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Examining Death Qualification

Further Analysis of the Process Effect

Craig Haney*

The biasing effects of the death-qualification process are structured into the very nature of the procedure, and may be intensified by variations in the manner in which the process is actually conducted. This article illustrates the process as it unfolds in court, discusses the manner in which its basic features can be exacerbated, and analyzes some of the nonobvious consequences of the process for the participants. It also discusses the treatment afforded some analogous "process effects" in law, and evaluates several proposed remedies to the biasing effects of death qualification.

The problematic nature of the death-qualification process stems largely from this anomalous fact: it requires penalty to be discussed long before penalty is relevant. The attention of prospective jurors is drawn away from the presumption of innocence and onto postconviction events. This anomaly is structural and is built into the very nature of death qualification. Thus, is it not a simple matter of language, of unfortunate phrasing, or the injudicious choice of words by the judge or the attorneys during the *voir dire*. If a guilt-phase jury is to be death-qualified, certain psychological imperatives attach to this stage of the proceedings.

This article illustrates the process of death qualification, the way in which the various aspects of this process manifest themselves in the courtroom, and the ease with which the basic structural problems can be exacerbated by variations in the nature of the questioning itself. The final sections examine the legal status of several other phenomena that are psychologically analogous to the death-qualification process, concluding with a discussion of potential remedies to the biasing effect of this procedure.

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On the Psychology of Death Qualification

It is possible to observe the problematic features of the death-qualification process at work both in the *voir dire* questions that are asked and in the responses that they evoke from potential jurors. That is, the biasing effects of the process influence both the questioners (attorneys and judges) as well as the respondents. The form, tone, and implication of the questions asked during death qualification move almost invariably into prejudicial and biasing modes that worsen the basic defects that are built directly into the process itself. Estimating the full impact of the process as it actually unfolds in the courtroom requires a detailed interpretation of its various features and effects.

To do so, I have drawn on my own direct observations during part or all of the jury selections in more than 30 capital cases, interviews with prospective jurors who were dismissed from participation in the course of death-qualifying *voir dire*, post-trial interviews with jurors who actually sat in capital cases, and numerous discussions with attorneys and judges who have had extensive experience with the death-qualification process. Brief passages also are quoted from trial transcripts in four separate cases, each of which occurred in different states (California, Colorado, Maryland, and Ohio),¹ and from a set of proposed judge's instructions for death-qualification that appear in the New Jersey *Judge's Benchbook*. This discussion retains and elaborates on the psychological aspects of the process used to explain the results of my earlier study (Haney, 1984).

Before turning to this discussion, however, it may be useful to conceptualize the death-qualification process from the perspective of its major participants. Most states provide for an initial period of death qualification conducted by the judge, and then some form of follow-up questioning by opposing counsel.² Judges, charged with the responsibility of deciding when a venireman has crossed the line into unequivocal opposition and is subject to disqualification under *Witherspoon*, are most concerned with how the death-penalty attitudes that are expressed compare with their own understanding of the legal standard of exclusion. To simplify the process of classification, judges often develop a fixed or routine series of questions that are applied in almost mechanical fashion to determine whether a prospective juror should be excluded.³

¹The states were chosen for geographical diversity. With one exception, the transcripts were selected exclusively on the basis of availability. (The one exception was California, where numerous transcripts were available to me. There I selected the most recent transcript I could obtain to reflect the most current practices.) Thus, no attempt was made to find the worst or most egregious example of *voir dire*. In no instance have I quoted from a case whose jury selection I observed directly.

²Most jurisdictions permit attorney-conducted questioning about death penalty attitudes as a matter of course in capital cases. In some jurisdictions, however, death-penalty questioning is permitted to be conducted by attorneys only after a venireman answers in such a way that he or she is at risk of being excluded under *Witherspoon*.

³Consider the following "boilerplate" questions from the New Mexico Uniform Jury Instructions:

In this case, the penalty of death may be imposed if the defendant is found guilty of the crime with which he is charged. I am going to ask you specific questions concerning your view of the death penalty. I ask that each of you answer the questions

Unfortunately, the legal category of exclusion is not bounded by bright and unyielding lines. The problem stems partly from the lack of any clear, definitive, and precise statement by the Supreme Court on exactly what the *Witherspoon* standard is and how it should be implemented.⁴ More importantly, however, individual attitudes about the death penalty are sufficiently complex and variable as to defy any neat categorization. Thus, the uncertainty that attends the process seems endemic and not capable of resolution by any simple legal formulas.

As between opposing counsel, the colloquy of death qualification has another dimension to it. Each side has an interest in maximizing the number of remaining jurors likely to be favorable to their case. Since death qualification generates *Witherspoon* exclusions that favor the prosecution and make conviction more likely, the prosecutor will attempt to increase the number of veniremen whose death-penalty opposition appears unequivocal.⁵ On the other hand, defense at-

either "yes" or "no." If you do not understand the questions, do not hesitate to tell me and I will repeat the question which you do not understand.

Do you oppose, for any reason, the imposition of the death penalty?

Because of your opposition to the death penalty, would you, regardless of the facts and circumstances which may be presented by the evidence during the trial, automatically refuse to vote for a verdict of guilty?

If you find the defendant guilty, would you, regardless of the facts and circumstances which may be presented by the evidence during the trial and the sentencing proceeding automatically refuse to vote for the sentence of death?

Some New Mexico judges restrict death-qualifying *voir dire* to exactly these words. Prospective jurors who do not understand the questions, request clarification, or believe their own death penalty attitudes are too complicated to permit them to answer as required may find that the judge will simply continue to re-read the question until they respond with either a "yes" or "no."

⁴*Witherspoon* seems to define the relevant standard of exclusion in terms of an "unambiguous" statement by prospective jurors to the effect that they are "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding" (391 U.S. 522, n. 21). Yet, the Court indirectly suggested two other formulations that potentially cloud the issue. The first appears in a statement that seems to indicate that veniremen who are simply "willing to consider all of the penalties provided by state law" (*ibid.*) are not properly excludable. This notion was also explicitly endorsed a year after *Witherspoon*, in *Boulden v. Holman*, 394 U.S. 478 (1969). It is not difficult to imagine persons who, while adamantly opposed to the death penalty and unable to conceive of circumstances under which they would ever vote to impose it, might still be willing to "consider" the punishment, however remote the chances that they would find it appropriate. The second modification appears in this reference: "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State" (391 U.S. 514-15, n. 7). It is also not difficult to imagine veniremen who could not conceive of circumstances under which they would impose the death penalty but who, nonetheless, would "obey the law" and consider it. As the Court observed in *Witherspoon*: "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors" (391 U.S. 516, n.9).

⁵Death penalty opponents who fail to meet the *Witherspoon* standard of unequivocal opposition are prime targets for prosecutorial peremptory challenges. In an extensive analysis and empirical study, for example, Winick (1982) has documented the systematic exclusion of death-scrupled veniremen

torneys will seek to minimize this number, often through "rehabilitating" questions that encourage death-penalty opponents who are at risk of exclusion to moderate their views and try to conceive of circumstances under which they could consider imposition.

Within this general framework, there are variations in the manner in which the death-qualification process unfolds. In the following pages, I discuss the basic and essential features of the process, the nature of the more common variations that occur in the courtroom, and the likely psychological consequences that these features have for the jurors exposed to them.

An Implication of Guilt: The Antecedent of the Penalty Phase

The implication of guilt at the initial stage of a capital trial stems from the otherwise anomalous discussion of penalty. It is built into the very structure of the death-qualification process and occurs in no other kind of case. The expenditure of time and energy by court personnel represents a decision that the penalty issue is relevant and important, despite disclaimers to the contrary⁶:

(By the Defense Counsel) Q: Now, we went into, in some detail, and the questions yesterday, about what the procedure will be in the event it ever comes to that. You see, we may just be wasting a lot of time talking about that, but it's kind of important. So I guess it's necessary to talk some about it, but do you understand the procedure as it was set forth and indicated by his Honor and by the questions that we asked about that yesterday, the procedures that were contained in the event a verdict of first-degree murder is returned?

(People of Colorado v. Michael Corbett, Criminal Action No. 22784, Div. I, February, 1976. Recorder's Transcript, p. 38-39.)

In addition to the structural implication, however, court personnel often employ language that makes the inference of guilt even more likely. Perhaps because they tire of using cumbersome contingent and subjunctive forms, and perhaps because they, too, are affected by the process and begin to assume that the penalty phase will occur, attorneys and judges often speak to prospective jurors as though the second phase of the trial was inevitable. For example, despite a

by prosecutors in one Florida jurisdiction. He concludes that this practice "deprives capital defendants of their due process right to an impartial jury on sentence" and, when considered in light of the effects of cause challenges under *Witherspoon*, "produces capital juries that are significantly more prone to convict than would be neutral juries, thereby depriving the capital defendant of his due process right to an impartial jury on guilt" (p. 82, footnote omitted).

⁶In most instances, judges are careful to include disclaimers to the effect that the penalty phase may not occur, and also to pose at least some of the death-qualifying questions in contingent form. However, several features of these disclaimers limit their effect. The first is that, at best, they do no more than restate what, but for death qualification, should be obvious: the defendant *might* be found not guilty. When repeated, they quickly take on the quality of protesting too much. Second, such explanations and questions are frequently posed in cumbersome subjunctive forms, are not fully understood by many veniremen, and often add to the general confusion that surrounds death qualification. Finally, despite disclaimers that the penalty phase might not occur, questioners usually then behave precisely as though it will.

complicated contingent explanation to the jury panel several days earlier, one judge prefaced his death penalty questioning of an individual venireman this way:

THE COURT: Now, as I explained to the jurors when you first arrived here this afternoon, and I referred to it the other day when all the jurors were present, *there are two parts to this case.*

(People of California v. Marucice John Keenan, Criminal Case No. 100402, November 1982. Recorder's Transcript, p. 567.) (Emphasis added.)

These minor variations in language may seem unimportant to court personnel who clearly understand the nature of capital trial proceedings. However, even veniremen who have heard the process explained several times may still be uncertain about exactly how it works. For many prospective jurors who are completely unfamiliar with such proceedings, initial legalistic explanations can be quite confusing. Unfortunately, attempts at clarification often further intensify implications of guilt through inadvertent suggestions that the penalty phase will, rather than may, occur:

(By the Prosecutor) Q: All right. Mrs. Marshall, you know all that you are going to have to go through with the second phase?

(Venireman) A: Yes.

Q: To determine the death penalty. Do you feel that this would have any bearing on your deliberation with regard to the guilt or innocence of it, knowing that you are going to have to—

A: Let me get this straight now.

(Prosecutor) Q: There's two.

A: Which, how I decide that, it was guilty of the crime, or not guilty, would this have anything to do with me deciding; no.

Q: No. Even though that you are going to have to go through and consider this the second phase?

(State of Maryland v. Doris Ann Foster, January, 1982. Recorder's Transcript, p. 337.)

Because the process is legally anomalous, attempts to explain it are rarely models of clarity or simplicity. Questions often move quickly and clumsily past the contingent nature of the process, and settle on the penalty phase. Prospective jurors may infer from these discussions that the real issue before them will be to decide what kind of punishment is appropriate:

(By the Prosecutor) Q: *Now, there will come a time in this case, presumably, and possibly, maybe that the death penalty will be a consideration of the jury and whether or not it will be a matter upon which the Court will charge you, when it will or it will not.*

Will you follow the charge of the Court?

(Venireman) A: Yes.

Q: In other words, the death penalty is not to be used indiscriminantly. If at all, it is consistent with whatever the law provides, and will you follow that law?

A: Yes.

(People of Ohio v. Leonard Jenkins, Case No. CR-168784, March, 1982. Recorder's Transcript, p. 981-982.) (Emphasis added.)

Defense attorneys also succumb to simpler, noncontingent phrasing and begin to word their questions as though the guilt phase has been completed and the real issue is the juror's penalty-phase behavior:

(By Defense Counsel) Q: And if there is this second trial that we are talking about and we put on evidence which tends to mitigate, would you be able to consider that evidence?

(Venireman) A: Yes.

Q: What we are worried about, since you are on the jury that already made a determination as it comes to pass of guilty, that some of the jurors might close their minds to this mitigation, but I take it you wouldn't have any problem keeping your mind open during that second trial?

A: No.

(*Jenkins*, RT at 1972-1973.)

Finally, consider the proposed standard instructions from the New Jersey judges' *Benchbook* (1982) suggesting language to be used in selecting juries under that state's newly enacted death-penalty law. Judges are told to inform the entire panel of prospective jurors that:

When I instruct the jury at the close of this trial, I will outline in detail the factors to be weighed in deciding whether to impose a death penalty. Let me give you a general idea of what I will say so that you can understand what we need to know now of your views. (p. 39)

A general discussion of mitigating and aggravating factors ensues, several paragraphs in length, in which the implication is quite clear: the penalty phase *will* occur and these factors will become relevant. (That is, the judge's language is nowhere contingent but informs the jurors simply, "I will point out to you . . .," and so on.) Judges are advised to conclude this discussion with a comment that further connects present questions to what will happen after the jurors find the defendant guilty: "I have given you this general description of the way a jury goes about considering whether death should be the sentence because it will help you understand our limited inquiry into you views concerning the imposition of a death penalty" (p. 40). This phrasing seems quite reasonable, given the court's apparent interest in the penalty-phase behavior of prospective guilt-phase jurors. Unfortunately, the more the court dwells on the penalty-phase procedures, in a valiant effort to be completely clear, the clearer becomes the implication that the penalty phase is likely to occur.

The presence of this noncontingent language in a set of proposed model instructions only serves to underscore how strongly the implication of guilt is built into the process of death qualification, and how easily this implication can find expression in the courtroom where legal niceties give way to the pressures of unrehearsed verbal interaction.

Imagining the Penalty Phase: Making the Event More Likely

A closely related psychological effect may occur when prospective jurors are encouraged to reflect on their possible behavior in the penalty phase that may occur. Even when questions are posed in scrupulously contingent terms, the very nature of the questions invites veniremen to imagine themselves as jurors in the penalty-phase proceeding. Most courts interpret the *Witherspoon* standard to require that questions go beyond probing mere opinion or attitude, demanding instead that jurors make behavioral predictions about themselves: Could you

consider imposing the death penalty? Could you vote to impose it? Would you listen to penalty-phase evidence with an open mind and weigh considerations both for and against imposing it in a given case? Can you think of any case in which you would impose it? All of these questions, commonly posed in the death-qualification process, require prospective jurors to translate attitudes into speculation about future behavior.

Social psychological research suggests that simply imagining or assuming that an event or outcome has occurred can increase our subjective estimate that it will. The explanation is put in terms of what Tversky and Kahneman (1973) have labeled the “availability heuristic.” They suggest that imagining an event makes its cognitive category, as well as the necessary sequence of events that precede it, more available and easier to mentally access. Once our mind has traversed a path, even in imagination, it seems easier and more likely to be traversed again. This increase in availability or accessibility means that the event or sequence of events will be easier to describe or cognitively experience in advance of their actual occurrence. Moreover, the ease of anticipatory experience seems to increase the expectation that the event will occur. Thus, turning the attention of prospective jurors to the possible occurrence of a penalty phase may increase their estimate that such an event *will* occur.

Sometimes, in the interests of obtaining as accurate and informative an answer as possible to questions about potential penalty-phase behavior, attorneys will ask prospective jurors to simply assume that they *are* in that stage:

(By the Defense Counsel) Q: Assuming at the first trial, you, along with your other jurors, determined that yes, he is guilty of an offense for which death is a possible penalty. Just assume that much.

(Venireman) A: Okay.

Q: Do you think that by that finding of guilt, your mind would be so tainted that you would be unable to listen to additional testimony, which is really geared toward lessening the punishment in this particular case?

Can you still keep an open mind and listen to that testimony?

A: Yes, I believe I could.

(*Jenkins*, RT at 956.)

Unfortunately, the attempt to ensure that veniremen will keep an “open mind” in the penalty phase may help to close their minds at the guilt phase.⁷

From one perspective, asking prospective jurors to imagine themselves in the penalty phase may be the best way to obtain even remotely accurate estimates of penalty-phase behavior. Courts that seize upon it, unmindful of its negative

⁷The practice of having prospective jurors imagine or assume that they are in the penalty phase of the case may seem perfectly appropriate, given the mandate of death qualification. However, consider how *inappropriate* the psychologically analogous counterpoint to this practice would seem. Suppose judges were compelled, as a matter of law, to ask prospective jurors in capital trials to imagine that the defendant in the case had been found not guilty and that they were members of the jury that acquitted him, to imagine perhaps that he was now a free man and that he was walking out of the courtroom, and then proceeded to question them about how they would feel about that fact, whether they could behave in legally appropriate ways in the face of it, and so on. Technically, of course, nothing prohibits judges from doing so. Yet, the practice seems highly anomalous.

psychological consequences, can be persistent in encouraging prospective jurors to assume that the guilt phase of the trial has been completed. For example, consider the following dialogue between a trial judge and a venireman who was initially reluctant to leave the guilt phase behind:

(By the Court) Q: All right, you wouldn't automatically vote for the death penalty in every case, would you, and never consider life without parole?

(By the Venireman) A: Well, no, because I understand, you know, the course and the person, you know—it goes like a step by step, you know? I cannot say he's guilty, you know, until, you know, I find the defendant, because I don't have facts, you know, what is the case.

Q: *All right. But let us assume that you've heard the evidence and you've been convinced beyond a reasonable doubt that the defendant, Keenan is guilty of murder in the first degree. Just assume that to be true.* Then there would be additional evidence introduced by both sides in this case as to which penalty should be imposed by the jury or not imposed, but which penalty should be the verdict of the jury, either death or life imprisonment.

Could you consider both penalties?

A: Yes, I do.

Q: And do you think you could be fair to both sides here?

A: In my opinion, yes, because if I make—I, a human being—we make a mistake sometimes.

Q: Okay.

A: Like everybody else, but that's an experience in life. That's the way we learn.

Q: All right.

(*Keenan*, RT at 1146–1147.) (Emphasis added.)

Desensitization: Coming to Terms with Capital Punishment

Imagining the penalty phase may do more than increase the cognitive “availability” of this stage of the trial, and the outcomes of certain events that must precede it. It also exposes prospective jurors to the most emotional and profound issue that can be confronted in human experience—life and death. Death qualification exposes them to this issue early in the proceedings, and may ease them over a hurdle that they would have been unwilling to traverse at a later time.

When death-qualifying *voir dire* is conducted in open court in the presence of the entire panel, prospective jurors will hear the issue referred to and discussed over and over again. In addition to repeated exposure to the potentially emotional issue—an essential element in desensitization and habituation—veniremen watch as many of their peers express a willingness to impose the penalty. Thus, a climate of death-penalty support may be created by the process. Peer support or approval is thereby added to repeated exposure, in a process that may serve to take some of the “sting” out of subsequent, awesome decisions. (Jurors who actually have some doubts about the death penalty may be reluctant to share them. Since there is no premium placed on equivocation, some prospective jurors may suppress their doubts, adding a false sense of unanimity to these collective endorsements of the death penalty.)

Even when death-qualifying *voir dire* is conducted on an individual, sequestered basis, the emotional hurdle must be traversed by each prospective juror before he or she can be accepted. They must confront the issue of death-penalty

imposition, come to terms with it far earlier than they must actually decide upon it, and they may become inured both to this ultimate issue and to the series of prior decisions it subsumes. There is also no guarantee that the discussion of the death penalty will be limited to individual questioning. In one case, for example, the judge's introductory remarks about the death penalty, delivered to the entire panel, consumed fully 10 pages of the transcript (*Keenan*, RT at 12-22). Moreover, even under individual *voir dire* procedures, attorneys and judges are forced to pose death-penalty questions over and over. The trial participants themselves may become desensitized to the emotional nature of the inquiry, inadvertently acting as though the issue was more or less routine. As a result, prospective jurors may infer that the matter is far less consequential than they would otherwise have thought. For example, after asking a prospective juror to assume "that the evidence was overwhelming or beyond a reasonable doubt that [the defendant] was guilty of first-degree murder," one trial judge tried to explain the subtleties of the penalty phase this way:

THE COURT: If that happens, there will be a second hearing, and that hearing may take place right after the first hearing. It may be a week later. And at the second hearing, *it's a whole new ball game* with evidence being introduced and that type of thing. And at the second hearing *the decision is simply whether she should receive life or death. Just black or white type thing.* Would the fact that you can't make a decision taking life, would that prevent you in the first trial of finding her guilty of first-degree murder if the evidence was proven to you beyond a reasonable doubt?

(*Foster*, RT at 381. Emphasis added.)

For other jurors, death qualification will be anything but routine and matter-of-fact. Discussion of this life-and-death issue can be emotional and full of impact. Some jurors will become distressed in the course of the questioning, others will ask to speak privately to the judge and request to be excused. Participation on death penalty juries is not for the fainthearted. Many people are either excused for their timidity, or return steeled to the task before them. In either event, the task is now performed by a group quite different in outlook from the group that decides other kinds of cases.

Public Affirmation: Committing to the Death Penalty

In some cases, death-penalty questioning is procedurally or verbally "marked" by the judge and set off from the rest of the *voir dire*. This may act to highlight the significance of the questions, to convey the notion that penalty-phase behavior is really the central concern in the *voir dire* (e.g., concepts like presumption of innocence and burden of proof are not handled in this special way), and to make clear the extreme nature of the task that prospective jurors are agreeing to undertake. In some instances the questioning is underscored with a special preface from the judge:

JUDGE: Okay.

I now have a series of questions that I want you to listen to very carefully and if I read them too fast or unclearly to you, you tell me, "Judge, that is a little too fast . . ." I want you to think this over.

Question No. 1, Mrs. Duke.

In this case, it may be necessary for you to make a determination in regard to the imposition of the death penalty . . .

(*Jenkins*, RT at 548–549.)

Death qualification also serves to anchor the instant case at the most extreme end of a continuum of heinousness.⁸ Prospective jurors learn that, in someone’s opinion, at least, the case they are about to hear is worthy of the most horrible and extreme punishment the law permits:

(By the Court) Q: . . . Okay, *having in mind the kind of case we have here*, do you have any strong views or convictions or opinions concerning the death penalty so that regardless of what the evidence might be—this case, that you would automatically and absolutely refuse under any circumstances to vote for or consider the death penalty?

Q: Do you feel that you have an open mind on the question of what punishment is appropriate and you are willing to reserve judgment until you have heard the evidence and the law?

A: Yes.

Q: Okay, *based on your views or opinions concerning the death penalty and the nature of this particular case*, do you feel you could give all the parties a fair and impartial trial if you were chosen?

A: Yes.

(*Keenan*, RT at 926–927.) (Emphasis added.)

⁸In the course of “rehabilitation” that may occur during death qualification, defense attorneys seek to obtain concessions (from veniremen who appear to be *Witherspoon* excludable) to the effect that they could impose the death penalty, at least in extreme cases. However, the use of explicit examples may directly connect the present case to the most horrible crimes that the veniremen can imagine and encourages them to expect the worst. For example:

(By the Defense Counsel) Q: Well, just so I understand, could you consider it even though you don’t want to, would you refuse to consider the death penalty?

A: Yes.

Q: You would refuse to. Now, ma’am, you are aware that there has been some vicious crimes committed in our community over the years?

A: Yes.

Q: Thinking back on some of the ones in your mind that were perhaps the most brutal, the worst, are you saying even in that type of case you could not consider the death penalty because right now you don’t have any evidence in this case to know where it would lie, as far as you are concerned, being brutal or whatever else, you don’t know that, correct?

A: Yes.

Q: At this point. I am telling you to assume some of the facts from some of those terrible crimes you have heard about in the past. Are you saying that even in that instance you could not consider the death penalty in that type of case?

A: I might have considered it.

Q: In that type of case?

A: In some case, yes.

Q: Basically the Court will instruct you as to what the law is as relates to this case, you understand that?

A: Yes.

Q: And he will tell you what is necessary as far as the truth is concerned with respect to this case. If in the following instructions of the judge, following the guidelines that he gives you, that you felt that the death penalty was appropriate in this case, you could consider that, could you not, ma’am?

(*Jenkins*, RT at 421–422.)

This process also forces defense attorneys into the extremely awkward position of appearing to argue for death penalty imposition.

Of course, the “nature of this particular case” is something that has been implied by the death-qualification process before any evidence has been presented. This process provides jurors with a legal yardstick that is present in no other kind of case and may create a set of expectations that colors the way jurors will perceive, weigh, and evaluate the evidence that follows.⁹

Death qualifying *voir dire* does more than provide cues and implicit suggestions to veniremen about the nature of the case that will follow. It requires each qualified juror to publicly affirm their willingness to take the most extreme legal action ever available to a juror. The act of publicly proclaiming one’s willingness to impose the death penalty is likely to intensify commitment to that course of action. Even individual, sequestered *voir dire* on this issue requires affirmation of the death penalty in front of the most prestigious figures in the courtroom—the judge and attorneys—as well as the real party at interest—the defendant:

(By the Court) Q: If, after hearing all the evidence in the case and after hearing the law that applies to this case, could you bring yourself to vote for the death penalty if you thought that was the appropriate penalty?

A: Well, if there is—I do it, you know, that’s the system, and he has to—I has to go, you know, for the truth.

Q: I take it, from your answer, that you could—you would be willing to assume that responsibility? Is that correct?

A: Yes.

(*Keenan*, RT at 1146.)

In some cases, the public affirmation goes beyond even the question of responsibility, and borders on asking for a behavioral commitment. For example:

(By the Prosecutor) Q: In an appropriate case, based upon the information that will be given to you, and the law that his Honor, Judge Matia, will give you, if you come to the conclusion that the imposition of capital punishment is the appropriate verdict at the second trial, *do you feel that you could join with your fellow jurors and sign a verdict form indicating that?*

(Venireman) A: Yes.

(*Jenkins*, RT at 1842. Emphasis added.)

Or, in the same case:

(By the Defense Counsel) Q: Okay. Basically, what it comes down to is, I put it to you directly, based on your opinion regarding the death penalty, *are you the kind of*

⁹The North Carolina Supreme Court made a related observation 30 years ago. In *State v. Canipe*, 240 N.C. 60, 81 S.E. 2d 173 (1954), a trial judge had made reference to two notorious and atrocious killings in his questioning of two death-scrupled veniremen, ostensibly to determine the limits of their opposition. Justice Ervin overturned the conviction and death sentence, ordering a new trial based on his conclusion that “the questions (about the other, heinous crimes) had a logical tendency to implant in the minds of the trial jurors the convictions that the presiding judge believed that the prisoner had killed his wife in an atrocious manner, that the prisoner was guilty of murder in the first-degree, and that the prisoner ought to suffer death for his crime” (81 S.E. 2d at 178). Although the trial judge had informed the jury that he had not intended to compare the present case with any others, Ervin observed that the “trial judge occupies an exalted station, and jurors entertain a profound respect for his opinion,” so that “it is virtually impossible for the judge to remove the prejudicial impression from the minds of the trial jurors by anything which he may afterwards say to them by way of atonement or explanation” (at 177).

person that could actually sign a verdict form, knowing that that form, with your signature on it, would be to his execution?

A: Yes.

(*Jenkins*, RT at 1578. Emphasis added.)

Legal Disapproval: Encouraging Death-Penalty Endorsement

Death qualification is a process of selection as well as questioning. Prospective jurors are judged as “fit for service” based on their answers to the death penalty questions put to them. Those who unequivocally oppose the death penalty, of course, are judged unfit and excluded from further participation. Especially when conducted in the presence of the entire jury panel, however, these acts of exclusion convey a not-so-subtle message. Not all judges are as pointed as the trial court in *Witherspoon*, where the judge announced at the start of *voir dire*: “Let’s get these conscientious objectors out of the way, without wasting any time on them” (391 U.S. at 515). Yet, it is difficult for prospective jurors who witness exclusions based on death penalty opposition to avoid the inference that the law disapproves of such people.

Prospective jurors also may fail to make the legal distinction between mere death-penalty opposition and the kind of unequivocal opposition that triggers exclusion. It is, after all, a distinction that still eludes the courts from time to time. Veniremen unfamiliar with this fine line may infer that the category of legal disapproval is much broader than, in fact, it is. Because the act of exclusion is performed by the judge, disapproval may appear official *and* personal. That is, prospective jurors may infer that the judge personally disapproves of death penalty opposition (cf. Jones & Harris, 1967). Some jurors who wish to please the judge may do so by more strongly embracing or endorsing the death penalty.

The nature of the *Witherspoon* standard and the process of exclusion subtly affects the tenor of the questioning. It is a complicated formality that must be engaged in to meet a legal test, the results of which—all parties know—will be carefully scrutinized by an appellate court. Especially when the questioning is done by the trial judge, prospective jurors who equivocate or express doubts about their ability to impose the death penalty are regarded as problematic. They represent potential reversible errors. The court may become impatient with them and question them more brusquely, at least until they have declared themselves one way or the other. Death-penalty juries are no place for the indecisive. But there is an asymmetry to this push for clarification. Questioning typically proceeds until the prospective juror concedes that he or she could impose the death penalty. If this point is never reached, then the venireman is likely to be dismissed. The direction and goal of the questioning is clear: prospective jurors are *supposed* to say that they could impose the death penalty.

The climate of questioning may convince some jurors that they are being asked to endorse an even more extreme position than technically required by the law. Some fail to distinguish between the expression of a willingness to consider all statutory punishments relevant to the penalty phase (including the death penalty), and an expressed commitment to actually impose the death penalty. Some

think that anything less than a commitment to the death penalty may be legally objectionable:

(Venireman A: I've thought about this a great deal and with my views, you know, kind of trying to balance out my views and feelings on capital punishment as opposed to the, trying to keep an open mind. But I've been having so many questions that right now I'm really confused, you know. I don't know. If it came to that part, you know, if we did have to do that second hearing, I don't know if I could honestly say I could, you know, not go for a lesser charge.

(*Corbett*, RT at 51.)

The belief that jurors have agreed to take the legally "approved" action of death-penalty imposition can combine with the processes of desensitization and public commitment to produce an attitude of extreme "tough-mindedness" among many jurors who pass through death qualification. Some jurors will infer from the process of selection that the law *wants* them to be tough, that expressions of sympathy or compassion for the defendant are inconsistent with the criteria used to select them, and that hesitancy to take the final step of death-penalty imposition somehow represents a violation of their death-qualifying "oath." Of course, once persons are committed to the extreme action of imposing the death penalty, less drastic actions like voting guilty and finding special circumstances may seem less awesome and require less caution as a result.¹⁰

The Legal Status of Process Effects

Exposure to death qualification may seriously compromise the fairness and impartiality of capital juries. Yet, the practice is legally compelled. Defendants are given no choice over whether it will occur, and instead, are left only with difficult tactical decisions over how to avoid adding to the biasing effects that seem to be structured into the very heart of the procedure. As the examples cited in the previous section suggest, the biasing effects may be exacerbated in the course of questioning.¹¹ Because the basic problems with the process appear

¹⁰It is sometimes suggested that the mere prospect of death penalty imposition will lead jurors to be more timid and cautious in their evaluation of the evidence in a capital case. There may be some merit to this suggestion. Other things being equal, we would certainly expect rational decision makers—to proceed somewhat more cautiously as the consequences of their decision became more serious. Yet, as applied to capital juries, this suggestion overlooks both the composition and process effects of death qualification. Death-qualified jurors begin with a crime-control rather than due-process orientation that leads them to weigh the costs of harsh errors differently from others (see Fitzgerald and Ellsworth, 1984; and Thompson, Cowan, Ellsworth, and Harrington, 1984). Moreover, the process by which they are selected requires them, in an atmosphere of legal approval, to publicly affirm their willingness to impose the death penalty. Thus, death qualification undercuts the rational response of increased caution that we would expect to see manifested in the normative case—in non-death-qualified juries.

¹¹The procedure used to evaluate the effects of death qualification in Haney (1984) contained few, if any, of the exacerbating features illustrated in the previous section. That study, as a spare version of death qualification, might be regarded as a conservative estimate of problems that could be made worse by variations in the way the process actually is conducted.

structural and systematic, however they are likely to occur every time death-qualification takes place.

Although only the *Hovey* court has dealt specifically with this problem, several other “process effects”—also rooted in the very nature of a mandatory legal procedure—have received more widespread attention. The federal courts are well aware that jurors may draw unintended and improper inferences from legal procedures. They know also that certain procedures may portray defendants in ways that amount to self-incrimination. In *Walker v. Butterworth*, 599 F.2d 1074, *cert. denied* 444 U.S. 937 (1979), for example, the First Circuit examined the traditional Massachusetts practice of compelling defendants personally to announce peremptory challenges in the presence of prospective jurors. Defendant Walker had raised an insanity defense at his criminal trial and his lawyers argued on appeal that this particular *voir dire* procedure conveyed to jurors the impression that the defendant could rationally consult with counsel and assist in important trial decisions. They argued that this impression would act to undermine his insanity defense. The appellate court agreed. Despite acknowledging that “[t]he actual impact of the defendant’s utterances on the jury cannot be measured,” the court decided that they “carried inferential weight” and “conveyed important and relevant information to the jury” (599 F.2d at 1084).

Such concern has not been restricted to “compelled utterances.” The United States Supreme Court prohibited the practice of forcing an incarcerated defendant to wear prison garb during trial because of the inferences the jurors would likely draw about him. In *Estelle v. Williams*, 425 U.S. 501, (1976), the Court wrote that prison garb “may affect a juror’s judgement” and makes likely the “unacceptable risk . . . of impermissible factors coming to play” (425 U.S. at 504 and 506). The Court did not require specific proof that wearing prison garb would lead to adverse inferences by jurors. Instead, it noted that “[t]he actual impact of a particular practice on the judgment of jurors cannot always be fully determined. But this Court has left no doubt that the probability of deleterious effects on fundamental rights calls for close judicial scrutiny” (*id.* at 504).

In a separate line of cases, numerous courts have recognized that the mere mention of the issue of legal punishment to the jury at the guilt stage of a trial can seriously distort its decision-making process, influence a juror’s role as fact finder, and constitute reversible error. The Supreme Court has made it very clear that a jury is required to “reach its verdict without regard to what sentence might be imposed” (*Rogers v. United States*, 422 U.S. 35, 1975). This rule is applied uniformly whether it involves the case where a defendant objects to the mention of sentence in front of the jury (e.g., *United States v. McCracken*, 488 F.2d 407 [5th Cir. 1974]) or, conversely, a case in which the defendant requests that the jury be informed of the sentence he would receive if convicted (e.g., *Chapman v. United States*, 443 F.2d 917 [10th Cir. 1971]; *United States v. Johnson*, 502 F.2d 1373 [7th Cir. 1974]). Indeed, as one court accurately and succinctly summarized the law on this issue: “The authorities are unequivocal in holding that

presenting information to the jury about possible sentencing is prejudicial” (United States v. Greer, 620 F.2d 1383, 1384 [10th Cir. 1980]).¹²

In each instance cited above, the courts have been concerned about the prejudicial impressions that legal procedures and events—including the mere mention of sentence or penalty—might leave with jurors whose fairness and impartiality thus would be compromised. In all cases, the bias was implied and no court required a showing that the improper suggestions be direct and explicit before they acquired constitutional significance. As the *Greer* court put it: “We should not assume that jurors are so obtuse that they are unable to draw simple inferences” (620 F.2d at 1385). Nor did any of these courts require a showing that the bias actually caused or influenced guilty verdicts in the specific cases being challenged, or even that they had any measurable impact on conviction rates in general. Instead, the cases speak of “risk” and “probability.” Finally, none of these courts suggested that probable but impermissible inferences could be cured simply by instructions or admonitions from the bench. By *prohibiting* the practices in question, the cases have indirectly acknowledged that such process effects cannot be eliminated through instructions that would ask jurors to refrain from all-too-obvious and natural processes of human inference.

The close judicial scrutiny that resulted in prohibiting the various practices cited above all occurred in noncapital cases. In light of the “enhanced due process” standard that the Supreme Court has brought to bear in capital cases, because death is “so profoundly different from all other penalties” [*Lockett v. Ohio*, 438 U.S. 605 (1978) (Burger, C. J., plurality opinion)], it seems that *at least* as exacting an analysis must be applied to the death-qualification process. Empirical data and social psychological analysis indicate that jurors who are exposed to death qualification can and do make “simple inferences” based on the events that occur throughout the process, creating a high “probability of deleterious effects” on the fundamental rights of capital defendants.

Death Qualification After *Hovey*: Curing the Process Effect

Faced with evidence of improper biasing effects, appellate courts can either modify or prohibit the procedures that produce them. In *Hovey*, the California

¹²The courts are concerned that mention of a sentence that the jury regards as lenient might encourage them to convict, while mention of a sentence they regard as harsh would make them more likely to acquit. Of course, death qualification represents the obvious exception to the rule that penalty is not to be made salient to the jury. However, the rule prohibiting mention of penalty later in the trial is often retained in some form despite the fact that death qualification has occurred at the very outset. In California, for example, before capital juries retire to deliberate the guilt phase of the case, they are admonished:

In your deliberations the subject of penalty or punishment is not to be discussed or considered by you. That is a matter which must not in any way affect your verdict or affect your findings as to the special circumstances in this case.

(CALJIC 8-83-2.)

Supreme Court identified and carefully examined the biasing effects of death qualification. It analyzed the nature of the process effect, discussed the underlying social psychological basis, and then ordered a modification in the procedure by which death penalty juries would be selected in California: “[T]his court declares . . . that in future capital cases that portion of the *voir dire* of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration” (*Hovey v. Superior Court*, 28 Cal. 3d 1, 80 [1980] [footnote omitted]).

Individual sequestration of prospective jurors during death qualification promises to reduce, but not eliminate, that portion of the biasing effect that derives primarily from *repetition*. Under individual sequestration (whereby a single prospective juror is questioned outside the presence of the others), veniremen will be spared the experience of hearing death-penalty questions posed again and again to other panel members. However, the possible limitations of this proposed remedy to the process effect bear examination. Under the new procedure, of course, prospective jurors are still questioned about their own death-penalty attitudes (a process that in some instances can last for a half-hour or more).¹³ The implication of guilt that is carried by initial discussions of penalty is still present, as is the effect of cognitively anticipating the penalty phase. Individual jurors are still exposed to the question of death-penalty imposition long before they have to decide it, and they are still required to publicly commit themselves to be willing to impose it. Thus, the core features of the death-qualification process are retained, absent their repetition.¹⁴

At the same time, however, individual sequestration during death qualification may create some special problems of its own. Separated from the rest of the *voir dire*, death-penalty questions become clearly distinguished from other topics

¹³For any given veniremen, then, the sequestered procedure might last longer than the simulated death-qualification whose effects were reported in Haney (1984). The *Hovey* court candidly acknowledged this limitation:

Of course, this court cannot insure that a rule of sequestered *voir dire* in capital cases will alleviate the untoward effects of the current procedures. Unless a juror is able to understand and respond with certainty to the *Witherspoon* questions, the juror may be subjected at the sequestered proceeding to considerable *voir dire* on his or her attitude toward capital punishment. It is unknown at this point whether such personal *voir dire* would entail the same dangers of inducing bias as do the current procedures for *voir dire*.

(28 Cal. 3d at 81.)

¹⁴The only specific feature of the process that might be eliminated completely by individual sequestration is the implication of legal disapproval created by *Witherspoon* exclusions. Since prospective jurors no longer see others excluded on the basis of death penalty opposition, the inference that the law and the judge disapprove only of death penalty opponents should be precluded. However, depending upon the manner in which exclusion occurs under sequestration, it is possible that some prospective jurors *will* make such inferences about the inevitable absence of some veniremen immediately following the death penalty questioning. It is also not too far-fetched to assume that some jurors will infer from their own presence on the jury that they answered the death penalty questions “correctly” by endorsing its imposition.

in a way that underscores their importance. Prospective jurors are likely to infer that these special questions address the most important issue in the case, an issue ostensibly far more important than standard topics like presumption of innocence that are merely addressed before the open jury panel. Moreover, some veniremen will feel "on the spot" when brought back into the courtroom (or the judge's chambers) to be questioned individually about their death-penalty attitude, and the experience is likely to be especially emotional and significant for them. Thus, in the name of reducing the repetitiveness of death qualification, the court may have inadvertently increased its symbolic significance and its emotional intensity.¹⁵

Another modification in the death-qualification process was suggested indirectly by the *Hovey* opinion. The process of excluding automatic death penalty jurors (ADPs), not part of the simulated *voir dire* in Haney (1984), might counterbalance the biasing effects of standard death qualification: "[I]nsofar as the venirepersons observe the judge dismissing prospective jurors who would automatically vote for the death penalty, the remaining jurors might infer a more symmetrical disapproval on the part of the law, offsetting the prejudicial operation of this particular psychological process" (28 Cal.3d 74, fn. 123). Of course, exclusions of ADPs could only offset one facet of death qualification—the implied legal disapproval of death-penalty opposition. Other features of the process remain unaffected. Indeed, several factors further limit the effectiveness of this potential remedy. The extreme infrequency of ADP veniremen means that such counterbalancing would rarely occur. In the same way that ADP exclusions fail to correct for imbalances that *Witherspoon* exclusions create in the composition of death-qualified juries (Kadane, 1984), they are too infrequent to have much impact on the process effect. Most prospective jurors simply would never see an ADP venireman identified and excluded. Second, ADP exclusions would have no impact on the process effect under the individual, sequestered death-qualification ordered by the *Hovey* court, since prospective jurors do not witness any exclusions under that procedure. (Thus, as correctives to the process effect, the two modifications in procedure suggested by *Hovey* could not operate jointly.) Finally, to the extent the ADP questions prolong the death-qualification process, they might actually worsen rather than mitigate the process effects.

Death qualification poses a series of seemingly insoluble dilemmas for attorneys and judges who may wish to minimize the biasing effects of the process on a case-by-case basis. Trial judges seeking to minimize juror confusion might provide veniremen with elaborate explanations about the process in an attempt to reduce uncertainty, but thereby risk the possibility that more undue attention will

¹⁵Unlike the courts, prospective jurors are not aware of the biasing effects of death qualification and are unlikely to understand the purpose of sequestration. The remedy may have a neutral purpose from a legal perspective, but it may also provide the occasion for an additional set of biasing inferences on the part of veniremen. The problem is not with individual sequestered *voir dire* per se, which can be highly desirable for other reasons in capital cases. (Cf. Nietzel & Dillehay, 1982.) Rather, the difficulty stems from the special attention that is drawn to the death penalty when it is isolated from the rest of the *voir dire* and generally handled in a way that underscores its importance.

be focused on penalty at the very outset of the trial. Or, judges might treat the issue tersely and without fanfare in their opening remarks and explanatory comments, hoping to minimize any implication that the death penalty is an immediate and central issue. But this practice is likely to increase the number of confused jurors who will be perplexed about why the death penalty is being discussed at all. In states other than California, trial judges might try to avoid attaching any special significance to the death penalty by treating the issue in routine fashion in open court, but they necessarily risk the effects of repetitive death-penalty questioning. Of course, individual sequestered *voir dire* as ordered in *Hovey* avoids repetition but underscores the significance of the issue in another way.

The process effect also imposes a set of unique handicaps on defense attorneys in capital cases. Should attorneys engage in elaborate death-penalty questioning to learn as much about prospective jurors as possible (thereby intensifying the process effects)? Or should they curtail death-penalty questioning to minimize the process effects, but learn little about the potentially important penalty-phase behavior of prospective jurors? An attorney who believed that the process of death qualification acted to make the penalty phase more likely—and the evidence certainly supports such a belief—would have an increased responsibility to inquire about the potential penalty-phase behavior of prospective jurors. But the evidence also suggests that prolonged and earnest inquiry into penalty-phase behavior further increases the biasing effects of the process. The confounding of the process and composition effects of death qualification creates another dilemma for defense attorneys. Should an attorney vigorously rehabilitate—persuade, cajole, or otherwise talk an apparently excludable juror into possible death-penalty imposition—and appear to advocate the death penalty as well as possibly connecting the present case directly to the most heinous crime the venireman can imagine? Or should they forgo attempts at rehabilitation and thereby increase the size of the excludable group? Doing a “good” job at capital *voir dire* by minimizing the number of persons who are excluded for death penalty opposition invariably comes at the expense of extending death qualification and intensifying the process effects.¹⁶ This maze of conflicting goals and uncertain trade-offs is imposed by the nature of the process itself.

The procedural modifications offered by the California Supreme Court appear unlikely to completely and effectively remedy the problems posed by death qualification. Indeed, in certain instances they may worsen rather than alleviate the overall process effect. *Ad hoc* attempts by conscientious judges and attorneys to modify the death-qualification process and minimize its biasing effects are plagued by incompatible concerns and irresolvable conflicts. It may be that the

¹⁶Use of a single jury to decide both guilt and penalty creates another kind of dilemma. Penalty phases are governed by somewhat different evidentiary standards and, under most capital sentencing statutes, evidence is regarded as relevant in the penalty phase that would be systematically excluded from the guilt phase. Attorneys who wish to *voir dire* prospective jurors on issues they anticipate may be raised at the penalty phase (e.g., prior crimes, escapes) risk serious prejudice to the guilt phase of their case.

only effective cure to these biasing effects is to prohibit death qualification of guilt-phase jurors.

Conclusion

The legal process of death qualification may undermine the fairness and impartiality of capital juries. Biasing effects flow from the basic structure of the process itself, and may be easily and naturally exacerbated by the tenor and logic of the questioning that occurs in the courtroom. Trial judges have little real control over the occurrence or magnitude of these effects, and legal fairness in a capital trial can vary idiosyncratically as a function of the vagaries of the death-qualifying *voir dire*. Unfortunately, the process effect may function additively to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process (e.g., Cowan, Thompson, & Ellsworth, 1983). Unlike the composition effect to which it is added, however, the basic process effect does not vary by venue or panel—all death-qualified jurors must pass through it. Death qualification puts defense attorneys in the untenable position of having to choose between two prejudicial effects, knowing that to reduce one is to intensify the other. Its consequences for capital defendants appear graver still.

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