally, they expressed skepticism toward all of the research because it had not undergone the traditional testing of the adversary process; that is, reports of the research were appended to legal briefs rather than being presented in a hearing by witnesses subject to cross-examination and attack by opposing experts.[40]

---

the systematic exclusion of "cognizable classes" of individuals—that is, groups of individuals with a common background, experience, or perspective not otherwise represented in the jury pool. Duncan v. Louisiana, 391 U.S. 145 (1968). For example, procedures that systematically exclude blacks, women, students, or day laborers have all been held to violate the Sixth Amendment. Based on the social science research, defense attorneys have argued that *Witherspoon* excludables constitute a "cognizable class." Although a few appellate courts have found this argument persuasive, *e.g.*, Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S.Ct. 1758 (1986), most appellate courts have taken the position that a group defined on the basis of attitudes alone (rather than more tangible attributes such as gender or race) cannot constitute a "cognizable class," and hence that research showing death qualified and *Witherspoon* excludable jurors have different perspectives cannot make out a constitutional violation, no matter how striking those differences might be. *E.g.*, People v. Fields, 35 Cal.3d 329 (1983), *cert. denied* 105 S.Ct. 267 (1984).

[34] *E.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984).

[35] Gross, *supra* Note 15.

[36] Major cases are reviewed in Gross, *supra* Note 15.

[37] *Id.*

[38] *Id.*

[39] The earliest research in this area, which was conducted before *Witherspoon*, simply compared the attitudes and verdicts of people who favored the death penalty to those of people who opposed it. Some of the post-*Witherspoon* studies also divided subjects into groups that were not precisely equivalent to death qualified jurors and *Witherspoon* excludables. Some studies, for example, failed to exclude guilt nullifiers from their samples before comparing death qualified subjects to penalty nullifiers. *E.g.*, Jurow, *supra* Note 31; Bronson, *supra* Notes 27 and 30. All of the studies, however, found a powerful and consistent correlation between attitudes toward the death penalty, on the one hand, and attitudes toward criminal justice issues and conviction-proneness on the other. The more favorable people are toward the death penalty, the more likely they are to hold proprosecution attitudes and to vote guilty in simulated trials.

[40] *See, e.g.*, State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968); *In re* Anderson, 69 Cal.2d. 613 (1968). *Compare* Ballew v. Georgia, 436 U.S. 223, 246 (1978) (Powell, J. concurring in opinion declaring five-person juries unconstitutional, but questioning the majority's reliance on jury studies that had not been subjected to "the traditional testing mechanisms of the adversary process.")

Social scientists responded to these criticisms by conducting increasingly sophisticated studies designed to answer objections the courts had raised to earlier research. Because no single study could answer all of these objections, they sought convergent validity through an array of studies looking at the difference between death qualified and excludable jurors in different ways. The new studies unanimously confirmed previous findings that death qualified jurors have attitudes more favorable to the prosecution[41] and are more likely to convict[42] than *Witherspoon* excludables. Moreover, differences between death qualified and excludable jurors in jury simulation studies tended to increase as the simulation studies became more realistic.[43]

In 1979, the extant research on death qualification was presented in an important pretrial evidentiary hearing in California.[44] The record created by this evidentiary hearing was reviewed by the California Supreme Court in *Hovey v. Superior Court*.[45] The Court first discussed the concept of a neutral jury, arguing that the aggregate view of impartiality adopted by the U.S. Supreme Court in *Witherspoon* should be applied in assessing whether death qualified juries are impartial with regard to the determination of guilt.[46] Then the Court discussed the research in a manner that "could easily be taken for a review article in a social science journal"[47] and concluded that the research successfully established that death qualified jurors are more conviction-prone than *Witherspoon* excludables. The court refused to hold death qualification unconstitutional in California, however, noting that in California, jurors who say during voir dire that they would automatically vote *for* the death penalty are excluded from capital juries along with *Witherspoon* excludables. The court argued that if substantial numbers of these automatic death penalty jurors are excluded from capital juries, and if this group is highly conviction-prone, then their removal might reduce the imbalance toward conviction that the research demonstrated among death qualified jurors.[48]

In light of the California Supreme Court's decision, a new round of research was necessary to study the automatic death penalty group. A series of surveys, including a nationwide Harris poll,[49] revealed that only one percent of the population would automatically vote for the death penalty, and statistical analysis confirmed that exclusion of this small group of potential jurors, even assuming

---

[41] Fitzgerald and Ellsworth, *supra* Note 2.

[42] Cowan, Thompson, and Ellsworth, *supra* Note 31; Thompson, Cowan, Ellsworth, and Harrington, *supra* Note 31; Fitzgerald and Ellsworth, *supra* Note 2; Ellsworth, Bukaty, Cowan, and Thompson, *The Death Qualified Jury and the Defense of Insanity*, 8 Law & Hum. Beh. 81 (1984).

[43] Cowan, Thompson, and Ellsworth, *supra* Note 31.

[44] Five witnesses, testifying for the defense, presented the results of two dozen studies, putting into evidence over 1,000 pages of exhibits. Two experts testified in rebuttal for the prosecution.

[45] 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980).

[46] 28 Cal.3d at 22.

[47] Levine and Howe, *supra* Note 1 at 176.

[48] The research had not dealt with automatic death penalty jurors because previously it was not clear whether they were excludable under California law and, in any case, it was commonly believed that this group was virtually nonexistant.

[49] Louis Harris and Associates, Inc., Study No. 814016, 812101 (1981) (prepared for the NAACP Legal Defense and Education Fund).

they all would take the most proprosecution position, would not materially alter the fact that death qualified jurors, as a group, are more conviction-prone than the total population of eligible jurors who meet the standard of fairness for the guilt phase of capital trials.[50]

These new findings, along with all previous research, were introduced in a test case in Arkansas, which led to a federal district court decision in late 1983, *Grigsby v. Mabry*,[51] holding death qualification to be unconstitutional in that state.[52] In January, 1985, the *Grigsby* decision was upheld by the Eighth Circuit Court of Appeal.[53] The Eighth circuit decision, if upheld, would have required the reversal of hundreds of convictions in capital cases in the Midwest. Furthermore, it created a conflict between the Eighth Circuit and two other circuits[54] that had upheld the constitutionality of death qualification. Because such important issues were involved, review of the issue by the U.S. Supreme Court was then inevitable.

## *LOCKHART v. MCCREE*

The U.S. Supreme Court ruled on the conviction-proneness issue in *Lockhart v. McCree*,[55] overturning the Eighth Circuit's decision in *Grigsby*.[56] The majority

---

[50] *See,* Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure,* 78 J. Am. Stat. Assn. 544 (1983); Kadane, *After Hovey: A Note Taking Account of the Automatic Death Penalty Jurors,* 8 Law & Hum. Beh. 115 (1984).

[51] 569 F.Supp 1273 (E.D. Ark. 1983).

[52] The Federal District Court in *Grigsby* held death qualification unconstitutional on both due process and Sixth Amendment grounds. In other words, the Court was persuaded both by the argument that death qualification produces a less-than-neutral jury with respect to guilt, thereby undermining defendants' due process right to an impartial jury, and by the argument that death qualified jurors are a "cognizable class," exclusion of which violates defendants' Sixth Amendment right to a jury drawn from a full cross-section of the community. *See* Note 33, *supra.*

[53] Grigsby v. Mabry, 758 F.2d 226 (1985). In upholding the District Court's opinion in *Grigsby,* the Eighth Circuit considered only the Sixth Amendment issue. *See* Note 33 *supra.* Because they found that death qualification violates the Sixth Amendment, they considered it unnecessary to address the Fourteenth Amendment due process issue. In reaching the conclusion that a death qualified jury does not provide adequate cross-sectional representation of the community, however, the Eighth Circuit placed heavy reliance on social science studies showing that *Witherspoon* excludables are less conviction-prone than death qualified jurors.

Another difference between the District Court and Eighth Circuit opinion is the remedy ordered. The District Court ordered the State of Arkansas, in all capital cases, to hold bifurcated jury trials (i.e., one jury for guilt, another for penalty). The eighth Circuit left the specific remedy to the State, but suggested several possible alternatives:

> Selecting enough alternate jurors at the outset to replace *Witherspoon* excludables at the penalty phase; shifting the sentencing duty to the judge; or using an advisory jury at the penalty phase which need not be unanimous in its recommendations.

758 F.2d at 243.

[54] The conflicting decisions were Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984).

[55] 106 S.Ct. 1758 (1986). In *McCree* the Court considered and rejected both the claim that death

opinion criticized the empirical studies, finding "several serious flaws in the evidence upon which the courts below had concluded that 'death qualification' produces 'conviction-prone' juries."[57] The ultimate basis of the decision was not the Court's rejection of the social science research,[58] however, but its rejection of the aggregate view of jury impartiality.[59]

Because this opinion has important implications for social scientists, I will discuss it in detail, looking first at its evaluation of the empirical studies and then at its legal analysis of jury impartiality.

## The Adequacy of Empirical Studies on Death Qualification

Writing for the majority,[60] Justice Rehnquist divided the research into categories and examined it in a piecemeal fashion. Upon finding a "flaw" in a study, or a group of studies, he dismissed it from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type. His analysis treated any study he deemed less than definitive as if it were completely uninformative.[61]

Eight of the studies presented by McCree were dismissed with a single sen-

---

qualification violates the defendant's Fourteenth Amendment right of due process by creating a conviction-prone jury and the claim that death qualification violates the defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community. *See* Notes 33 and 52 *supra*. This article will discuss only the Court's reaction to the conviction-proneness argument.

[56] In *McCree* the Supreme Court considered the same record reviewed by the Eighth Circuit in *Grigsby v. Mabry*. The case was recaptioned after the death of petitioner James Grigsby in an Arkansas prison. Replacing Grigsby as respondent when the case went to the Supreme Court was Ardia McCree, another Arkansas prisoner who, like Grigsby, had been convicted by a death qualified jury in Arkansas and whose habeas corpus petition had earlier been consolidated with Grigsby's. Mabry and Lockhart are the officials in the Arkansas Department of Corrections who were responsible, respectively, for holding Grigsby and McCree and therefore were the respondents to their petitions for habeas corpus.

[57] 106 S.Ct. at 1762.

> [58][W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases. 106 U.S. at 1764.
>
> [59][A]ccording to McCree, when the State "tips the scales" by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality . . . an impartial *jury* consists of nothing more than "*jurors* who will conscientiously apply the law and find the facts." 106 S.Ct. at 1767 (citing Wainwright v. Witt, 105 S.Ct. 844, 852 (1985)).

[60] The opinion was signed by Justices Rehnquist, O'Connor, White, Powell, and Burger. Justice Blackmun concurred in the result but offered no separate opinion.

[61] By contrast, the minority opinion, written by Justice Marshall and joined by Brennan and Stevens, explicitly recognized the importance of the convergence of findings across multiple studies:

> The chief strength of respondent's evidence lies in the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies. Even the Court's haphazard jabs cannot obscure the power of the array. Where studies have identified and corrected apparent flaws in prior investigations, the results of the subsequent work have only corroborated the conclusions drawn in the earlier efforts.
>
> 106 S.Ct. at 1773.

tence: "[These] studies dealt solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system, and were thus, at best, only marginally relevant [to the issue of conviction-proneness]."[62] Six of the eight studies in this group were attitude surveys[63] which the Federal District Court, in *Grigsby,* had found particularly persuasive on the issue of conviction-proneness.

> The attitudinal surveys . . . clearly [establish] that a juror's attitude toward the death penalty is the most powerful known predictor of his overall predisposition in a capital criminal case. That evidence shows that persons who favor the death penalty are predisposed in favor of the prosecution and are uncommonly predisposed against the defendant. The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will . . . be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury "organized to convict."[64]

The Supreme Court offered no analysis or comment on the striking difference between its assessment of the import of the survey research and the assessment of the District Court judge.[65]

The remaining two studies in the initial group of eight dealt directly with the relative conviction-proneness of death qualified and *Witherspoon* excludable subjects.[66] These studies were obviously mischaracterized by the Court. The reasons for this error are unclear.

---

[62] 106 S.Ct. at 1773.

[63] The six studies were those cited in Note 30, *supra* as well as an unpublished archival study and "various Harris, Gallup, and National Opinion Research Center polls conducted between 1953 and 1981." 106 U.S. at 1763, n.1.

[64] 569 F.Supp. at 1304.

[65] Whether an appellate court should give deference to a lower court's evaluation of social science is a controversial issue. *See generally,* Monahan and Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law,* 134 U.PA.L.R. 477 (1986). Rule 52(a) of the Federal Rules of Civil Procedure requires appellate courts to overturn the "factual" findings of a trial court only when they are "clearly erroneous." Appellate courts have been particularly reluctant to second guess a trial court where its factual findings are based on expert testimony presented in an adversarial hearing. Graver Tank & Mfg. Co. v. Linde, 336 U.S. 271, 274 (1949). Some courts have argued, however, that the "clearly erroneous" standard is inapplicable to "legislative facts," that is, facts that pertain to general questions of law or policy. *E.g.,* Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983). Monahan and Walker agree, arguing that "social science research, when used to create a legal rule, is more analogous to 'law' than 'fact,' and hence should be treated much as courts treat legal precedent." 134 U.PA.L.R. at 478. In a footnote, the *McCree* Court endorsed the distinction between legislative and adjudicative facts drawn in *Dunagin,* but stated that there was no need to resolve the "standard of review" issue "because we do not ultimately base our decision today on the invalidity of the lower courts' 'factual' findings. . . ." 106 S.Ct. at 1762, n.3.

[66] In one of these studies, jury-eligible adults who were classified as either death qualified or excludable under the *Witherspoon* standard were given written case descriptions and asked to judge the guilt of four criminal defendants who presented an insanity defense. Ellsworth, Bukaty, Cowan, and Thompson, *The Death-Qualified Jury and the Defense of Insanity,* 8 Law & Hum. Beh. 81 (1984). In the second study, a similar group of subjects viewed a videotape of conflicting testimony by a

The District Court had also given considerable credence to a study showing that the process of openly questioning potential jurors about their willingness to vote for the death penalty promotes an impression that the defendant is guilty and a likely candidate for the death penalty.[67] By contrast, the majority of the Supreme Court dismissed this study as irrelevant, arguing that a bias created by the process of death qualifying a jury "would not, standing alone, give rise to a constitutional violation."[68] Of course, the bias created by the *process* of death qualification does not stand alone; it exacerbates the proconviction bias that is created by the tendency of death qualification to select proconviction jurors. By dismissing the study for its individual insufficiency, Justice Rehnquist's opinion ignores the possibility that the study may help make a convincing case when considered in connection with other research.

The Court next turned to six "conviction proneness" studies. Three of the studies were dismissed without further discussion because they had been before the Court in Witherspoon:[69] "It goes almost without saying that if these studies were 'too tentative and fragmentary' to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some eighteen years, are still insufficient to make out such a claim in this case."[70] This analysis has two serious flaws. First, it is based on a mistaken premise. The *Witherspoon* Court found the studies "tentative and fragmentary" in part because it had before it only preliminary reports of the research.[71] By contrast the *McCree* Court had complete, published versions of these studies.[72] Second, the Court's analysis ignores the fact that the three studies have been replicated repeatedly. The *Witherspoon* Court undoubtedly considered the three studies "tentative" because they were the first to address the "conviction-proneness" issue. After 18 years of research that provides essentially unanimous support for the conclusions of these initial studies, it is fatuous to continue ignoring them on the grounds that they are

---

police officer and criminal defendant charged with assaulting the officer and made a number of judgments regarding the credibility of each witness and the guiltiness of the defendant. Thompson, Cowan, Ellsworth, & Harrington, *Death Penalty Attitudes and Conviction Proneness,* 8 Law & Hum. Beh. 95 (1984).

[67] Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process,* 8 Law & Hum. Beh. 121 (1984). The District Court found that "Dr. Haney's work adds an entirely new and different dimension to the problem . . . independently of the compositional effects of voir dire, and in addition thereto, the process itself increases the likelihood that [a death qualified jury] will . . . convict." 569 F.Supp. at 1302, 1304.

[68] 106 S.Ct. at 1763.

[69] The three studies were those cited *supra* at Note 23.

[70] 106 S.Ct. at 1763.

[71] The only material available at the time on the Zeisel study, for example, was a preliminary unpublished summary that contained neither the data nor analysis that underlay Zeisel's conclusions, nor the final conclusions themselves. *See,* Witherspoon v. Illinois, 391 U.S. 510, 517, n.10 (1968); Hovey v. Superior Court, *supra* Note 45 at 30, n.63; 106 S.Ct. at 1771, n.1 (Footnote to Marshall's dissenting opinion). The Goldberg study, *supra* Note 23, was also available only as an unpublished draft.

[72] Except for Wilson, *supra* Note 23, which was never published.

tentative.[73] Nevertheless, having concluded (by this flawed analysis) that these three studies are insufficient to support McCree's constitutional claim, the Court dismissed them from further consideration.

The remaining three studies[74] were criticized for being "based on the responses of individuals randomly selected from some segment of the population, but who were not actual jurors sworn under oath to apply the law to the facts of an actual case."[75] Two of the studies were dismissed from consideration because they failed to simulate the process of group deliberation, and more importantly, because they failed to identify and account for the presence of guilt nullifiers when comparing death qualified subjects to *Witherspoon* excludables—a deficiency that Justice Rehnquist labeled a "fundamental flaw."[76] Although the remaining conviction proneness study included group deliberation and took guilt nullifiers into account, the Court balked at basing a constitutional ruling on "the results of the lone study that avoids this fundamental flaw."[77]

## Death Qualification and the Right to an Impartial Jury

After declaring the social science data inadequate, the Court went on to declare it legally irrelevant because the data speak only to the aggregate tendencies of the jury. The majority explicitly rejected the aggregate view of jury im-

---

[73] Mendel's experiments on inheritance were once viewed as tentative and fragmentary (although they later were replicated thoroughly). Gonick and M. Wheelis, The Cartoon Guide to Genetics 37–66 (1983). By the Court's logic, Mendel's experiments should be viewed with skepticism for eternity.

[74] Harris, *supra* Note 31, Jurow, *supra* Note 31 and Cowan, Thompson and Ellsworth, *supra* Note 31.

[75] 106 S.Ct. at 1763. The Court expressed "serious doubts about the value of these studies in predicting the behavior of actual jurors," *Id.*, without bothering to point out that two studies that examined actual jurors obtained results consistent with the findings of the simulation studies. In the Zeisel study, *supra* Note 23, for example, actual jurors were interviewed after trial about their attitudes toward the death penalty and their votes in a real case; Zeisel thus found the familiar connection between favoring death and favoring conviction among "actual jurors sworn under oath to apply the law to the facts of an actual case." The majority had already dismissed the Zeisel study, however, based on its membership in the "tentative and fragmentary" group. Similar findings were noted in a second study, Moran and Comfort, *supra* Note 32. This study was cited and discussed in briefs filed with the Court, *see, e.g.*, Brief for *Amicus Curiae* American Psychological Association in Support of Respondent at 27, 106 S.Ct. 1758 (1986), but was not cited in the Court's opinion. Furthermore, the Court failed to reconcile this criticism of simulation studies with the Court's reliance on similar studies in Ballew v. Georgia, 435 U.S. 223 (1968) (citing a number of simulation studies comparing 6- and 12-person juries to support the conclusion that reducing the size of the jury to five members would inhibit the functioning of the jury sufficiently to render the practice unconstitutional).

[76] 106 S.Ct. at 1764. Although Harris and Jurow failed to include group deliberation, Cowan, Thompson, and Ellsworth did allow subjects to deliberate and found that differences in conviction-proneness between death qualified and *Witherspoon* excludable subjects persisted after deliberation.

[77] *Id.* Contrary to the Court's suggestion, the study by Cowan, Thompson, and Ellsworth was *not* the only one to exclude guilt nullifiers before comparing *Witherspoon* excludables to death qualified subjects. This procedure was also followed in three other studies, all of which found results consistent with the results of studies that failed to exclude nullifiers. Thompson, Cowan, Ellsworth, and Harrington, *supra* Note 31, Ellsworth, Bukaty, Cowan, and Thompson, *supra* Note 42, and Fitzgerald and Ellsworth, *supra* Note 2.

partiality and held that "an impartial jury consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.' "[78]

The Court's adoption of the individual view of impartiality is problematic for two reasons. First, the individual view is inconsistent with the aggregate view of impartiality taken by the Court in *Witherspoon*.[79] By changing the definition of jury impartiality, the *McCree* Court is in the awkward position of rejecting as irrelevant the very research the *Witherspoon* Court had invited social scientists to undertake. More importantly, the individual view adopted by the Court is naive and illogical. This view is difficult to defend on either psychological or legal grounds. To the extent the individual view is based on the assumption that qualified jurors are fungible, it is psychologically naive. Those who qualify for jury service by virtue of their willingness to "conscientiously apply the law and find the facts" may nevertheless differ widely in their propensity to favor the prosecution or defense due to their diversity of experience, viewpoints, knowledge, or due to differing standards of reasonable doubt.[80] To the extent the individual view rests on the assumption that the aggregate propensities of the jury are irrelevant to the jury's "impartiality," it creates a truly disturbing procedural anomaly. Because death qualification excludes disproportionate numbers of jurors favorable to the defendant, the "impartial" juries that try capital cases are more prone to convict than the "impartial" juries that try other criminal cases. As Gross points out, this means that a prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue.[81]

Given the serious implications of viewing jury impartiality as an individual rather than aggregate phenomenon, one might have expected a thorough analysis of the relative merits of the two positions. Instead, the majority offered only two poorly reasoned criticisms of the aggregate view. First, the majority argued that it is "illogical" to view death qualified juries as "slanted" by the systematic removal of *Witherspoon* excludables when other juries sometimes, by chance, contain no *Witherspoon* excludables and hence do not differ from death qualified juries.

> McCree characterizes the jury that convicted him as "slanted" by the process of "death qualification." But McCree admits that exactly the same twelve individuals could have ended up on his jury through the "luck of the draw," without in any way violating the constitutional guarantee of impartiality. Even accepting McCree's position that we should focus on the *jury* rather than the individual *jurors*, it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a State-ordained process, yet impartial when exactly the same jury results from mere chance.[82]

---

[78] 106 S.Ct. at 1767 (citing Wainwright v. Witt, 105 S.Ct. 844, 852 (1985)).

[79] *See* Notes 18 and 19 *supra* and accompanying text.

[80] *See* Thompson, Cowan, Ellsworth, and Harrington, *Supra* Note 31 (describing several psychological theories that may explain how individual differences in background and perspective are translated into differing verdicts). *See also* Hovey v. Superior Court, 28 Cal. 3d at 22.

[81] Gross, *supra* Note 15, at 13.

[82] 106 S.Ct. at 1767.

What McCree had argued, of course, is that death qualified juries *as a class* are more conviction prone than other criminal juries. The fact that other juries may occasionally have a composition identical to that of death qualified juries hardly makes McCree's position illogical. A showing that a given woman is as tall as any man would hardly make it illogical to claim that men are taller, as a group, than women. Moreover, as the minority opinion pointed out, the logic of McCree's argument "is precisely that which carried the day in *Witherspoon* . . ."[83] At a broader level, the Court appears to suggest that a "State-ordained process" cannot be viewed as unconstitutional where the same result may occur by chance. This suggestion is ludicrous. Many juries by chance contain no blacks. This fact hardly gives States license to exclude all blacks from jury service. Many juries by chance contain no Republicans. Would the majority tolerate a State law excluding all Republicans from jury service? Any illogic here resides not in McCree's argument but in the majority's response to it.

The second criticism of the aggregate view of impartiality is that it is "hopelessly impractical" because it would require the trial judge to assure that each jury contain the "proper number of Democrats and Republicans, young persons and old persons, white collar executives and blue-collar laborers, and so on."[84] This criticism is a classic "straw-man" argument, which badly mischaracterizes the remedy being sought by critics of death qualifications. McCree did not ask that the State try to balance viewpoints on each and every jury. He was willing to rely on random and therefore fallible processes to produce a representative jury. What McCree asked is merely that the State refrain from a practice that *systematically* skews the jury toward conviction.[85]

The Court next dealt with McCree's contention that *Witherspoon* set a precedent for applying the aggregate view of jury impartiality to the issue of death qualification. *Witherspoon* struck down Illinois's blanket exclusion of death penalty opponents because the Court believed that this procedure produced a jury at the penalty phase that was, in the aggregate, slanted toward death. McCree argued that the principles underlying *Witherspoon* require the Court to strike down current death qualification procedures if there is proof that these procedures produce a jury that is, in the aggregate, slanted toward conviction. The Court disagreed, distinguishing *Witherspoon* on two grounds. First, the Court argued that Illinois's blanket exclusion had no legitimate justification and, indeed, was deliberately designed "for the purpose of making the imposition of the death penalty more likely."[86] By contrast, current death qualification procedures serve the State's "entirely proper interest in having a single jury decide both guilt and penalty in capital trials."[87] In *Witherspoon* there was a clear alternative to the blanket exclusion of death penalty opponents that could satisfy the state's interest in assuring an impartial jury at the penalty phase without "slanting" the jury (i.e.,

---

[83] *Id.* at 1775.
[84] *Id.* at 1767.
[85] *See* Brief for Respondent Ardia McCree at 23–24, 87–89 106 S.Ct. 1758 (1986).
[86] 106 S.Ct. at 1768.
[87] *Id.*

the exclusion of guilt and penalty nullifiers only, rather than all death penalty opponents).[88] By contrast, the alternative to current death qualification procedures suggested by McCree, of using a non-death-qualified jury to decide guilt and a death qualified jury to decide penalty,[89] would not satisfy the State's interest in having a single jury make both decisions. The two reasons cited by the Court for maintaining a single jury, however, were not particularly persuasive. Although the Court suggested that having a single jury may allow more efficient trial management, this point is not beyond dispute.[90] Moreover, the Court has previously refused to sacrifice the defendant's interest in a fair trial for a mere savings of "Court time and financial costs."[91] The Court also argued that with a single jury the defendant might benefit at the penalty phase from any "residual doubts" jurors have about their decision to convict.[92] This theory is unproven, however.[93] Furthermore, as Finch and Ferraro note, the argument that death qualification "may be in the defendant's best interests, seems specious unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction."[94]

Second, the Court distinguished *Witherspoon* by arguing that the concerns raised in *Witherspoon* about the aggregate impartiality of juries were important only in "the special context of capital sentencing, where the range of jury discretion necessarily gave rise to greater concern over the possible effects of an 'imbalanced' jury."[95] The aggregate propensities of the jury are less likely to affect the decision on guilt, the Court suggested, because "jury discretion is more channeled" when the jury performs its "traditional role of finding facts and de-

---

[88] *See* Notes 19–21 *supra* and accompanying text.

[89] McCree's request derived directly from *Witherspoon,* where the Court suggested that a bifurcated trial could accommodate both "the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment" and the defendant's interest in a fair determination of guilt. 391 U.S. at 520 n.18. As noted earlier, Note 53 *supra,* there are several ways to implement a two-jury system.

[90] The dissenters in *McCree* offered the following argument, to which the majority did not respond:

> In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase. The voir dire needed to identify nullifiers before the guilt phase is less extensive than the questioning that under the current scheme is conducted before *every* capital trial. The State could, of course, choose to empanel a death-qualified jury at the start of every trial, to be used only if a penalty stage is required. However, if it opted for the cheaper alternative of empaneling a death-qualified jury only in the event that a defendant were convicted of capital charges, the State frequently would be able to avoid retrying the entire guilt phase for the benefit of the penalty jury. Stipulated summaries of prior evidence might, for example, save considerable time. Thus, it cannot fairly be said that the costs of accommodating a defendant's constitutional rights under these circumstances are prohibitive, or even significant.

106 S.Ct. at 1781.

[91] Ballew v. Georgia, 435 U.S. 223, 243–244 (1978).

[92] 106 S.Ct. at 1769.

[93] If two juries were used, the second jury's "residual doubts" about the first jury's conviction might be as influential as a single jury's doubts about its own conviction.

[94] Finch and Ferraro, *supra* Note 4, at 69.

[95] 106 S.Ct. at 1769.

termining the guilt or innocence of a criminal defendant."[96] This distinction is tenuous because *Witherspoon* has been affirmed in a number of cases where the jury's role in the penalty phase is essentially limited to fact-finding and hence is nearly indistinguishable from the role performed by juries at the guilt phase.[97] In any case, the social science evidence indicates that the aggregate propensities of the jury may have a powerful effect on how juries evaluate evidence and determine guilt, notwithstanding the channeling of their discretion.

## Explaining the Decision

In sum, the majority opinion in *McCree* is poorly reasoned and unconvincing both in its analysis of the social science evidence and in its analysis of the legal issue of jury impartiality. If this opinion is forthright and sincere, reflecting the best efforts of the majority of the Court, it should raise serious doubts about the ability of these Justices to understand and deal with social science. The Court's piecemeal evaluation of the studies[98] may be explained, perhaps, by a failure to appreciate the concept of convergent validity. Although this concept was explained in briefs and lower court opinions, the majority of the justices may nevertheless have assumed that a study is unworthy of consideration unless it is designed in a manner that rules out all possible confounds and alternative explanations—an assumption one might call "the myth of the definitive study."[99] The Court's misreading and mischaracterization of several of the studies[100] is more difficult to explain, unless it was due simply to intellectual carelessness. This explanation seems unconvincing, however, for several reasons. The research is unusually straightforward and easy to understand. Most of the studies involved simple two-group comparisons. There was no need to understand elaborate statistical models to appreciate the results. Finally, the legal and empirical issues were well briefed[101] and had been thoroughly discussed in lower court opinions.

An alternative explanation is that the opinion is not forthright and sincere. Legal realists caution that appellate decisions are often based on pragmatic considerations rather than pure legal analysis.[102] Under this view, the arguments set

---

[96] *Id.* at 1770.

[97] In Adams v. Texas, 448 U.S. 38 (1980), for example, the Court applied the principles of *Witherspoon* to a Texas death penalty scheme in which the jury, at the penalty phase, was asked to answer three factual questions, answers to which would determine whether the defendant received the death penalty. *See also,* Schnapper, *supra* Note 1.

[98] *See* Note 61 *supra* and accompanying text.

[99] In the physical and biological sciences it may be more common than in social science to have single definitive experiments that resolve major issues. C. Hempel, Philosophy of Natural Science 3–32 (1966). Perhaps the justices' knowledge of natural science led them to look for a single definitive experiment here.

[100] *See* Note 66 and accompanying text.

[101] In McCree's brief as well as the amicus brief filed by the American Psychological Association there were detailed accounts of the studies.

[102] Consider, for example, the comments of O. W. Holmes in The Common Law (1881):

> The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient. . . . The official theory is that each new decision follows syllogistically from existing precedents.

forth in judicial opinions are often merely the court's effort to provide an acceptable justification for an expedient decision. In *McCree* the Court may have approached the issue of death qualification pragmatically, balancing the perceived costs of eliminating death qualification against the increased protection of defendant's rights that would be afforded by the remedy sought by McCree (i.e., a bifurcated jury trial in capital cases). The decision may ultimately be based on a simple judgment that the increased protections are not worth the trouble of changing a procedure that has been employed for many years. Some of the justices may well believe that capital defendants have enough protection already. Hence, to require the additional protections sought by McCree may have seemed an unnecessary coddling of criminal defendants.[103] Because these pragmatic considerations are not recognized as a legitimate basis for a constitutional holding, they are not reflected in the opinion. Instead, the Court attacked the social science research and shifted to an individual view of jury impartiality in a disingenuous effort to justify a decision reached on the basis of political pragmatism rather than constitutional principle.

An even more cynical view is that the Court was influenced by a desire to avoid reversing the convictions of defendants tried by death qualified juries in previous cases. When *McCree* was decided there were over 1,500 people on death row, and probably an even larger number of individuals serving life sentences, who had been convicted by death qualified juries.[104] In the absence of an innovative and unprecedented holding regarding retroactivity,[105] a finding in McCree's

---

> [But] in substance the growth of the law is legislative. . . . The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy. . . .

*See generally,* J. Monahan and L. Walker, Social Science in Law 2–32 (1985).

[103] The decision might, nevertheless, have been different had the Court viewed death qualification as an intentional effort by states to slant the jury against the defendant. It is clear, however, that the Court viewed the slanting of the jury as an unintended side effect of the state's legitimate efforts to obtain jurors willing to follow the law at both phases of the trial. *See* Note 86 *supra* and accompanying text.

[104] U.S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 428–434 (1986). Some defendants tried by death qualified juries receive life sentences because the jury decides not to recommend the death penalty.

[105] Although it is difficult to discern clear rules governing the retroactivity of rulings that invalidate state criminal procedures, the Court has consistently given retroactive effect to decisions that bear directly on the "integrity of the fact-finding process" during the trial, Robinson v. Neil, 409 U.S. 505, 510 (1973) (giving full retroactive effect to a ruling on double jeopardy), and to decisions designed "to overcome an aspect of a criminal trial that substantially impairs the truth-finding function," Ivan v. New York, 407 U.S. 203 (1972) (giving full retroactive effect to the requirement of proof beyond a reasonable doubt announced in In Re Winship, 397 U.S. 358 (1970)). *Witherspoon* was given retroactive effect and, as a result, "hundreds of death sentences around the country were vacated." Gross, *supra* Note 15 at 8. The decisions that the Court has applied prospectively only are generally directed to collateral purposes unrelated to the basic fairness of fact-finding during the trial, such as deterring unlawful police conduct. *E.g.,* Linkletter v. Walker, 381 U.S. 618 (1965) (declining to overturn convictions based on illegally obtained evidence in state

favor would have compelled the Court to reverse these convictions, necessitating new trials in hundreds of murder cases. Perhaps this consideration contributed to the determination of some of the Justices to find a way to uphold death qualification.

## The Role of Social Science After McCree

Had *McCree* been based solely on the insufficiency of the social science evidence, there might have been hope of overcoming the majority's support for death qualification through additional research. By adopting the individual view of impartiality, however, the Court effectively rendered social science irrelevant and thereby precluded any hope of using social science to successfully challenge death qualification in the federal courts. Though it is not impossible that the majority's view of impartiality will change, it is likely to remain the law of the land for the foreseeable future.[106]

Social science may still be relevant in some state courts in connection with efforts to challenge death qualification on independent state grounds. State constitutions occasionally are held to provide protections to criminal defendant that extend beyond the scope of defendant's rights under the U.S. Constitution.[107] Hence, defense attorneys may continue to cite social science research in efforts to attack death qualification in state courts. Given the serious political ramifications of declaring death qualification unconstitutional, these challenges seem unlikely to succeed.[108]

---

cases that had become final before the exclusionary rule was extended to the states in Mapp v. Ohio, 367 U.S. 643 (1961); Johnson v. New Jersey, 384 U.S. 719 (1966) (holding that Escobedo v. Illinois, 378 U.S. 487 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966) affect only those cases in which the trial began after the date of these decisions).

[106] Although there have been a few instances in which the Court has, within a few years, reversed important constitutional decisions, these cases are rare. *E.g.*, West Virginia Board of Education v. Barnett, 319 U.S. 624 (1943) (state regulation requiring school children to salute the American flag notwithstanding religious objections was overturned even though the same regulation had been upheld by the Court only three years earlier). Constitutional rulings typically change, if at all, only after a much longer period.

[107] Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L. J. 421 (1974). State Courts that are willing to provide defendants with greater procedural protections than are required by the Federal Constitution may construe a state constitutional provision more expansively than the U.S. Supreme Court has interpreted a similar provision in the Federal Bill of Rights. Thus, in spite of *McCree*, a state court might still hold death qualification unconstitutional on grounds that it violates a defendant's rights under a state constitution.

[108] The political pressures that may come to bear on state justices are well illustrated by the furor that arose in California after the state supreme court overturned death sentences in a series of cases that had been prosecuted under a controversial death penalty statute.

> Hardly a week goes by without an attack on the court's record on capital punishment. Public officials, led by Gov. George Deukmejian, accuse the court of giving murderers legal rights and remedies beyond reason. Prosecutors across the state have joined the campaign to defeat Chief Justice Rose Elizabeth Bird and other liberal justices in next year's balloting. Legislators threaten to cut off the justices' salaries unless they act more quickly in ruling on capital cases.

After *McCree,* then, there is little likelihood that additional research on death qualification will influence the development of the law. Social scientists who hope to see their research used in litigation and cited in legal opinions would be well advised to work in another area. Nevertheless, a number of important questions about death qualification remain unanswered and await further research. A particularly interesting question is how the new standard of exclusion announced in the Court's 1985 opinion in *Wainwright v. Witt*[109] will change the process of death qualification and the characteristics of those excluded from juries in capital cases because of their feelings about the death penalty. The *Witt* opinion will be described in the next section. For social scientists whose goal is simply to understand the operation of the legal system, the death qualification process under *Witt* remains a worthy and interesting topic of study.

## THE NEW STANDARD OF *WAINWRIGHT v. WITT*

McCree was tried by a jury that was death qualified under the *Witherspoon* standard. Accordingly, the issue before the Court in *Lockhart v. McCree* was the constitutionality of removing *Witherspoon* excludables from a capital jury. Before the *McCree* case reached the U.S. Supreme Court, however, the Court significantly modified the *Witherspoon* standard in *Wainwright v. Witt.* Although the new *Witt* standard was not at issue in *McCree,* it is now the law of the land.

In *Witt* the Supreme Court rejected the requirement that potential jurors in death penalty cases be excluded only if they make it unmistakably clear (a) that they would "automatically" vote against capital punishment without regard to the evidence or (b) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Instead, the court held that the proper standard was whether a juror's views would "prevent or substantially impair the performance of his duty as a juror in accordance with his instructions and oath."[110] This new formulation dispenses with *Witherspoon's* reference to "automatic" decision making and with the requirement that a juror's bias be stated with "unmistakable clarity" and thus expands the number of jurors who can be excluded for cause from capital trials because of their views on the death penalty.

Although the new *Witt* standard departs markedly from the *Witherspoon* standard, the majority opinion in *Witt* failed to acknowledge that the decision significantly changed the law.[111] Writing for the majority, Justice Rehnquist de-

---

Morain, *Agony Over Resuming Execution,* Los Angeles Times, Aug. 18, 1985, at 1, col.1. In a confirmation election held in November 1986, Chief Justice Bird and two other "liberal" justices were voted out of office by huge margins.

[109] 105 S.Ct. 884 (1985).

[110] 105 S.Ct. at 850.

[111] *See* Comment, *Excluding Death Penalty Opponents from Capital Juries: Witt, Witherspoon, and the Impartial Juror,* 34 Kan. L. R. 149, 151 (1985) ("The *Witt* decision, while purporting merely to

clared that the *Witherspoon* standard had already been replaced by a more lenient standard annunciated in *Adams v. Texas*.[112] This assertion undoubtedly surprised many lawyers because *Adams* had been widely perceived, prior to *Witt,* as consistent with *Witherspoon*.[113] Indeed, *Adams* quoted with approval language from *Witherspoon's* Footnote 21[114] which had been cited frequently in post-*Witherspoon* opinions of the Supreme Court and many lower courts as *the* standard for exclusion of capital jurors.[115]

By failing to acknowledge that its opinion significantly changed the law, the Court avoided some of the burden of justifying its abrogation of *Witherspoon*. The Court did, however, offer two arguments for the superiority of the new standard over the *Witherspoon* standard. First, the Court argued that the "automatically" language of the *Witherspoon* standard is obsolete[116] given the changes that have occurred in death penalty statutes following *Furman v. Georgia*[117] and *Gregg v. Georgia*.[118] Before *Furman* and *Gregg,* statutes in many states gave the jury in capital cases unlimited discretion in choice of sentence. Under such a statute, all that was required of a juror was that he or she be willing to consider imposing the death penalty (i.e., not automatically vote against it). After *Furman* and *Gregg,* capital penalty statutes gave juries more limited discretion. In many states, capital juries are asked specific factual questions, answers to which determine whether death is the appropriate penalty. In these circumstances, the Court argued, it is more appropriate to ask whether the juror will follow instructions—not whether he or she will "automatically" vote against death (since the latter choice may never be directly presented to the jury).[119]

This first argument appears to be a mere make-weight. Whether a modern

---

refine and clarify already-existing standards, actually departs markedly from not only the *Witherspoon* standard, but from the presumptions underlying the *Witherspoon* decision").

[112] 448 U.S. 38 (1980).

[113] Schnapper, *supra* Note 1; Comment, *supra* Note 111. *Adams* concerned the propriety of excluding potential capital jurors who state during voir dire that their feelings about the death penalty might "affect" their deliberation. The *Adams* Court held that exclusion of such jurors is improper because a juror's statement that he would be "affected" may mean only that he would be emotionally involved, not that he would be unable or unwilling to follow his oath of impartiality. Hence, the Court's holding in *Adams* was entirely consistent with *Witherspoon*.

[114] 448 U.S. at 38, 50.

[115] *E.g.,* Maxwell v. Bishop, 398 U.S. 262, 265 (1979); Boulden v. Holman, 394 U.S. 478, 482 (1969); Hackathorn v. Decker, 438 F.2d 1363, 1366 (5th Cir, 1971); People v. Washington, 71 Cal. 2d 1061, 1091–92, 458 P.2d 479, 496–497 (1969). The majority argue, however, that the language of Footnote 21 is dicta, not part of the holding in the case, and declare that subsequent opinions "demonstrate no ritualistic adherence to a requirement that a prospective juror make it 'unmistakably clear . . .' that he would *automatically* vote against the imposition of capital punishment." 105 S.Ct. at 850. *But see* Comment, *supra* Note 113 ("The Court's reliance on the footnote language suggested that the standards stated in *Witherspoon* should carry something more than mere footnote status"). For a general discussion of the distinction between dicta and holdings, *see* I. Horowitz and B. Willging, Psychology of Law, 49, 1983.

[116] 105 S.Ct. at 851.

[117] 408 U.S. 238 (1972).

[118] 428 U.S. 153 (1976).

[119] 105 S.Ct. at 851.

juror's duties are compatible with the precise language of the *Witherspoon* footnotes or not is tangential to the major issue raised in *Witt;* namely, how strict or lenient should be the standard for exclusion of jurors based on their feelings about the death penalty. The major thrust of *Witt* is to make the standard for exclusion more lenient. The Court's first argument offers no justification for the change.

The intellectual core of the majority position is revealed in the Court's second argument: "The *Adams* standard is proper because it is in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made."[120] The majority's position is that the standard for removal of jurors whose feelings about the death penalty might bias their judgment need be no different than the standard for removing jurors for potential bias of any other type. Courts have never thought it necessary that jurors make it "unmistakably clear" that they would be biased before excluding them for cause where, for example, they are acquainted with one of the parties or lawyers in the case or have been exposed to pretrial publicity.[121] The Court argued that there is no reason to invoke a stricter standard for death qualification than for other challenges for cause: "There is nothing talismatic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries."[122]

The problem with the majority's position is that it ignores a crucial difference between death qualification and other challenges for cause. As the *Witherspoon* court recognized, death qualification has the potential to systematically skew the jury against the defendant by removing the very jurors most likely to favor the defense.[123] Challenges for cause on other grounds (e.g., familiarity with the case or exposure to pretrial publicity) are unlikely to operate against the defendant in this systematic manner because those excluded will not necessarily or even typically be those most favorable to the defense. By equating death qualification with other challenges for cause, the majority in *Witt* showed itself willing to tolerate what the *Witherspoon* court found intolerable: a procedure that skews the jury against the defendant in order to protect the State's interest in a jury free of nullifiers.

Of course, the skewing of capital juries is problematic only under the aggregate view of jury impartiality. The Court's lack of concern about this tendency is, then, an early indication of the Court's retreat from the aggregate view of jury impartiality toward the individual view of impartiality that allowed the Court, the following year in *Lockhart v. McCree,* to declare irrelevant the evidence that death qualification produces a conviction-prone jury.

## Comparison of Witherspoon and Witt

The *Witt* standard for exclusion of jurors in capital cases differs in important ways from the standard that was previously thought to be the law. To help clarify

---

[120] 105 S.Ct. at 851.

[121] *See generally,* 2 W. Lafave and J. Israel, Criminal Procedure 21.3 *et seq.* (1984).

[122] 105 S.Ct. at 852.

[123] *See* text accompanying Notes 17 and 18.

the differences between the two standards, Figure 1 represents the categories of jurors excluded and included under *Witherspoon* and under *Witt*. Under *Witherspoon*, two categories of jurors were excluded. One group, labeled guilt nullifiers, was composed of jurors who made it unmistakably clear "that their attitude toward the death penalty would prevent them from making an impartial decision

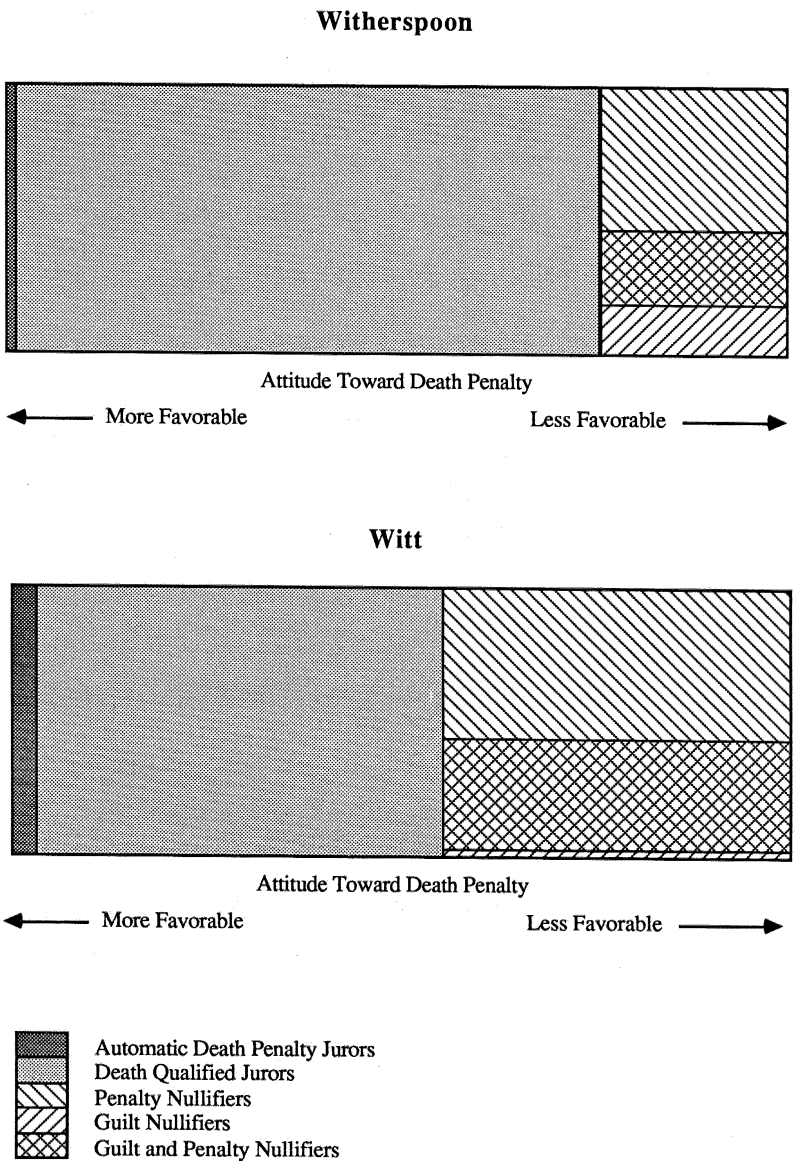


Fig. 1. Relative proportion of jury pool excluded through death qualification under *Witherspoon* and under *Witt*.

as to the defendant's guilt."[124] This group is represented in the lower right corner of the upper panel of Figure 1. Survey research indicates that 8%–12% of eligible jurors fell in this group.[125] The second group excluded under *Witherspoon* was composed of penalty nullifiers, that is, jurors who "make it unmistakably clear . . . that they would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them."[126] This group is represented in the upper right corner of the upper panel of Figure 1. The penalty nullifiers and the guilt nullifiers partially overlap (because some jurors fell in both groups). The subset of penalty nullifiers who were *not* guilt nullifiers is the group known as *Witherspoon* excludables. The surveys indicate that 11%–17% of eligible jurors were *Witherspoon* excludables.[127] Post-*Witherspoon* cases[128] also mandated the exclusion of a third group, commonly called the automatic death penalty (ADP) group—that is, those who made it unmistakably clear that they would automatically vote *for* imposition of capital punishment without regard to any evidence that might be developed at the trial.[129] Survey findings indicate that about 1% of eligible jurors fell into this group.[130] The remaining jurors were death qualified and therefore eligible to serve on capital juries. This group included 71%–79% of all eligible jurors.[131]

Under the *Witt* standard, an excludable juror is one whose views on capital punishment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[132] This new standard probably expands the class of jurors considered nullifiers because it does not require that they make their bias "unmistakably clear" before they may be excluded. Hence, it is likely that the percentage of eligible jurors excludable under *Witt* will be larger than the 21%–29% excludable under *Witherspoon*.[133] How much larger the excluded group will be is a worthy question for future research. The lower panel of Figure 1 represents the relative size of the excludable and death qualified groups under *Witt*—making the (probably conservative) assumption that under *Witt* the excludable group will expand to about 40% of eligible jurors.

The *Witt* standard does not differentiate guilt nullifiers and penalty nullifiers, though jurors of both kinds will be among those excluded. Under *Witt*, a guilt nullifier is a juror whose views on capital punishment would "prevent or substan-

---

[124] This language is, of course, the second prong of the *Witherspoon* standard. *See* Note 19 *supra* and accompanying text.

[125] Field Research Corp., *supra* Note 2; Fitzgerald and Ellsworth, *supra* Note 2.

[126] 391 U.S. at 522 n.21. *See* Note 19 *supra* and accompanying text.

[127] Field Research Corp., *supra* Note 2; Fitzgerald and Ellsworth, *supra* Note 2. Kadane (1984), *supra* Note 50.

[128] *E.g.*, Hovey v. Superior Court, *supra* Note 45.

[129] *See* text accompanying Note 50.

[130] Louis Harris and Associates, *supra* Note 49. Kadane (1984), *supra* Note 50.

[131] Kadane, *supra* Note 50.

[132] 105 S.Ct. at 852.

[133] Fitzgerald and Ellsworth, *supra* Note 2.

tially impair the performance of his duties" during the *guilt phase* of the trial. Guilt nullifiers are represented in the lower right corner of the lower panel of Figure 1. A penalty nullifier under *Witt* is a juror whose views on capital punishment would "prevent or substantially impair the performance of his duties" during the *penalty phase* of the trial. Penalty nullifiers are represented in the upper right corner of the lower panel of Figure 1. The relative number of penalty and guilt nullifiers under *Witt* is another unknown, although it seems likely penalty nullifiers will continue to outnumber guilt nullifiers because opponents of the death penalty are likely to have greater difficulty sentencing someone to death than merely convicting him. As with the *Witherspoon* standard, some penalty nullifiers will also be guilt nullifiers. There may also be a group excluded under *Witt* that is comparable to the ADPs—that is, jurors whose feelings about the death penalty would prevent or substantially impair their ability to follow their oath due to their commitment to automatically vote in favor of death at the penalty phase—but this group will probably be small. *Witherspoon* excludables outnumber ADPs by at least 10 to 1.[134] It seems likely that approximately the same ratio will hold under *Witt,* although this assumption certainly warrants empirical verification.

For researchers interested in whether death qualification under *Witt* slants the jury toward conviction, it is important to distinguish guilt nullifiers, penalty nullifiers, and ADPs. Death qualification slants the jury toward conviction to the extent it causes the exclusion of otherwise eligible jurors who are less conviction prone than those who remain. The otherwise eligible jurors who are excluded during death qualification fall into two groups: (1) penalty nullifiers who are not also guilt nullifiers (hereinafter called *Witt* excludables), and (2) ADPs. Hence, it is these jurors who should be compared to death qualified jurors in studies designed to determine whether death qualification produces a conviction-prone jury. Guilt nullifiers would be excluded from a capital jury whether it was death qualified or not and thus should not be part of the comparison.

To the extent death qualified *jurors* are more conviction-prone, as a group, than *Witt* excludables and ADPs, one would expect death qualified *juries* to be more conviction-prone than non-death-qualified juries. Because non-death-qualified juries contain a mixture of death qualified and excludable jurors, however, any difference in conviction rate between death qualified and non-death-qualified juries may be of smaller magnitude than the difference between death qualified and excludable individuals. Therefore under *Witt,* as under *Witherspoon,* the effects of death qualification can best be estimated by comparing the conviction rates of death qualified juries with the conviction rates of "mixed" juries containing *Witt* excludables and ADPs in numbers proportionate to their frequency in the population.[135]

---

[134] Kadane (1983, 1984), *supra* Note 50.

[135] The extent to which differences between death qualified and excludable jurors are muted in comparisons of death qualified and mixed juries may depend, however, on the relative number of death-qualified and excludable jurors on mixed juries. If the number of *Witt* excludables is larger than the number of *Witherspoon* excludables, it is likely that differences between death-qualified

## Identifying *Witt* Excludables

A key methodological issue facing future researchers is how to identify death qualified and excludable individuals under the *Witt* standard. The *Witt* ruling makes the task of classifying research subjects into appropriate legal categories far more formidable than it was under *Witherspoon* for two reasons.

First, *Witt* allows trial judges to rely on impressionistic evidence and their own subjective reactions when determining the qualifications of potential jurors.

> Determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism . . . many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear". . . . Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.[136]

This subjective evaluation, allowed under *Witt,* was explicitly forbidden by *Witherspoon. Witherspoon* emphasized that in determining a potential juror's qualifications the judge must rely only on what the juror actually said—not on what the judge inferred or assumed about the juror's position;

> Unless a venireman states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be *assumed* that that is his position.[137]

Determining whether a research subject would impress a trial judge as someone "unable to faithfully and impartially apply the law" (and therefore would be excluded under *Witt*) is clearly a more difficult challenge for the researcher than determining whether the subject would state unambiguously that he or she would automatically vote against the death penalty (and therefore would be excluded under *Witherspoon*).

Second, *Witt* greatly limits appellate review of trial judges' decisions. Under *Witherspoon,* a trial judge's decision to exclude a juror was reviewable *de novo* by appellate courts on the basis of transcripts of the voir dire. This *de novo* appellate review was helpful to social scientists in two ways. First, the appellate opinions, which included extensive discussion of the propriety of excluding potential jurors who had made various statements, helped clarify what sorts of statements would

---

and excludable jurors will be a better reflection of jury-level differences under *Witt* than under *Witherspoon.*

[136] 105 S.Ct. at 852–853.

[137] 391 U.S. at 516 n.9 (emphasis added). This insistence that exclusions be justified by potential jurors' actual statements arose, according to commentators, because the Court did not trust trial court judges to make accurate inferences about potential jurors.

> The Court apparently understood that the substantive rules it announced faced a grave and immediate danger of emasculation by the lower courts. In an atmosphere of casual inferences, cavalier disregard of the actual words of jurors and uncritical deference to the actions of trial judges, the distinctions required by *Witherspoon* would quickly have been obliterated.

Schnapper, *supra* Note 1 at 898–899.

and would not cause a juror to be excluded under *Witherspoon.*[138] Second, because lawyers and judges knew that appellate courts might "second guess" *Witherspoon* exclusions based on a reading of the voir dire transcripts, death qualification under *Witherspoon* tended to be rather formalized and to include a standard set of "Witherspoon questions" which appellate courts had previously found acceptable.[139] Social scientists were able to duplicate these "Witherspoon questions" for the purpose of classifying research subjects.

Under *Witt* the situation is different. *Witt* eliminated *de novo* appellate review of the trial judge's decisions during death qualification by declaring that a potential juror's ability to be impartial is a factual issue. Once an issue is classified as "factual" rather than "legal," the judge's determination is entitled to a "presumption of correctness" during Federal appellate review.[140] This presumption is appropriate, the Court argued, because exclusions under *Witt* may depend "upon determinations of demeanor and credibility that are peculiarly within a trial judge's province."[141] Exclusions by a trial judge under *Witt* are reversible only where they are "clearly erroneous."[142] Because this holding greatly limits appellate review, exclusions under *Witt* will probably receive little attention in appellate opinions and, as a result, these opinions will not be a useful source of information concerning the sorts of statements that will and will not cause a potential juror to be disqualified under *Witt.* Furthermore, in the absence of *de novo* appellate review there is likely to be less consistency among trial judges in the application of *Witt* than in the application of *Witherspoon;* a judge's determinations under *Witt* are less likely to turn on specific responses to specific standard questions. Indeed, some practitioners have argued that *Witt* has increased the importance of "creative" lines of questions designed to "rehabilitate" potential jurors who initially indicate that their feelings about the death penalty might affect their ability to be impartial.[143] Because the decision to exclude the juror or not depends on the judge's overall impression of the jurors' ability to be fair, a negative impression based on a response to any single question may be counteracted by the juror's response to any number of other questions. Hence, it will probably be more difficult for social scientists to develop a set of questions that will dis-

---

[138] *See generally,* Schnapper, *supra,* Note 1.

[139] Among lawyers there was "a tacit consensus that . . . *Witherspoon*'s requirements were clear and could be applied in a relatively simple and straightforward manner, perhaps necessitating only that a single additional question be asked of prospective jurors." *Id.,* at 980.

[140] 105 S.Ct. at 85355. Whether a potential juror should be excluded on *Witherspoon* grounds had previously been viewed as a "mixed question of law and fact" and therefore subjected to *de novo* appellate review. Darden v. Wainwright, 725 F.2d 1526, 1529 (11th Cir. 1984). Under the Federal statute governing habeas corpus review, however, the "factual" findings of a trial court are entitled to a "presumption of fairness." 28 U.S.C. 2254. *Cf.,* Note 65 *supra.* By declaring the decision a purely factual matter, the Court made it more difficult for federal appellate courts to reverse a decision of a state trial judge concerning the qualifications of a capital juror.

[141] 105 S.Ct. at 834.

[142] *See* Note 140 *supra.*

[143] Bowman and Martin, *When Equivocal Isn't Enough, or, Do You Have Some Time to Kill: A Logical Approach to Rehabilitating the Witt-Excludable Juror,* 10 The Champion 38 (1986).

tinguish those excluded and included under *Witt* in a manner comparable to the way that determination is made in court.

An initial effort to compare those likely to be excluded under *Witherspoon* and *Witt* illustrates the problem of finding an adequate way to classify research subjects under *Witt*. In a survey of registered voters, Neises and Dillehay tried to identify *Witt* excludables by asking subjects a "*Witt* question" (e.g., "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?").[144] Though this question may capture the essence of the *Witt* standard,[145] it will not necessarily classify subjects in a manner comparable to the way they are classified in court. Whether a potential juror is excluded or not under *Witt* depends on the judge's assessment of the juror, not the juror's self-assessment. A potential juror who responded in the affirmative to this "*Witt* question" during death qualification might well be excluded under *Witt* (unless successfully rehabilitated by the defense), but one who responded in the negative would not necessarily be seated on the jury. A judge might determine that the juror's feelings about the death penalty would "substantially impair the performance of his duties" notwithstanding the juror's denial that he will seriously be affected.

An important first step for those interested in studying the effect of death qualification under *Witt* is to learn how trial judges are actually implementing the *Witt* standard. A study of voir dire transcripts (or, better yet, observation of death qualifying voir dire) to see what sorts of statements cause potential jurors to be excluded would be helpful. It may be the case that attorneys are continuing to use fairly standard voir dire questions and that whether a juror is excluded or included can be predicted from his or her responses to those questions. If so, those questions can be adopted and used to classify research subjects. On the other hand, death qualification may be less standardized under *Witt*. Judges may rely so heavily on subjective impressions that it is difficult to predict who is excluded based on what they say. In that case, exclusions under *Witt* will be difficult or even impossible to predict based on the response of potential jurors to any particular question.

If it proves impossible to classify subjects appropriately based on their response to a few "Witt questions," it probably will not be feasible to conduct telephone surveys to determine the relative percentage of jury-eligible adults who would be death qualified and excluded under *Witt* or to compare the attitudes of death qualified and excludable respondents.[146] Jury simulation studies may still be feasible, however. Researchers could create a simulated voir dire in which a district attorney and defense attorney ask each subject a series of questions comparable to the questions potential jurors are asked in actual capital cases, includ-

---

[144] Neises and Dillehay, *Death Qualification and Conviction Proneness: Witt and Witherspoon Compared,* 5 J. Beh. Sci. & Law, 479 (1987).

[145] The *Witt* standard actually asks whether the juror's views would "prevent or substantially impair" the performance of duties. *See* Note 110 *supra* and accompanying text.

[146] The best example of such a study with regard to the *Witherspoon* standard is Fitzgerald and Ellsworth, *supra* Note 2.

ing follow-up questions and lines of questions designed to "rehabilitate" scrupled jurors who waver on their willingness to be fair.[147] A panel of experts[148] could examine subjects' responses to these questions and make a judgment as to whether the individual would be qualified or disqualified under *Witt*. Subjects could then be shown a videotape of a simulated trial and asked to evaluate the guiltiness of the defendant in order to assess, for example, whether, under *Witt*, death qualified subjects continue to be more conviction-prone than *Witt* excludables.

## CONCLUSIONS

It would be quite surprising, of course, if death qualified individuals under *Witt* were *not* found to be more conviction-prone than *Witt* excludables. Although the existing research does not define excludable and death qualified groups in a manner precisely comparable to the *Witt* standard, the research shows a strong and consistent correlation between attitudes toward the death penalty and conviction-proneness: The more favorable a juror is toward the death penalty, the more likely he or she is to favor conviction.[149] Regardless of whether the standard of exclusion is strict or lenient, those excluded should, as a group, be less favorable toward the death penalty than those who are death qualified. Hence, death qualification will undoubtedly produce a conviction-prone jury under *Witt* just as it did under *Witherspoon*. Indeed, the effect may be larger under *Witt* given the greater size of the excludable group.[150]

In light of *Lockhart v. McCree*, however, the relative conviction-proneness of death qualified and non-death-qualified juries is an academic point, without constitutional significance.[151] In *McCree* the Supreme Court was willing to assume that death qualified juries are more conviction-prone than other criminal juries (though not without taking a gratuitous and ill-founded swipe at the research supporting this conclusion), but nevertheless found no constitutional violation. The Court has continually endorsed the principle that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . ."[152] Yet, the Court was unwilling to forbid states from selecting capital juries in a manner that

---

[147] *Cf.*, the simulated voir dire employed by Haney, *supra* Note 67.

[148] Ideally the expert raters would be attorneys or judges with experience conducting voir dire in capital cases.

[149] *See generally* the studies cited in Notes 30–32 *supra*.

[150] *But cf.* Neises and Dillehay, *supra* Note 144 (raising the possibility that "the broader focus [of the *Witt* standard] may ensnare some capital punishment adherents" thereby decreasing the net difference between the death qualified and excludable groups).

[151] Except perhaps under state constitutions. *See* Note 107 *supra*.

[152] Spaziano v. Florida, 104 S.Ct. 3154, 3167 (1984) (Stevens, J., concurring in part and dissenting in part); *accord, e.g.*, Pulley v. Harris, 104 S.Ct. 871 (1984); Spaziano v. Florida, *supra*, 104 S.Ct. at 3159 (opinion of the Court); Barclay v. Florida, 463 U.S. 939 (1983).

renders them more likely to convict than the juries that try any other type of criminal case.

To social scientists who have followed the issue of death qualification closely, the Court's decisions in *Witt* and *McCree* are disheartening. Some viewed the issue of death qualification as a crucial test of the Supreme Court's trust and acceptance of social science research on the jury.[153] Though the Court had cited such research before,[154] it was always to justify decisions that might well have been reached on other grounds.[155] Hence, there was a lingering suspicion that the Court viewed such research as window dressing, useful to support a decision but not sufficiently compelling to be the basis for a decision.[156] The issue of death qualification was a better test of the influence of social science because the research supported a decision that the Court was unwilling to reach on other grounds. Moreover, the social science appeared particularly convincing. The research addressed a question the Court had itself raised in *Witherspoon*. The results of the research were clear, consistent, and uncontradicted, many of the studies had been designed in a legally sophisticated manner to address the precise questions the Court faced, and the research had successfully undergone "the traditional testing mechanisms of the adversary process."

Faced with a compelling answer to the question raised in *Witherspoon*, the Court chose to revise the question. *Witt* hinted at, and *McCree* formalized, the Court's rejection of the aggregate view of jury impartiality that had been the basis of *Witherspoon*. In place of the aggregate view, the Court adopted the naive and illogical "individual view" of jury impartiality; the only apparent attraction of this view is that it renders the social science evidence legally irrelevant.

If the issue of death qualification was a test of the Court's receptivity to social science, the Court failed the test badly. One must keep in mind, however, given the tremendous political and practical ramifications of declaring death qualification unconstitutional,[157] that this was a particularly difficult test. It is possible, perhaps even likely, that the Court would have been more receptive to the data had there been less at stake. Therefore the Court's rejection of the empirical studies in this case does not necessarily support the pessimistic view that relegates social science eternally to the role of window dressing. On the other hand, the intellectual weakness of the Court's opinions in *Witt* and *McCree* lends support to the cynical conclusion that the majority of the Supreme Court is willing to distort and ignore social science when it supports the "wrong" conclusion. History will not view these opinions kindly.

---

[153] Ellsworth, Eternal Truths and Ephemeral Questions: Empirical Data in Judicial Decision Making, Invited Address at the American Psychological Association Convention, Division 41, August 25, 1982.

[154] *See* Ballew v. Georgia, *supra* Note 40; Colgrove v. Battin, 413 U.S. 149 (1973); Williams v. Florida, 399 U.S. 78 (1970) (citing research on the connection between jury size and performance). *See generally*, M. Saks & R. Hastie, Social Psychology in Court, 75–83 (1978).

[155] Loh, *Perspectives on Psychology and Law*, 11 J. App. Soc. Psych. 314 (1981).

[156] Loh argued, for example, that the Court in *Ballew* used social science "the way a drunk uses a lamppost: for support rather than illumination." *Id.*, at 340.

[157] *See* Note 108 *supra* and accompanying text.