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Due Process vs. Crime Control

Death Qualification and Jury Attitudes*

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Juries that exclude people who are unwilling to impose the death penalty (death-qualified juries) may be biased against capital defendants. To evaluate this possibility we compared the demographic characteristics and attitudes toward the criminal justice system of people who would or would not be excluded by the *Witherspoon* standard. A random sample of 811 eligible jurors in Alameda County, California were interviewed by telephone. Of the 717 respondents who stated that they could be fair and impartial in deciding on the guilt or innocence of a capital defendant, 17.2% said that they could never vote to impose the death penalty, and thus are excludable under *Witherspoon*. Significantly greater proportions of blacks than whites and of females than males are eliminated by the process of death qualification. On the attitudinal measures, the death-qualified respondents were consistently more prone to favor the point of view of the prosecution, to mistrust criminal defendants and their counsel, to take a punitive approach toward offenders, and to be more concerned with crime control than with due process. Eleven of the 13 items showed statistically significant differences.

INTRODUCTION

> Then since the burden of the case is here, and rests on me, I shall select judges of manslaughter, and swear them in, establish a court into all time to come.
>
> Litigants, call your witnesses, have ready your proofs as evidence under bond to keep this case secure. I will pick the finest of my citizens, and come back. They shall swear to make no judgment that is not just, and make clear where in this action the truth lies.
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> Aeschylus, *The Eumenides*, 481–489.

With these words Athene, having confessed that not even she has the right to stand in judgment of a man accused of murder, creates a new form of tribunal,

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the Areiopagica, the first jury. Aeschylus does not tell us what qualifications the goddess sought in choosing these excellent citizens to represent the sober judgment of the whole community, or how she tested them.

Lacking divine intervention, the American criminal justice system has devised elaborate procedures to govern the selection of jurors in criminal proceedings. Jurors are questioned about any associations they may have had with the attorneys, the defendant, or the victim. Have they been exposed to any accounts of the crime that might predispose them to lean one way or the other? Is there anything in their background or experience that might affect their ability to be fair and impartial? And, in cases where the death penalty may be imposed, jurors are asked about their attitudes toward capital punishment. Those who oppose capital punishment are asked a further question: Is their opposition so strong that they would refuse to consider voting for the death penalty in any case, no matter how strong the evidence? Following the Supreme Court's ruling in *Witherspoon v. Illinois,*[1] this question determines the eligibility of opponents of capital punishment to serve on capital juries. Those who feel that they could not vote to execute anyone are not allowed to participate in decisions about the appropriate penalty, nor are they allowed to participate in decisions about the guilt or innocence of the person on trial.

Critics have contended that this procedure creates juries that are more likely than ordinary criminal juries to favor the prosecution's point of view. Furthermore, they contend, these "death-qualified" juries are unrepresentative of the communities from which they are drawn. These are, of course, empirical questions, and in this paper we address them with data from a survey of persons eligible for jury duty.

There are two stages in a death penalty proceeding. The first stage is the determination of guilt or innocence, and resembles any other criminal trial. It is often the only stage: Unless the jury finds the defendant guilty beyond a reasonable doubt of a murder for which the State provides the death penalty as a possible punishment, the trial is over with the verdict, and the judge pronounces the penalty for any defendant found guilty of a lesser offense. But if the defendant is convicted of a potentially capital murder, then in most states the jury must deliberate again, to decide between life imprisonment and the death penalty.[2]

One consequence of this special arrangement is that death penalty trials differ from other criminal trials in the questions asked during the *voir dire*—the examination of prospective jurors to determine their suitability for a particular case. Since in most states the death penalty trial is the only criminal proceeding in which the jury determines the sentence as well as the guilt or innocence of the defendant, the death penalty *voir dire* is the only time jurors' sentiments about punishment play a central role in determining their competence.

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[1] *Witherspoon v. Illinois,* 391 U.S. 510 (1968).

[2] The Supreme Court has ruled that an automatic death sentence for all those convicted of a certain class of homocide is unconstitutional. The jury must consider the particular aggravating and migrating factors of the case before them in deciding whether the death penalty is appropriate [*Woodson v. North Carolina,* 428 U.S. 280 (1976)].

Prior to the Supreme Court's decision in *Witherspoon,* the prosecution could challenge for cause all members of the *venire* who expressed any degree of opposition to capital punishment. In *Witherspoon,* however, the Court imposed constitutional restrictions on the exclusion of those opposed to capital punishment. The only people who can be excluded are those who will refuse to vote for the death penalty in any case, regardless of the evidence, or those who feel that their opposition to the death penalty is so strong that it would interfere with their ability to render a guilty verdict in a capital case, even though they were convinced beyond a reasonable doubt that the defendant was indeed guilty.

Since 1968 these restrictions have been the foundation of the "death qualification" of juries in capital trials. The question is, given this standard of exclusion, are the attitudes of the death-qualified jurors different from those of the excluded jurors in ways that might bias capital juries toward a prosecution point of view?

There are four major parts to our presentation. In the first part, we review the hypothesized attitudinal differences between those who are permitted and those who are forbidden to sit on capital juries, using Packer's (1968) definitions of due process and crime control orientations as a frame of reference. We then proceed to a critical review of the literature on these attitudinal differences. In the third section, we describe the measures and procedures we used in our survey, and present our findings. Finally, we discuss our findings in light of the U.S. Supreme Court's opinion in *Witherspoon* and the California Supreme Court's consideration of this research in *Hovey v. Superior Court.*[3]

Due Process and Crime Control Orientations

Attitudes toward the death penalty are a symptom of a more general cluster of social/political attitudes. Previous investigators have consistently found that proponents and opponents of the death penalty differ in their views on a broad spectrum of issues related to criminal justice (Vidmar and Ellsworth, 1974; Smith, 1976; Ellsworth and Ross, 1983; Tyler and Weber, 1982). Packer's (1968) distinction between Due Process and Crime Control orientations toward the criminal process captures these ideological differences very nicely.

Packer argues that those holding due process values emphasize the fallibility of the criminal process in correctly apprehending, trying, and convicting lawbreakers. Due process values are grounded in an enduring suspicion of unbridled state power, and a corresponding concern with the rights of the individual; thus preeminent among these values is the proposition that the burden rests with the state to prove guilt beyond a reasonable doubt. People with due process values demand proof of legal guilt in addition to factual guilt; hence, due process adherents stress procedural guarantees, especially the presumption of innocence (Packer, 1968, pp. 163–166). They trust the formal, rule-governed fact finding of the courts over the relatively efficient, but relatively unregulated, decisions of police and prosecutors, and share with the United States Supreme Court the view

[3]*Hovey v. Superior Court,* 616 Pac. 2d 1301 (1980).

that the "history of liberty has largely been the history of observance of procedural safeguards" (*McNabb v. United States,* p. 347).[4]

People who hold crime control values, on the other hand, believe that the most important function of the criminal justice system is repressing crime. Laws require strict enforcement. If the due process advocate focuses on the need to protect the rights of the individual, the crime control advocate emphasizes the need to deal swiftly and efficiently with large numbers of criminal suspects. The justice system, in this view, should function like "an assembly line conveyor belt down which moves an endless stream of cases . . ." (Packer, 1968, p. 159). Belief in the effectiveness of criminal justice professionals—police and prosecutors—is the foundation that supports crime control values. Since these professionals correctly apprehend the guilty and release the innocent

> the supposition is that the screening process(es) . . . are reliable indicators of probable guilt. Once a man has been arrested and investigated without being found to be probably innocent, or, to put it differently, once a determination has been made that there is enough evidence of guilt to permit holding him for further action, then all subsequent activity directed toward him is based on the view that he is probably guilty . . . (Packer, 1968, p. 160).

The presumption of innocence is seen as an obstacle to the punishment of those assumed to be factually guilty, i.e., those whom the prosecutor has not released for lack of evidence.

If we assume that the correlation between death penalty attitudes and general orientation toward the criminal justice system is monotonic, with strong opponents of capital punishment holding the most extreme due process values and strong proponents the most extreme crime control values, then death-qualified jurors should be more favorable toward crime control values and the prosecution point of view than the jurors who are excluded from capital juries. Likewise, the process of death qualification, by eliminating those who hold the strongest due process values, should result in juries whose average predisposition is more sympathetic to the prosecution than that of juries composed of people representing the whole range of capital punishment attitudes. We hypothesized that *Witherspoon*-excludable respondents would be more likely than death-qualified respondents to subscribe to due process values and less likely to endorse crime control values.

Previous Research on the Attitudes of Death-Qualified and Excludable Jurors

There are numerous studies that demonstrate general relationships between attitudes toward capital punishment, crime control, and due process orientations, and more general social and political values. There are a few studies that have attempted to address the issue of death qualification more directly, and we shall restrict our discussion to these in the review that follows.

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[4]*NcNabb v. United States,* 318 U.S. 332 (1943).

Wilson

One of the three studies before the Court in *Witherspoon* was a brief summary of research by Wilson (1964). He asked 187 students at the University of Texas whether they had conscientious scruples against the death penalty, then gave them five descriptions of cases on which they voted to convict or acquit, and finally asked for their agreement or disagreement with a number of attitude statements designed to tap proprosecution bias. Wilson found that those who lacked conscientious scruples were more likely to convict, more likely to assign severe punishments, and marginally more likely to agree with proprosecution statements and to reject the insanity defense. While the results are suggestive, it is impossible to evaluate the validity of the procedures or the analyses, as Wilson never followed up his "tentative and fragmentary" presentation with a detailed report. In addition, Wilson's research was conducted before the Supreme Court's decision in *Witherspoon,* and thus his "scruples" question was not sufficiently precise to identify the group that is currently excluded by the *Witherspoon* standard. First, the people who had "conscientious scruples against capital punishment" but who could nevertheless consider imposing it in some cases were classified as excludable by Wilson but would be qualified to serve under the new standard. Second, Wilson did not identify those whose views on the death penalty would impair their ability to reach a fair verdict in judging the defendant's guilt or innocence. For example, some people might consider a defendant guilty but vote to acquit him because they knew he would be eligible for the death penalty if he were convicted. People like this, who would perhaps "nullify" the will of the majority by refusing to join them in a guilty vote, would almost certainly be excluded from jury service under any standard, and so should not be considered eligible jurors for the purpose of research on this issue. Consequently, without further research, it is impossible to determine how well Wilson's findings would generalize to *Witherspoon* conditions. Also, since his work was not based on a random sample of an eligible jury pool, there would be no reliable estimate of the *size* of the excluded group even if he had asked the appropriate question.

Zeisel

The Court in *Witherspoon* also had before it a sketchy, second-hand report of a study conducted by Zeisel. The full report of this research (Zeisel, 1968) covers three topics: the correlation of general death penalty attitude with demographic variables; the correlation of general death penalty attitudes with other social attitudes; and the first-ballot votes of scrupled and nonscrupled jurors in actual jury deliberations. The data on demographics, derived from three national Gallup polls (1960, 1965, 1966), follow closely that pattern observed in numerous other surveys of general attitudes toward capital punishment (Smith, 1976; Vidmar and Ellsworth, 1974): race and gender showed strong significant effects, with blacks and women less likely to approve of capital punishment. Age, religion, income, and education were relatively weakly related to death penalty attitudes. As Zeisel points out, however, all people do not understand the general scruples

question in the same way—the scrupled group undoubtedly included some who would be excluded under *Witherspoon* and some who would not—and thus we cannot automatically assume that the qualified and excludable groups also differ with respect to race and gender.

The attitudinal questions included in the Gallup polls covered topics such as gun registration, the John Birch Society, open housing, racially mixed neighborhoods, and abortion. Zeisel found that opponents of the death penalty were more likely than proponents to choose the "liberal" answer on all of these topics except abortion. Since these issues are rather distantly related to crime control and due process values, they do not provide much information relevant to our hypothesis.[5]

Finally, as described in Cowan, Thompson, and Ellsworth (this issue), Zeisel is the only researcher who has collected data on the relative likelihood that scrupled and nonscrupled individuals will vote for conviction in actual jury deliberations. He reported results in line with his hypothesis that the scrupled jurors would be less likely to vote guilty on the first ballot.

Bronson

Shortly after *Witherspoon,* two other relevant studies were reported in the literature. One of these was by Bronson (1971), who surveyed a jury-eligible population to determine whether or not death-qualified juries are "conviction prone." Assisted by student interviewers, Bronson administered a questionnaire to 1117 prospective jurors drawn from Colorado jury lists. 718 interviews were completed (64.3%). About half were telephone interviews, and about half face-to-face.

Respondents were asked to "agree or disagree" with five statements concerning the constitutional rights of the accused, the relative importance of crime control and due process values, and the insanity plea. Bronson defined "conviction proneness" as agreement with any of the five statements—the more statements agreed to, the more conviction prone the respondent. Thus, the possibility of an agreement response set is cause for concern in the interpretation of the results.

After answering the five attitudinal statements, respondents were asked if they strongly favored, favored, opposed, or strongly opposed the death penalty. Bronson found that "conviction proneness" varied directly with support for the death penalty. He attempted to adapt his findings to the new *Witherspoon* criteria by considering all respondents who strongly opposed the death penalty as potentially excludable jurors, and compared the responses of these surrogate excludable jurors to all others on the five attitudinal items. For all five items, the "excludable" jurors were significantly less conviction prone.

Bronson was also the first to attempt to provide information on the issue of nullification: would opponents of the death penalty act contrary to the facts and

[5]While gun registration might seem to represent a crime control issue, in fact the meaning of responses to this question are ambiguous, since some respondents may think in terms of the availability of guns to criminals and others may think of the availability of guns to those who would defend themselves against criminals.

evidence and vote "not guilty" simply in order to prevent the imposition of the death penalty? Rather than asking respondents what they themselves would do, however, Bronson asked whether they "approved of " the conduct of a hypothetical juror who had behaved in this manner, and thus the results are of dubious relevance to the respondents' own eligibility to serve on capital juries.

Like Zeisel, Bronson found that whites were significantly more likely than nonwhites to express approval of the death penalty and, again by assuming that those who strongly oppose the death penalty are *Witherspoon* excludable, he found that death qualification would eliminate 50% of the black members of the *venire*. But Bronson's sample contained only 10 black respondents, and thus this finding is not reliable.

Bronson explored the relationship between death penalty attitude and a number of other demographic characteristics. Death qualification, he argued

> produces appreciable skewing in the sex, race, ethnic background, religion, occupation, income, and political party affilitaion of potential jury members (Bronson, 1971, p. 31).

Bronson grouped his data in a variety of ways in calculating these demographic effects. The most appropriate way, given his data, is to use his own criterion for the excludable category under *Witherspoon*—those who are strongly opposed to capital punishment versus all others—although, of course, even this division is at best a rough approximation of the *Witherspoon* standard. Recalculating Bronson's data in terms of this criterion, we find that "death qualification" affects the composition of juries by removing more women than men (chi square = 4.14, $p < 0.05$), more nonwhites (blacks and latinos) than whites (chi square = 13.5, $p < .001$), and more Democrats than Republicans (chi square = 7.83, $p < .005$). Other demographic variables do not show statistically significant associations with death qualification.

Overall, then, Bronson's data indicate that there are significant attitudinal and demographic differences between those respondents who strongly oppose the death penalty and all others. Although Bronson's use of "strong opposition" as the criterion for the *Witherspoon* excludable group is a better approximation than the "general scruples" criterion used by others, it is still not a precise identification, and thus the applicability of his findings to current cases must also remain questionable until they are replicated by research using an appropriate *Witherspoon* question.

Jurow

Jurow's 1971 study is considerably more elaborate than any of the previous research. 211 Sperry Rand employees (volunteers) completed numerous questionnaires designed to measure a variety of personality traits (e.g., authoritarianism), political attitudes, attitudes toward the criminal justice system, and support for capital punishment. After completing this battery of tests, the subjects listened to two audiotapes of murder trials and voted to convict or acquit the defendant in each case. Finally, after reaching their verdict in the second case, subjects were given brief descriptions of 14 murder cases and asked to assign penalties.

Unlike the research considered so far, Jurow's study included a reasonably appropriate *Witherspoon* question. His "Capital Punishment Attitude Questionnaire" had two parts. In the first part [CPAQ(A)], respondents were asked to choose the one of five statements that best summarized their general views about the death penalty. The second part [CPAQ(B)] instructed respondents to assume that they were "on a jury to determine the sentence for a defendant who has already been convicted of a very serious crime." They were then asked to choose among the following five answers:

1. I could not vote for the death penalty regardless of the facts and circumstances of the case.
2. There are some kinds of cases in which I know I could not vote for the death penalty even if the law allowed me to, but others in which I would be willing to consider voting for it.
3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.
4. I would usually vote for the death penalty in a case where the law allows me to.
5. I would always vote for the death penalty in a case where the law allows me to.

(Jurow, 1971, p. 599.)

Option number 1 corresponds more closely to the criteria established by *Witherspoon* than either the scruples question employed by Wilson and Zeisel or the four-point general attitude scale used by Bronson. The main drawbacks to Jurow's method are, first, that due to inattention or a desire to be consistent some subjects may have checked the "same" point on the CPAQ(B) scale as they had on the CPAQ(A) scale and so been misclassified; and second, that we have no way of knowing how many subjects would have nullified.

Jurow's data provide strong support for the hypothesis that jurors excluded by *Witherspoon* hold attitudes that differ from those of death-qualified jurors, in line with our hypothesis that the excluded jurors are more oriented toward due process and less inclined toward the prosecution. Jurow found that his "*Witherspoon*" group was significantly less conservative and less authoritarian, both in general and in their orientation toward the legal system, than the death-qualified group, and less punitive. In fact, on all but the conservatism measure, they differed significantly even from those subjects who checked the next most extreme response on the CPAQ(B). This suggests that the inclusion of less adamant opponents of the death penalty on the jury cannot remedy the attitudinal bias created by *Witherspoon* exclusions. Jurow's data on the responses of the two types of subject to the tape recorded cases are discussed in Cowan, Thompson, and Ellsworth (this issue).

Harris

In 1971 Louis Harris and Associates conducted a nationwide survey that included items bearing directly on our hypothesis. Although it was never written up for publication, nor even completely analyzed, it has been referred to in various publications, including the California Supreme Court's opinion in *Hovey v. Superior Court* (1981; see also White, 1973), so we mention it for the sake of comprehensive coverage. The sample was a nationwide stratified random sample

of 2068 adults, who were interviewed in person. They were asked whether in a murder trial "there would be any situations in which you might vote for the death penalty, or do you think you could never vote for the death penalty, regardless of the circumstances?" Those who said they could never vote for death were considered to be excludable under *Witherspoon*. This group differed significantly from the death-qualified group in the proportion who mistrusted the insanity defense, who believed the courts to be a major cause of the breakdown of law and order, and who indicated that they would be willing to ignore procedural safeguards in order to vote for conviction. In all instances the excludable respondents were more likely than the death-qualified respondents to favor the due process point of view. In addition, death-qualified respondents found prosecutors to be much more credible than defense attorneys on a variety of measures. Excludable respondents also tended to favor the prosecutor, but by a significantly smaller margin. These findings appear to provide strong support for our hypothesis, but without more complete information about the survey they are difficult to evaluate.

Summary

All of the studies we have examined provide support for the general proposition that, compared to excludable jurors, death-qualified jurors have attitudes that predispose them toward the prosecution point of view and toward conviction. All of the studies also have flaws. Some of these flaws are unique to particular studies, and so do not seriously shake our confidence in the convergent support for the general proposition. Other weaknesses, however, are more general. Although the studies vary in the adequacy of their classification of subjects into includable and excludable under *Witherspoon,* none is perfect. Most of them simply produce evidence of a correlation between general attitudes toward the death penalty and proprosecution or proconviction attitudes. None of the studies identifies and excludes those who are barred from jury service for a far more pertinent reason: their inability to reach an impartial verdict of guilt or innocence. And none of the studies provides a reliable estimate of the size of the excludable group, or its demographic composition. Thus we do not know whether death qualification eliminates a substantial or a negligible proportion of otherwise eligible jurors, or whether it threatens the representativeness of capital juries. If the excluded group is numerous, and if research using a correct definition of the excludable group finds results similar to those of the previous studies, then of course our confidence in the conclusions of those studies would be greatly enhanced. Our purpose was to conduct such research.

THE SURVEY

Our survey was designed to achieve a reliable estimate of the size of the group whose adamant opposition to the death penalty would exclude them from capital juries under *Witherspoon,* and to assess the effects of their exclusion on

the attitudes and demographic characteristics of prospective jurors at the start of a capital trial. In particular, we wanted to test the hypothesis that *Witherspoon*-excludable jurors are more attentive to due process values, while includable jurors are more likely to emphasize crime control values. We also hypothesized that excludable jurors have less punitive attitudes than includable jurors, and that they are more open to particular kinds of criminal defense. Finally, based on previous research, we hypothesized that women and blacks are more likely to be excluded by death qualification.

Procedure

During the month of April, 1979, the Field Research Corporation administered the survey instrument to persons eligible for jury duty in Alameda County, California. Respondents were contacted by telephone using random digit dialing. The interviewers were professional employees of Field Research who were trained in the administration of the instrument. Interviewing was carried out at Field's office, and was supervised and monitored by Field employees.

After the interviewer had obtained a list of all eligible respondents within a household, one of them was randomly designated the respondent. Substitutions were not allowed, and multiple callbacks were used to contact absent or reluctant respondents. 811 interviews were completed for a response rate of 70%.

Classification of Death-Qualified and Excludable Respondents

Three questions were used to determine attitude toward the death penalty and *Witherspoon* eligibility. The first question asked respondents to rank themselves on a four-point continuum, from strongly favoring to strongly opposing the death penalty (question 3 in the Appendix). Next, respondents were given a *Witherspoon* question prepared with the advice and consultation of lawyers and law professors specializing in criminal law (question 4 in the Appendix). We asked respondents to assume that they had been called as possible jurors for a case in which the prosecutor was asking for the death sentence. They were informed about the two parts to a death penalty trial, and were then told that the judge would ask then the following question:

> Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?

Respondents who stated that they would be unwilling to impose death penalty in any case were classified as *Witherspoon* excludable. Respondents who were willing to impose the death penalty in at least some cases were classified as death-qualified.

In *Witherspoon* the Court ruled that it is proper to excuse for cause any prospective juror who cannot be fair and impartial in deciding guilt because of his or her attitude toward the death penalty: in other words, anyone who would "nullify" a guilty verdict by the rest of the jury. Question 5 was asked in order to identify such nullifiers, and all respondents who stated that they could not be

fair and impartial in judging guilt were eliminated from the sample before we compared the death-qualified and excludable respondents. Thus our survey examined the population of jurors who could make up their minds about the guilt of a defendant fairly and impartially; within this population, we compared those who would be willing to consider imposing the death penalty in at least some cases with those who would not.

Measures

Likert-format items were designed to measure due process and crime control orientations by testing specific attitudes toward the right to protection from self-incrimination, the presumption of innocence, the burden of proof, the exclusion of inadmissable evidence, and prejudicial pretrial publicity. We also obtained measures of respondents' punitiveness, willingness to consider the insanity defense, and feelings about the opposing counsel. All questions were pretested and if necessary revised to ensure comprehensibility, and worded so as to eliminate the possibility of confounding due to an agreement response set. The text of the attitudinal questions is given in the Appendix.

We also collected demographic information on each respondent in order to determine whether or not death qualification disproportionately eliminates minorities and other distinct groups from capital juries.

To avoid the possibility that differences between the *Witherspoon* groups on the attitudinal items might be caused by sensitizing respondents to conform their responses to their stated death penalty views, we asked the death penalty question midway through the questionnaire. As Table 2 shows, the groups differ in their responses to the questions asked before the death penalty items as well as to those asked afterward, and the magnitude of the difference is similar for the two sets of questions.

We are also sensitive to the possibility of interviewer effects, even though the interviewers were continually monitored throughout the survey. To rule out the chance that interviewers with different attitudes toward the death penalty might have asked the death penalty questions in different ways, we looked to see whether respondents expressed different opinions about the death penalty to different interviewers. They did not (chi square probability = .6). Nor were there any significant differences in death penalty attitude by the number of attempts required to complete the interview.

The Effects of Death Qualification on Juror Attitudes

In response to question 3 about general attitudes toward the death penalty, 64% of the total sample said that they favored the death penalty, 37% favoring it "strongly." Strong opposition was expressed by 18.6% of the respondents. Approximately 21% of the total sample responded that they would never vote to impose the death penalty (question 4). However, in response to question 5, 9% of the respondents said that they could not be fair and impartial in judging guilt in a capital case, and these "nullifiers" were removed from the sample. This left

Table 1. Witherspoon Eligibility by Death Penalty Attitude

Witherspoon category	Death penalty attitude			
	Strongly favor	Somewhat favor	Somewhat oppose	Strongly oppose
Unwilling to impose the death penalty in any case	3.5%	5.8%	22.3%	70.2%
Would consider imposing the death penalty	96.5%	94.2%	77.7%	29.8%
Total	100.0% (287)	100.0% (208)	100.0% (130)	100.0% (171)

Chi square = 326.98 $p < .0001$.

717 fair and impartial jurors, of whom 17.2% were excludable under *Witherspoon* on the basis of their attitude toward the imposition of capital punishment. This figure is important, as there have been no previously published estimates of the size of the group that would be fair in judging guilt, but barred from service on capital juries because of their attitudes toward the penalty. Our data demonstrate that the group is not negligible.

Table 1 shows the relationship between general attitude toward the death penalty and death qualification. Not surprisingly, as opposition to the death penalty increases, so does unwillingness to impose it. Seven of every ten people who strongly oppose capital punishment are eliminated by death qualification. The distinctiveness of this group is emphasized by comparing it to the group that only "somewhat opposes" capital punishment: only two out of ten in this group would be eliminated under *Witherspoon*.[6]

Differences between the attitudes of death-qualified and excludable jurors are shown in Table 2. Excludable respondents are more likely than death-qualified respondents to agree that it is better for society to let some guilty defendants go free than to risk convicting an innocent person (question 2a; 63% vs. 44%). This is one of the central tenets of the criminal justice system, and a fundamental value to those who believe in due process. While the survey provides no data on the relationship between this attitude and actual juror performance, one reasonable supposition is that jurors who disagree may hold the prosecution to a lighter burden of proof than those who agree, or that those who disagree may have a less stringent standard of reasonable doubt (cf. Thompson, Cowan, and Ellsworth, this issue).

The difference between death-qualified and excludable respondents extends to the Fifth Amendment protection against self incrimination (question 2b): almost

[6]Given these data, it seems that the scale question used by Bronson, while it is not a perfect indicator of *Witherspoon* eligibility, provides a reasonable estimate of the excluded group. In this light we can attribute more reliability to his conclusions about death qualification and juror attitudes.

Table 2. Attitudinal Differences Between Death-Qualified and Excludable Respondents[a]

Item[b]	Respondent category[c]	Percent of respondents who: Agree strongly	Agree somewhat	Disagree somewhat	Disagree strongly	*N*	Chi square probability
Better some guilty go free.	EXC	32.5	30.0	20.8	16.7	(120)	< .001
	INC	16.1	27.9	27.2	28.9	(585)	
Failure to testify indicates guilt.	EXC	10.9	12.6	31.9	44.5	(119)	< .006
	INC	16.0	16.3	39.5	28.2	(582)	
Consider worst criminal for mercy.	EXC	40.2	37.6	10.3	12.0	(117)	< .001
	INC	15.0	29.0	15.5	40.5	(575)	
District attorneys must be watched.	EXC	21.2	31.9	32.7	14.2	(113)	< .05
	INC	23.9	25.0	26.4	24.6	(568)	
Enforce all laws strictly.	EXC	22.3	24.0	25.6	28.1	(121)	< .003
	INC	38.1	19.0	25.3	17.6	(585)	
Guilty if brought to trial.	EXC	14.9	11.6	17.4	56.2	(121)	NS
	INC	17.2	15.1	17.7	49.9	(581)	
Exclude illegally obtained evidence.	EXC	50.0	13.9	17.2	18.9	(122)	< .09
	INC	38.4	18.1	24.0	19.6	(576)	
Insanity plea is a loophole.	EXC	27.5	31.7	22.5	18.3	(120)	< .001
	INC	51.5	26.5	13.7	8.3	(577)	
Harsher treatment not solution to crime problem.	EXC	55.0	25.0	14.2	5.8	(120)	< .001
	INC	32.7	26.3	17.9	23.1	(571)	
Defense attorneys must be watched.	EXC	21.0	43.7	23.5	11.8	(119)	< .003
	INC	38.9	34.6	17.4	9.1	(581)	

Item	Respondent category	Percent choosing		*N*	Chi square probability
Most serious problem: unemployment or crime.		Unemployment	Crime		
	EXC	50.4	49.6	(117)	< .01
	INC	37.5	62.5	(581)	
Consider confession reported by news media.		Would not	Would consider		
	EXC	60.2	39.8	(118)	< .04
	INC	49.1	50.9	(581)	
Infer guilt from defendant's silence.		Should not infer	Should infer		
	EXC	86.0	14.0	(121)	< .02
	INC	76.0	24.0	(588)	

[a]All nullifiers removed.
[b]Exact wording of items may be found in Appendix.
[c]EXC = *Witherspoon* excludable for adamant opposition to the death penalty. INC = Death-qualified, or includable jurors.

a third of the death-qualified group agreed that a defendant who fails to testify is probably guilty, compared to 23% of the excludable respondents. Even after being told that as a matter of law they must not interpret the defendant's refusal to testify as an indication of guilt (question 8), the death-qualified group was less likely to accept this principle.

Death-qualified respondents were more punitive than excludable respon-

dents—less likely to consider mercy, more likely to favor harsh punishment as a means of reducing crime, and more likely to believe in the strict enforcement of all laws, no matter what the consequences. These differences are dramatic. Whereas 40% of the excludable respondents *strongly* agreed that even the worst criminal should be considered for mercy (question 2c), about the same proportion of death-qualified respondents *strongly* disagreed. Similarly, 55% of the excludable group agreed strongly that harsher treatment is not the solution to the crime problem, compared to only 33% of the death-qualified group (question 6d). These differences may have important implications for the course of jury deliberation. If we assume that people who hold opinions strongly are likely to be especially vigorous in asserting and defending their opinions, then death qualification eliminates from the jury room many of the strongest advocates of mercy and due process values.

Besides affecting the range of attitudes about the defendant's legal right, death qualification affects the jury's view of the defendant's counsel. Death-qualified respondents were signficantly more likely to trust district attorneys (question 2d) and to distrust defense attorneys (Question 6e) than excludable respondents.

As can be seen in Table 3, excludable respondents tend to be wary of both lawyers, though slightly more skeptical of the defense. A test for the equality of variance in dependent samples (Glass and Stanley, 1970) indicates no significant difference in their appraisal of the two attorneys. Death-qualified respondents, on the other hand, were anything but evenhanded in their evaluations. Almost 40% strongly agreed that the defense attorney had to be watched carefully, while only 24% strongly agreed that the district attorney had to be watched carefully. These differences are highly statistically significant. The data in Table 3 provide graphic and dramatic testimony to the disadvantages a defense attorney faces in pleading a case to a panel of death-qualified jurors.

Death qualification not only creates juries that start out less favorable to the defense attorney; it also affects their willingness to consider the issues that he may raise in his client's defense. We replicated an item about the insanity defense

Table 3. Death-Qualified and Excludable Respondents' Assessment of the Prosecutor and Defense Attorney

		Percent who				Equal variance probability[a]
	Must watch	Agree strongly	Agree somewhat	Disagree somewhat	Disagree strongly	
Death qualified:	Prosecutor	23.9	25.0	26.4	24.6	
	Defense attorney	38.9	34.6	17.4	9.1	<.001
Excludable:	Prosecutor	21.2	31.9	32.7	14.2	
	Defense attorney	21.0	43.7	23.5	11.8	NS

[a]Test for the equality of variances in related samples. p values for two-tailed t-test (see Glass and Stanley, 1970, 306).

used by Bronson (1971) and Harris (1971): "The plea of insanity is a loophole allowing too many guilty people to go free." Over half of the death-qualified respondents strongly agreed with this statement, compared to only 28% of the excludable respondents. Across several studies, death-qualified respondents have consistently proved to be less willing to consider the insanity defense.

We also inquired about respondents' willingness to disobey judicial instructions about pretrial publicity (question 7). Respondents were asked to assume that they were jurors in a trial that had received news coverage. The media reported that the defendant in the trial had confessed to the crime, but the confession was not entered as evidence during the trial. They were then told

> The judge instructs you that you must make your decision about guilt or innocence only on the evidence you heard during the trial. Without the confession the prosecution's case is weak: it would not convince you beyond a reasonable doubt. In reaching your verdict, what would you do?
>
> I would not consider the confession, even though it may mean the defendant will go free.

or

> I would take the confession into consideration in reaching my verdict since it clearly indicates the defendant's guilt.

As Table 2 indicates, 60% of the death-qualified group would consider the confession, compared to 49% of the excludable group.

Several earlier studies have examined the impact of judicial instruction on jurors' consideration of pretrial publicity. Simon (1966) found that a judge's admonition to disregard pretrial publicity was effective. Sue and Smith (1974), however, reported that the inadmissable prejudicial publicity affected jurors' perception of evidence presented at trial, biased them toward guilty verdicts, and enhances their evaluation of the prosecution's case. Our data indicate that death-qualified respondents are marginally more favorable than excludable respondents to allowing inadmissable evidence in court (question 6b, $p = .09$), and significantly more willing to consider an inadmissable confession reported in the media. The high level of avowed willingness to disobey judicial instructions among both groups is disturbing.

Finally, in keeping with their hypothesized orientation toward crime control, death-qualified respondents are more likely to choose violent crime over unemployment as the more important problem facing county residents (question 1; 62.5% vs. 37.5%). Excludable respondents were evenly divided (49.6% vs. 50.4%).

Overall, then, our data reveal a consistent pattern of differences between death-qualified and excludable jurors. Of the 13 comparisons, all showed differences in the predicted direction: eleven of these differences were significant at the .05 level or better, one was marginally significant, and only one (question 6a) was nonsignificant. Compared to the excludable group the death-qualified group is more punitive, less sensitive to procedural and constitutional guarantees, less equable in its evaluation of opposing counsel, and more willing to ignore a judge's instructions about pretrial publicity. The systematic character of these differences is advantageous to one side only. Capital juries, as they first sit down to hear the

evidence, are more favorable to the prosecution than juries in any other kind of case. The practice of death qualification forces a defendant whose life is at stake to assume a special handicap in his contest with the State.

The Effects of Witherspoon Exclusion on the Demographic Composition of Capital Juries

The results reported in the last section demonstrate that the jurors removed by death qualification share a distinct and consistent point of view. Table 4 shows that it also threatens the representativeness of the jury by disproportionately eliminating certain demographic categories of people. Our findings confirm those of Zeisel and Bronson with respect to race: Blacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%). Similarly, our data confirm the finding that death qualification removes more women than men from capital juries (21% vs. 13%).

We are also able to validate several other effects suggested by Bronson. Death qualification distorts the religious composition of the jury as well: Jews, atheists, and agnostics are disqualified significantly more often than Protestants and Catholics. People whose household income is less than $15,000 a year are excluded more often than wealthier people (23% vs. 13%). Thus, death qualification does not merely create juries that are unrepresentative of the communities from which they are drawn; it specifically gerrymanders the jury against the large number of capital defendants who are black and poor by fencing out those who might bring to the deliberations the understanding that arises from common experience.

Our data also indicate that both the less educated and the better educated (those having some college or more) are disqualified more often than respondents having some high school or a high school diploma. Self-employed people are more likely to be excluded than people who are employees. Finally, death qualification removes twice as many Democrats as Republicans.

DISCUSSION

In summary, our research answers three important questions about the effects of death qualification. First, it shows that the group excluded is sizable: more than one sixth of the community of fair and impartial jurors is banned from the jury box in capital cases. Second, it demonstrates that the practice of death qualification threatens the representativeness of the jury by discriminating more heavily against some demographic groups than others: a fifth of the women and a quarter of the black jurors are forbidden to serve. Finally, the results of our study are in line with previous research indicating that a person's attitude toward capital punishment is an important indicator of a whole cluster of attitudes about crime control and due process. Compared to the death-qualified jurors, the members of the excluded group are more concerned with the maintenance of the fundamental due process guarantees of the Constitution, less punitive, and less

Table 4. Percent Witherspoon Excludable by Major Demographic Characteristics

Race							
Black	All other						
25.5 (94)	16.5 (616)					$\chi^2 = 5.10$	$p = .024$
Sex							
Male	Female						
13.1 (350)	21.0 (367)					$\chi^2 = 7.20$	$p = .007$
Religion							
Protestant	Catholic	Jewish	Other	Agnostic/ atheist			
14.1 (290)	15.0 (180)	20.0 (20)	17.9 (56)	24.2 (161)		$\chi^2 = 8.25$	$p = .083$
Income							
Under $15,000	$15,000+						
23.2 (314)	12.6 (381)					$\chi^2 = 12.9$	$p = .0003$
Education							
0–8 yrs.	Some H.S.	H.S. grad	Some college	College grad	Post-grad		
24.1 (29)	15.6 (64)	12.3 (284)	21.3 (127)	18.9 (90)	22.1 (122)	$\chi^2 = 9.58$	$p = .088$
Self employed							
Yes	No						
24.2 (66)	14.7 (511)					$\chi^2 = 3.34$	$p = .07$
Political party							
Democrat	Republican	Independent voter/ other party					
21.3 (342)	10.1 (129)	12.2 (49)				$\chi^2 = 9.27$	$p = .01$

mistrustful of the defense. This highly consistent pattern of attitudinal differences provides strong confirmation for the hypothesis that death qualification removes from juries in capital cases a group of eligible jurors who hold attitudes about the criminal justice system that are distinct and different from those of the remainder of the population, and leaves a jury that is relatively biased toward the prosecution. Furthermore, some of these attitudes are among the most highly valued principles of American democracy.

In the first appellate court ruling on death qualification to consider the new research (*Hovey v. Superior Court,* 1980), the California Supreme Court accepted our findings as valid. They concluded that the well-established correlations between opposition to capital punishment and race and gender result in "significant disparities . . . when a *Witherspoon* question is posed" (p. 1339). They also concluded that the attitudinal differences between the *Witherspoon* excludable group and the death-qualified group were persuasive, and that evidence of this difference was important because it would "reinforce our confidence in the conviction-proneness studies' (cf. Cowan, Thompson, and Ellsworth, this issue) findings of a relationship between attitudes toward the death penalty and conviction proneness" (p. 1326) and would "[show] that exclusions tends to reduce 'the presence of minority viewpoint[s]' on the jury" (p. 1327). They concluded that we had achieved our goal of completing the "tentative and fragmentary" evidence in *Witherspoon.*

More parochially, however, they concluded that although our results were valid with regard to the *Witherspoon* questions we set out to answer, they were not sufficiently specific to deal with the local situation in California, because we had not considered "the differences between a '*Witherspoon*-qualified' jury and a 'California death-qualified' jury" (p. 1346). In California, those who state that they would automatically vote to impose the death penalty whenever it was a legal option, regardless of the evidence, are also excluded, and since we did not identify this group, we could not tell whether adding them to the excluded group would have materially altered our results. Since our survey the relevant data have been collected, and their impact on our survey results has been assessed by Kadane (this issue, and Kadane, 1983). His analysis shows that our results are applicable not only to the national standard laid down in *Witherspoon,* but also to the California system of exclusion. By either rule, death qualification systematically distorts the attitudes of the jury in a direction that discriminates against the defendant and undermines the protections of due process.

APPENDIX

(IF NECESSARY, RE-INTRODUCE YOURSELF TO THE DESIGNATED RESPONDENT. SEE INTRODUCTION ON SCREENING FORM.):

1. Which of the following problems do you think is more serious for Alameda County residents—*unemployment* or *violent crime*?

(DON'T READ)→
UNEMPLOYMENT 1
VIOLENT CRIME 2
DON'T KNOW 3
OTHER: _____ . 4
(RECORD VERBATIM)

2. I'd like to read you some statements about crime and the criminal justice system. Please tell me whether you *agree strongly, agree somewhat, disagree somewhat,* or *disagree strongly* with each statement. (BEGIN WITH THE FIRST STATEMENT. REPEAT ANSWER CATEGORIES AFTER READING EACH STATEMENT.)

					DO NOT READ	
	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Don't Know/ Unsure	Refused to Answer
a. It is better for society to let some guilty people go free than to risk convicting an innocent person	1	2	3	4	8	9
b. A person on trial who doesn't take the witness stand and deny the crime is probably guilty	1	2	3	4	8	9
c. Even the worst criminal should be considered for mercy	1	2	3	4	8	9
d. District attorneys have to be watched carefully, since they will use any means they can to get convictions	1	2	3	4	8	9
e. All laws should be strictly enforced, no matter what the results	1	2	3	4	8	9

3. I'd like to ask you some questions about the death penalty. Are you *strongly in favor, somewhat in favor, somewhat opposed* or *strongly opposed* to the death penalty?

STRONGLY IN FAVOR 1
SOMEWHAT IN FAVOR 2
SOMEWHAT OPPOSED 3
STRONGLY OPPOSED 4

4. Now assume that you've been called as a possible juror in a first degree murder trial. The prosecutor is asking for the death sentence. Since this is a case where the death penalty may be imposed, the judge will ask you certain questions about your attitudes toward the death penalty before deciding whether you should be chosen to serve on the jury.

   There are two parts to any trial where the death penalty may be imposed. In the first part, the jury decides whether the person on trial is guilty or not guilty. If the person is found guilty, there is a second part—a separate trial—in which the jury decides whether he or she should get the death penalty, or life in prison.

   The judge will ask you the following question:

   "Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?"

   How would you answer? Would you say . . . (READ EACH ANSWER CHOICE)

   I WOULD BE UNWILLING TO VOTE TO IMPOSE IT IN ANY CASE 1
   OR: I WOULD CONSIDER VOTING TO IMPOSE IT IN SOME CASES 2

5. Now suppose that you were a juror in the *first* part of the trial, just to decide whether the accused person is guilty or not guilty of the crime. The judge instructs you that in reaching your verdict you are only allowed to consider the evidence presented in court, and must follow the law as he will state it to you. If the accused is found guilty, there will be a separate trial to decide whether or not he or she should get the death penalty.

   Which of the following expresses what you would do if you were a juror for the first part of the trial? (READ EACH ANSWER CHOICE)

   I WOULD FOLLOW THE JUDGE'S INSTRUCTIONS AND DECIDE THE QUESTION OF GUILT OR INNOCENCE IN A FAIR AND IMPARTIAL MANNER BASED ON THE EVIDENCE AND THE LAW 1

   OR: I WOULD NOT BE FAIR AND IMPARTIAL IN DECIDING THE QUESTION OF GUILT OR INNOCENCE, KNOWING THAT IF THE PERSON WAS CONVICTED HE OR SHE MIGHT GET THE DEATH PENALTY 2

6. Now I'd like to read you some more statements about the criminal justice system. Please tell me whether you *agree strongly, agree somewhat, disagree somewhat* or *disagree strongly* with each statement. (BEGIN WITH FIRST STATEMENT AND REPEAT ANSWER CATEGORIES AFTER READING EACH.)

					DO NOT READ	
	Agree Strongly	Agree Somewhat	Disagree Somewhat	Disagree Strongly	Don't Know/ Unsure	Refused to Answer
a. A person would not be brought to trial unless he or she were guilty of a crime	1	2	3	4	8	9
b. If the police obtain evidence illegally it should not be permitted in court, even if it would help convict a guilty person	1	2	3	4	8	9
c. The plea of insanity is a loophole allowing too many guilty people to go free	1	2	3	4	8	9
d. Harsher treatment of criminals is not the solution to the crime problem	1	2	3	4	8	9
e. Defense attorneys have to be watched carefully, since they will use any means to get their clients off	1	2	3	4	8	9

7. Now suppose that you're a juror in a criminal trial. The case has been reported in the newspapers and on television and radio. From the newspaper and television stories you have seen you know that the defendant made a confession to the crime. But the confession isn't presented during the trial.

   The judge instructs you that you must make your decision about guilt or innocence only on the evidence you heard during the trial. Without the confession the prosecution's case is weak; it would not convince you beyond a reasonable doubt of the defendant's guilt. In reaching your verdict what would you do? (READ EACH STATEMENT ANSWER CHOICE.)

   I WOULD NOT CONSIDER THE CONFESSION, EVEN THOUGH IT MAY MEAN THE DEFENDANT WILL GO FREE 1

   OR: I WOULD TAKE THE CONFESSION INTO CONSIDERATION IN REACHING MY VERDICT SINCE IT CLEARLY INDICATES THE DEFENDANT'S GUILT 2

8. Now I'd like to ask you about a principle of law that you would have to follow if you were a juror in a criminal trial. Some people accept this principle and some don't. I want to know whether you *agree* or *disagree* with this principle.

   If the defendant does not testify, this should not be treated as showing guilt. Do you agree or disagree with this principle?

   AGREE 1
   DISAGREE 2

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