Law and Human Behavior, Vol. 20, No. 2, 1996

Life Under *Wainwright v. Witt*: Juror Dispositions and Death Qualification

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The current standard for determining juror qualification in cases in which the prosecution is seeking the death penalty was formulated by the U.S. Supreme Court in 1985 in Wainwright v. Witt. *This standard differs importantly from its predecessor, and requires that prospective jurors be dismissed if their views would prevent or substantially impair their ability to perform their functions as jurors. We assessed respondents according to the criteria imposed by* Witt. *We also measured independently prospective jurors' abilities to perform the various specific tasks of a capital juror and their disposition to impose the death penalty automatically upon defendants convicted of murder punishable by death. Data from 148 respondents, selected randomly from juries on previously tried felony cases, indicated that 28.2% of those includable by the* Witt *standard would automatically impose the death penalty. Considering all respondents who would be erroneously included or excluded, a total of 36% of the sample showed inconsistencies with the* Witt *criterion. These findings are discussed in terms of jurors' difficulties in anticipating their roles as capital jurors.*

The current standard for juror death qualification in capital cases was set by the U.S. Supreme Court in *Wainwright v. Witt* in 1985. The standard according to *Witt* is that a juror is dismissed for cause if s/he feels so strongly about the death penalty that her/his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (p. 852).

The death qualification standard replaced by *Witt* was announced in *Witherspoon v. Illinois*, adopted by the Court in 1968. *Witherspoon* was a two-pronged test, directing that only those jurors could be excused for cause who "made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt" (*Witherspoon v. Illinois*, 1968, p. 552).

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The *Witherspoon* doctrine itself had replaced a practice of dismissing jurors who claimed to have "scruples" against the death penalty (the pre-*Witherspoon* standard), where scruples referred to conscientious or moral reservations about capital punishment. *Witherspoon* was an effort to tighten the standard for qualifying the jury in capital cases. With the change wrought by the *Witherspoon* standard, those prospective jurors who entertained serious personal objections short of unequivocal opposition were not supposed to be dismissed for those reasons alone (see, for example, Carr, 1987; Gross, 1984; Thompson, 1989).

Death Qualifications and the Judgment Task of the Prospective Juror

The juror undergoing voir dire for a capital case under any of these standards extant over the last 30 years has been required, typically in response to several questions posed by the court or attorneys, to render judgments or opinions that supposedly indicate his or her ability to serve as a fair and impartial assessor of the facts, both as to guilt and to punishment. Each standard has, however, required a different kind of judgment of the prospective juror, usually made in the course of a series of voir dire questions about the death penalty. These judgments differ in what they demand of the juror, both as to self-understanding or insight and comprehension of what they would be required to do as jurors during a trial in which the prosecution seeks the death penalty.

Under either a test based on jurors' scruples or on *Witherspoon*, the interviewee during voir dire was asked to make a self-judgment about circumstances that could be known only to that person, or which were reasonably foreseeable by her or him. Thus, the pre-*Witherspoon* practice asked juror candidates to assess their feelings about capital punishment. A question like "Do you have any religious or conscientious objections to the death penalty" asks interviewees to describe an aspect of themselves. To the extent that one can describe his or her own dispositions, the question is reasonably targeted; it does require a degree of self-knowledge, however.

The *Witherspoon* tests required, in a similar way, that prospective jurors make self-assessments concerning their thoughts and feelings about the death penalty, but *Witherspoon* required more. For either prong of this standard, juror candidates were often asked to announce whether they would be impaired in judging the facts about guilt, or unable to consider voting for death, both judgments made about cases and circumstances other than the case before the court. That is, prospective jurors were not asked to state how they would vote in the case at hand, but in hypothetical or other actual cases. So *Witherspoon* additionally asked members of the venire to engage in some "as if" behavior, to act "as if" they were confronted with specific, knowable future or hypothetical circumstances, and say what they would do.

The *Witt* doctrine, by contrast, requires prospective jurors answering questions about capital punishment during voir dire to make self-judgments about unknown circumstances. Those circumstances are the specific tasks and functions that jurors must perform, under the facts of the case at hand and the law as given by the

judge. But the specific real or hypothetical circumstances posed to jurors under the *Witherspoon* standard are absent under *Witt* guidelines. Often in practice, neither the specifics of the law they will be asked to follow nor the circumstances under which they must apply it to the facts of the case are described by the judge or attorneys. Thus, as noted by Carr (1987, p. 448), if venire members in capital cases knew what was in store for them, they might respond differently to voir dire questions on their ability to follow the law (see *Morgan v. Illinois*, 1992, p. 4545). The same point—that jurors are not in a position to answer a question during voir dire on following the law when they do not know what the law may direct—is made by Gold (1984) concerning the limited use of a defendant's record of prior convictions.

Our contention is that the judgment required of jurors under *Witt* is quite different and more objectively difficult, mainly for the reasons just cited, than that required by either of *Witt*'s predecessors. In fact, unless prospective jurors are provided enough information to understand the essentials of the proceedings and their own role, a reasonably valid prediction of their own behavior is not possible, and that task loses much of its meaning.

One might assert that the argument just presented is overdrawn, that jurors can be given and in fact are given sufficient explanation during voir dire to comprehend what their role will be and what the law will require. Exposure to trial practice contradicts this contention. The first author has served as a behavioral consultant (see Dillehay & Nietzel, 1986; Nietzel & Dillehay, 1986) on over 50 capital cases, and been an in-court voir dire consultant in 19 of those in various states in the south, midwest, and the west, in which *Witherspoon* or *Witt* was used as a standard. We have also examined records of more than 30 voir dire proceedings in other capital cases held in some of the same states and in other states in these regions. Often little clarifying explanation is provided or prospective jurors are told that the judge will instruct them on the law if they are selected to serve. If attempts are made to clarify the process by which jurors are supposed to reach their sentencing decision, they sometimes become vague references to "mitigation" and "aggravating circumstances" that are not well explained and themselves remain somewhat mysterious to the prospective juror. In fact, research reveals that jurors who have served on capital cases often misunderstand judges' supposedly explicit sentencing instructions (Luginbuhl & Howe, 1995; see also Haney, Sontag, & Costanzo, 1994). Hence, it is unlikely that prospective jurors, who receive only general information about the tasks that might await them, have sufficient information upon which to respond accurately to a question about how their attitude would affect their ability to perform the duties of a juror.

A second objection to the concern that jurors cannot make the judgment required of them under *Witt* is that the judgment is irrelevant, because *Witt* made the question of fitness to serve a factual rather than a legal matter (see discussion in Thompson, 1989). This change means that the trial judge is accorded greater discretion under *Witt* than under *Witherspoon* in ascertaining whether a juror passes the test of death qualification. Thus, it might be asserted that "(w)hether a potential juror is excluded or not under *Witt* depends on the judge's assessment of the juror, not the juror's self-assessment" (Thompson, 1989, p. 213). While there is no doubt that the greater discretion given the judge potentially alters, in principle, the judge's

role in deciding fitness to serve, what we have seen in voir dire and learned from colleagues and other practitioners (of course based on a limited, nonrandom sample) is that judges' behavior has not shown much of a difference. They seem to follow as closely as ever what jurors say about themselves, with the addition of responses to questions focused on the ability of the juror to perform her or his role. Judges' behavior may change, of course, if experience with appellate review substantiates the conjectures by Thompson and others that serious attention by appellate courts to *Witt* excludables is not likely.

While the task of the researcher studying death qualification may be more difficult under the criteria established by *Witt*, we are not alone in the belief that potential jurors can be meaningfully and properly classified in research under this doctrine. In a recent study of death qualification under "modern" standards (i.e., the doctrines announced in *Wainwright v. Witt*, 1985; *Hovey v. Superior Court*, 1980; and *Morgan v. Illinois*, 1992) Haney, Hurtado, and Vega (1994) employed survey questions to classify a random sample of jury-eligible Californians according to whether they would be excluded from a capital case based on their death penalty dispositions. In their research, as in ours, respondents were given information about the bifurcated nature of a capital case, and were asked a series of questions (nearly identical to ours) about their death penalty views, in accord with the doctrines of *Witherspoon*, *Witt*, and *Morgan*. Studies like those of Haney, Hurtado, et al. (1994) and Neises and Dillehay (1987), as well as the one reported here, rely on the assumption that the dispositions jurors carry to the courtroom can be assessed meaningfully in research in accord with the doctrines of the Court. These are the same dispositions that are examined during voir dire.

Whether the death-qualification standard being addressed in the courtroom during voir dire is based on *Witherspoon* (1968), *Witt* (1985), or *Morgan* (1992), several—sometimes many—questions may be asked of jurors. In our experience, jurors have never been dismissed for cause based on a single question, under the previous or present doctrines. On the surface, the process there does not resemble the situation of the survey respondent considering either a question based on *Witherspoon* or one conforming to *Witt*. However, in many respects the courtroom questioning process is structurally similar to the sequence of questions used by Haney, Hurtado, et al. and by us: Global questions about attitudes toward the death penalty are followed by questions that test the extremes of belief on the subject. And these questions follow a description of the bifurcated nature of the capital trial.

The complications of increased judicial discretion provided by the *Witt* doctrine, relative to the procedures followed under *Witherspoon*, should not be confused with the difficulties posed for the researcher that result from a consideration of the courtroom efforts to rehabilitate jurors at risk of being excused for cause. Under the *Witherspoon* doctrine, competent defense attorneys have typically attempted to salvage any juror who stated that she could not consider giving death as punishment. Sometimes those efforts are/were successful. This fact was never incorporated into any of the seminal research that attempted to assess dispositions according to the *Witherspoon* doctrine (Cowan, Thompson, & Ellsworth, 1984; Fitzgerald & Ellsworth, 1984; Neises & Dillehay, 1987; Thompson, Cowan, Ellsworth, & Harrington, 1984). Under rehabilitation questioning in voir dire, jurors sometimes ap-

pear to change their position on giving death as punishment. And there is recent research to indicate that research participants sometimes change their stated positions, too. Robinson (1993) reports that college students responding to a questionnaire in a regular classroom session are sometimes inconsistent in their responses to brief scenarios about heinous crimes compared to their previous responses to questions based on *Witherspoon*. This "rehabilitation" of excludables—only 39.4% remained adamantly against death over the five crime vignettes presented to them—is similar to the results found by Cox and Tanford (1989), also with student subjects but using different methods. But Robinson's results and those of Cox and Tanford must not be taken at face value as corresponding to what occurs in capital case voir dire. As a demonstration of the inconsistency of responding between questions designed to screen for exclusion under the *Witherspoon* doctrine and questions about briefly described, specific cases, the results seem clear: College subjects under the circumstances of the studies demonstrate they will answer inconsistently. But there is little fidelity in the research to courtroom rehabilitation. In the courtroom a prosecuting attorney bent on removing an antideath juror would spring to life and might reverse even a student's position on considering death as punishment.

The efforts of attorneys to rehabilitate jurors who are in danger of being lost for cause because of their death penalty dispositions will be as strong under *Witt* as formerly, and any such courtroom rehabilitation strains the correspondence between a classification based on research questions, including those taken from the *Witherspoon* doctrine, and the decision of the judge to excuse a juror or not. But fostering that correspondence is not our aim. A reasonable position for researchers is that the screening questions used in research on death qualification, based on either *Witt* or *Witherspoon*, provide the best estimate of the juror's relevant dispositions (see Neises & Dillehay, 1987).

A major objective of the research reported here was to provide data on the question of eligible jurors' understanding of their role as capital jurors. Such data provide evidence concerning the ability of members of the venire on capital cases to answer meaningfully the question posed by the standard in *Witt*. If prospective jurors indicate in response to a general question based on *Witt* that they would be capable of performing their function as jurors, in accord with the law, then they should also indicate that they would be able to meet satisfactorily each task that in fact is required of a capital juror. In addition, those potential jurors who state that they would be incapable of performing their role as jurors should also indicate an inability to perform at least one legally required task asked of jurors. On the other hand, if prospective jurors do not substantially understand what would be asked of them in an actual capital trial, then some of those who say they would be unimpaired by dispositions toward capital punishment should not be able to execute their specific functions as jurors, and some jurors anticipating substantial interference with their role performance should be able in fact to perform it.

We expect that prospective jurors are not able to anticipate accurately their role as capital jurors in the manner contemplated by typical questioning under *Witt*. Consequently, we predicted that significant numbers of juror-eligible respondents who indicated that they would not be impaired as jurors would nonetheless show

by their responses to questions about specific juror tasks that they could not function as required by their role.

The *Witt* Standard and Jurors Who Would Automatically Vote for Death

The pre-*Witherspoon* standard was entirely partial to excluding those with anti-death-penalty dispositions, a bias that *Witherspoon* overcame only partly in theory and practice. *Witherspoon* required that jurors render their verdicts without regard to their attitudes about the death penalty, and be able to consider capital punishment as a penalty for murder. It did not, however, require a juror to consider all of the penalty options under the law, including death and lesser sentences. Thus, the *Witherspoon* standard was not a broad prescription for a fair and impartial evaluation of the penalty-phase evidence, but rather a proscription against automatically rejecting death as punishment. The Court did comment, however, in a now-famous footnote (1968, note 20, pp. 521–522), that "the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death."

This other side of the issue—automatically voting for death regardless of the evidence—has been handled in voir dire practice, especially before *Morgan* (1992) gave the defense the right to ask about the disposition to automatically vote for death, primarily by requiring jurors to say they would follow the judge's instructions and consider all penalty options afforded by the law. The intent of the Court in announcing *Witt* (1985) was apparently in part to attempt to pull these several potential interferences with the proper execution of the capital juror role under a single test: Can the prospective juror perform the role of a capital juror as required by the law? This is, after all, the ultimate interest of a standard for death qualification in a capital case.

The prospective juror who would automatically vote for the death penalty, regardless of the mitigating evidence presented during the trial, for anyone convicted of first degree murder is of particular interest to the Court (e.g., *Morgan v. Illinois*, 1992; *Ross v. Oklahoma*, 1988) and practitioners alike (Dillehay & Nietzel, 1986; Krauss & Bonora, 1990; McNally, 1985; Nietzel & Dillehay, 1986). These jurors are referred to as reverse-*Witherspoon* or automatic death penalty (ADP) jurors; their identification during voir dire is obviously very important. They are difficult to discover for several reasons (e.g., their interest in serving, their apparent deference to the judge, and their ready endorsement of conventional standards, such as a fair hearing based on the evidence in the case). Krauss and Bonora (1990, Vol. 2, Chap. 23, pp. 29–39) provide a detailed discussion of the difficulties that arise in ascertaining ADP status during voir dire. But *Witt* was designed in part to identify them so that they might be excluded from serving. Indeed, one practitioner (McNally, 1985) speculated that the *Witt* standard would be a decided improvement in excluding ADP jurors, an outcome he referred to as "Rehnquist's revenge."

Neises and Dillehay (1987), using a random sample of juror-eligible citizens, explored the issue as to whether the *Witt* standard would likely exclude ADP jurors. In an effort to follow as closely as possible the kinds of voir dire questioning procedures encountered in actual trials, an interviewer in that study gave respondents

a brief description of the bifurcated trial used in capital cases, and then respondents were questioned about their death penalty dispositions. The determination of juror status under the two *Witherspoon* criteria was made using the procedure from Fitzgerald and Ellsworth (1984); screening to assess probable classification according to the *Witt* doctrine was done by asking: "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?" And the disposition to give the death penalty in every case to defendants who had been convicted of capital murder was measured by the following, which was asked only if the respondent had previously indicated she would consider voting to impose the death penalty: "O.K., you've said you would vote for the death penalty in at least some cases. Now, is your attitude toward the death penalty such that as a juror you would ALWAYS vote for the death penalty in every case in which you were sure beyond a reasonable doubt that the defendant was guilty of capital murder?" Using responses to these questions about death penalty dispositions it was possible to determine among these juror-eligible respondents whether those who were likely ADPs would be included or excluded by applying the doctrine advanced by *Witt*. The findings indicated that questions based on the *Witt* standard failed to identify a substantial number of ADP respondents. The analyses show that, considering exclusion under *Witt* and ADP status separately, 20.9% of the respondents met the standard for exclusion under *Witt*, while 24.1% of the total sample said they would impose the death penalty for all defendants convicted of capital murder. (See the Discussion section for comment on the estimated prevalence of ADPs.) Further analyses revealed that 26 of the 32 respondents who were classified as ADPs would not have been excludable under *Witt*. That is, even though these juror-eligible citizens had indicated that they would always impose the death penalty for individuals convicted of intentional murder, they did not consider that their death penalty attitudes would affect their ability to perform their duties as jurors in a capital case. These "potential jurors are apparently unaware that their extreme commitment regarding capital punishment violates the juror duty of considering all possible sentences for convicted defendants" (Neises & Dillehay, 1987, p. 493). Precisely the same issue of a juror's inability to anticipate his/her role and the instructions of the court regarding penalty options was noted by the U.S. Supreme Court in *Morgan* (1992, p. 4545).

One of the purposes of this research was to determine whether questioning following the *Witt* doctrine would also fail to identify and exclude ADP jurors when those being questioned had previously served as felony jurors and would be expected to have first-hand general knowledge of what a juror role entailed. Our sample of prior jurors was particularly relevant to this task because Kentucky jurors serving in felony cases do more than determine guilt: In contrast to the typical felony juror in this country, Kentucky jurors decide the penalty a convicted defendant will receive. Thus, our test of the ability of the *Witt* standard to eliminate ADP jurors can be thought of as the most likely one to demonstrate *Witt*'s efficacy in excluding this category of potential juror. With their experience, these former jurors should be aware that they would be required to consider a range of penalty options. Nonetheless, we expected that ADPs were likely to be missed by the standard, because its application requires too much from prospective jurors.

METHOD

Former jurors in Fayette Co., Kentucky were selected randomly from the files of the Circuit Court and interviewed to determine their potential qualification to serve as capital jurors under the standard in *Witt* (1985). They were also asked separately about their ability to perform each of the series of tasks required of jurors in a death-penalty case, and their ability to perform these tasks was compared to their classification under *Witt*. In addition, their disposition to give only the death penalty for convicted defendants was assessed to determine their ADP status, which was compared to their classification according to *Witt*.

Respondents and Procedure

The selection of respondents entailed a two-stage random process in which 50 felony cases were first selected from the 105 felony jury trials, excluding capital murder cases, that had taken place in the Fayette County Circuit Court during the year and one-half preceding the initiation of the study. Then five jurors were randomly selected from each of the trials for possible inclusion in this study. The first three of these jurors per case were targeted as principal participants, while the remaining two jurors for each case were selected as replacements, if necessary. Thus, the goal was to interview 150 previous felony jurors—three jurors from each of the 50 trials. Following this selection procedure, telephone interviewing was initiated with 213 jurors. There were 19 refusals among those contacted. Of the others, 16 jurors could not be reached after five attempts at various times of the day and week; telephone numbers could not be found for another 16; eight interviewees refused to answer several significant questions, leaving their data incomplete for our analyses here; three jurors claimed to have served on six-member juries; two were alternates; and one ended the interview after the first question. The result was 148 completed interviews, 81.8% of those contacted. In terms of social and demographic characteristics, the sample was approximately 56% female, 93% white, and 71% married, with a mean age of 45 years.

The Structured Interviews

Interviewers identified themselves as from the University of Kentucky doing a survey of people who have served as jurors in the county. The interviews were conducted by the second author and two other experienced interviewers specifically trained for this research.

Because the interviews were being conducted as part of a larger research project that had several objectives (encompassing a master's thesis on conviction proneness by the second author and studies of jury voting behavior), the questions essential to the purposes of this study were included among a number of questions. Thus, interviewees were first asked questions about the juries on which they had served, and then two questions about their concern regarding burglaries/armed robberies, and violent crimes. Issues about the death penalty were then covered.

The question to determine whether the respondent was qualified to serve on a capital jury was based on the criterion from *Witt* and taken from Neises and Dillehay (1987). This question was asked after several questions about the respondent's general attitude toward the death penalty had been explored, using structured questions covering her or his overall disposition, a question on conscientious and religious scruples about the death penalty, a question designed to measure ADP status (Neises & Dillehay, 1987, except that we substituted "first-degree, intentional murder" for "capital murder"), and a measure of qualification under *Witherspoon* (see Fitzgerald & Ellsworth, 1984; Neises & Dillehay, 1987).

The specific wording for the question based on *Witt* was as follows: "Now, before you would be selected as a juror in a trial where a convicted defendant could be given the death penalty, you may be asked another question before being allowed to participate as a juror. Here is the question: Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?" This wording was selected deliberately to be faithful to the *Witt* standard and to be comprehensible to the respondent, and a form of the question had been reviewed by attorneys active in capital cases. If asked what the duties of the juror are, interviewers were instructed to state "listen impartially to the evidence; follow the judge's instructions; be fair to the defendant and the state." (For a discussion of the difficulties faced by the researcher in this arena and an analysis of this specific item, see Thompson (1989) and the Discussion section of this paper.)

The items that comprise the Capital Juror Role Performance Scale (CJRPS) (Dillehay & Sandys, 1992) were developed specifically for this study, and were devised to cover the major tasks of a juror in a death-penalty case, including the penalty phase of such a trial. They are listed in Table I, in the order in which they were asked. As an introduction to these items, interviewees were told: "OK. I'm going to mention some things that jurors must do. Please tell me how difficult or easy it would be for you to do each one of these in a case in which the prosecution was seeking the death penalty. Tell me whether it would be impossible for you, very difficult for you, somewhat difficult for you, or not at all difficult for you. If you want me to repeat any of these questions, feel free to ask." The interviewers read the response alternatives after each question, alternating the order.

In the interview these questions followed all of the other questions about capital trials, and were themselves followed by questions about trials on which the respondents had served, and items concerning the social characteristics of the respondents.

To assess their ADP status, respondents were asked the question from Neises and Dillehay (1987) about their disposition to give the death penalty whenever a defendant is convicted of capital murder. Respondents indicated whether they would always give death if they were convinced beyond a reasonable doubt that the defendant was guilty of first degree, intentional murder, or if they would not always do so.

Table I. Items of the Capital Juror Rule Performance Scale

Item No.	
1.	In a death penalty case, how difficult or easy would it be for you to *listen to the evidence* with an open mind?
2.	In a death penalty case, how easy or difficult would it be for you to *wait to decide* about the defendant's guilt or innocence until all of the evidence had been presented?
3.	In a death penalty case, how difficult or easy would it be for you to *be fair in your evaluation* of the evidence presented by the *prosecution* that the defendant is guilty of murder?
4.	In a death penalty case, how easy or difficult would it be for you to *be fair in your evaluation* of the evidence presented by the *defense* that the defendant is innocent of murder?
5.	In a death penalty case, how difficult or easy would it be for you to *follow the instructions* given by the judge on the law you must use in deciding whether the defendant is guilty or not guilty?
6.	In a death penalty case, how easy or difficult would it be for you to *discuss with the other jurors* your views of whether the defendant is guilty or not guilty?
7.	In a death penalty case, how difficult or easy would it be for you to *vote for a guilty* verdict if the evidence justified it?
8.	In a death penalty case, how easy or difficult would it be for you to *vote for a verdict of not guilty* if the evidence justified it?
9.	In a death penalty case, how difficult or easy would it be for you to *decide* whether the defendant should be given *the death penalty* if you believed the person to be guilty?
10.	In a death penalty case, how easy or difficult would it be for you to *vote* for a penalty of *death* if you believed the person to be guilty?
11.	In a death penalty case, how difficult or easy would it be for you to *vote* for a penalty of *life* in prison if you believed the person to be guilty
12.	In a death penalty case, how easy or difficult would it be for you to *vote* for a penalty of *20 years to life* in prison if you believed the person to be guilty?

RESULTS

The *Witt* Standard

For the respondents whose data were complete on the questions assessing qualification under *Witt*, just under nine out of 10 (89.8%) indicated that their attitudes toward capital punishment were not so strong that those attitudes would seriously affect them as jurors and interfere with their ability to perform their duties. In other words, approximately one out of 10 would be excluded by the application of the *Witt* doctrine.

The Capital Juror Role Performance Scale

The frequency and percentage of response to each of the items that comprise the Capital Juror Role Performance Scale (CJRPS) are shown in Table II. The vast majority of the respondents indicated that it would be not at all difficult or only somewhat difficult for them to perform each of these tasks. However, there are three tasks which 20%–23% of the respondents say they would find very difficult

Table II. Response Distributions of the Capital Juror Role Performance Scale

		How difficult or easy to...								
		Impossible		Very		Somewhat		Not at all		Total
	Item[a]	Percent	(*n*)	Percent	(*n*)	Percent	(*n*)	Percent	(*n*)	(*n*)
1	Listen, open mind		—	3.4	(5)	14.3	(21)	82.3	(121)	147
2	Wait to decide	1.4	(2)	4.1	(6)	25.2	(37)	69.4	(102)	147
3	Fair to prosecution	1.4	(2)	2.7	(4)	28.6	(42)	67.3	(99)	147
4	Fair to defense		—	3.4	(5)	29.9	(44)	66.7	(98)	147
5	Follow instructions	1.4	(2)	6.1	(9)	23.8	(35)	68.7	(101)	147
6	Discuss		—	2.7	(4)	14.3	(21)	83	(122)	147
7	Vote guilty	2.0	(3)	4.8	(7)	28.6	(42)	64.6	(95)	147
8	Vote not guilty	1.4	(2)	2.7	(4)	10.9	(16)	85	(125)	147
9	Decide death	7.5	(11)	15.8	(23)	45.2	(66)	31.5	(46)	146
10	Vote death	8.2	(12)	12.9	(19)	44.9	(66)	34	(50)	147
11	Vote 20-to-life	2.0	(3)	6.1	(9)	23.1	(34)	68.7	(101)	147
12	Vote life	5.4	(8)	14.3	(21)	23.1	(34)	57.1	(84)	147

[a]Complete item wording is given in Table I.

or impossible: deciding on death as a punishment; voting for death; and voting for life imprisonment.

The intercorrelations among these items are presented in Table III, along with the correlation between each item and a corrected total score (the sum of responses to the 11 other items). Regarding the interitem correlations, the median is .18, and 40 of the 66 associations reported are greater than .16 (which is the value at the $p = .05$ level of significance for a single correlation with $N = 143$). The few negative correlations are close to zero. Each item correlates significantly with the sum of responses to the other items; the median item-total score correlation is .37.

Witt Excludables/Includables and Anticipated Capital Juror Role Performance

Respondents were classified as either includable under the *Witt* standard, or excludable, based on their response to the question asking whether their attitude toward capital punishment is so strong that it would seriously affect them and interfere with their ability to perform their role as a juror in a capital case. Responses to the specific tasks of a juror in such a case were then compared to the status of the respondent under the *Witt* criterion.

At a general level, scores on the CJRPS were significantly related to status determined by the *Witt* criterion. The point biserial correlation between these indices was .50 ($p < .001$), indicating that inclusion by the *Witt* standard was associated with relatively greater ease in performing the tasks of a capital juror. Of more specific relevance to the question of the ability of the *Witt* standard to identify jurors who could not perform their roles in accordance with the law is an examination of the number of respondents who gave one or more responses on the CJRPS that conflicted with that standard. This matter was addressed by determining how many respondents who would qualify by the *Witt* criterion also indicated that

Table III. Relationships Among Items on the Capital Juror Role Performance Scale

		Items										
Items	Total[a]	1	2	3	4	5	6	7	8	9	10	11
1	.57											
2	.37	.45										
3	.57	.60	.35									
4	.47	.61	.35	.68								
5	.45	.31	.29	.34	.27							
6	.25	.30	.19	.22	.14	.16						
7	.43	.40	.17	.35	.28	.21	.09					
8	.18	.20	.21	.18	.23	.22	.14	.05				
9	.37	.21	.05	.22	.13	.18	−.01	.45	−.07			
10	.35	.23	.04	.16	.05	.18	.06	.47	−.16	.80		
11	.34	.12	.17	.17	.10	.24	.25	.04	.15	−.04	.02	
12	.17	.00	.07	.12	.07	.19	.07	−.12	.10	−.04	−.08	.66

Note: $N = 143$–148. For $N = 143$, $r = .16$ represents $p < .05$; $r = .21$ represents $p < .01$. Median inter-item correlation: $r = .18$. Median item-total correlation: $r = .37$.

[a]Total is based on all items aside from the particular item included in the correlation.

it would be impossible to perform one or more tasks required of capital jurors (which is a standard somewhat more stringent than the screening we used under the *Witt* doctrine), and how many of those excluded by the *Witt* standard indicated that no task would be impossible for them to do.

Among the respondents who would have been includable by the *Witt* criterion (N = 132), 9.1% (N = 12) indicated that it would be impossible to perform at least one required juror task. Not surprisingly, these tasks were deciding to vote for a penalty of death, voting for a penalty of death, voting for life in prison, or voting for 20 years to life in prison, all of which are penalty-setting tasks.

When the *Witt* excludables (N = 16) were asked specifically about their ability to perform each of the required juror tasks, five respondents indicated that they would not find any of them impossible to do, while two did not answer the CJRPS, claiming they would never serve on a capital case. Thus, it is likely that nearly one-third of the excludables were improperly classified; the other excludables indicated one or more tasks they could not perform, which was consistent with their classification.

Witt Status and Automatically Choosing the Death Penalty

To determine whether the *Witt* standard accurately classified respondents according to their ability to consider the death penalty and penalties other than death, we compared the status of our respondents based on the *Witt* standard with what they claimed concerning whether they would always give the death penalty to a person convicted of capital murder beyond a reasonable doubt. Among the respondents of this study, 28.2% (N = 42) of those classified as includable by the *Witt* standard would be ADP jurors, that is, they indicated that they would always give the death penalty for intentional murder, regardless of the evidence. Another 3% (N = 4) of those who would be included according to the *Witt* criterion stated that it would be impossible for them to vote for the death penalty under any circumstances.

Considering the various ways examined above in which a person's death penalty dispositions could be in conflict with the response given on the *Witt* test, and counting a respondent once only, 36% (N = 53) of the total sample would be misidentified using the *Witt* criterion.

DISCUSSION

Witt and the Role of the Juror in a Capital Case

Does the *Witt* standard as a general criterion likely exclude only jurors who would not be able to perform one or more tasks of the juror role in a capital case, and include only jurors who would be expected to be able to perform them all? The data of this study indicate a clear "no." A substantial number of eligible jurors are likely to be included who would be unable to perform all of the required tasks,

and some will probably be excluded when they could do what is required of jurors on a capital case. The total number of respondents in our sample who gave responses on the question based on *Witt* that conflicted with other indices was quite large. In fact, 36% of the total sample was classified in error by the *Witt* criterion, either being included when other, more specific information indicated that they could not perform as required by law, or being excluded when indications were they could have indeed done all the tasks required of capital jurors. Most of these misclassifications were tied to the questions of death as punishment; many of them are traceable to the fact that screening jurors under *Witt* frequently misses the disposition to give the death penalty automatically to a defendant convicted beyond a reasonable doubt of intentional, first-degree murder. In this fashion a sizable number of prospective jurors are likely to be judged qualified when they should be dismissed as ADP jurors.

These results suggest that a substantial percentage of juror candidates cannot be expected to know what their role would entail were they to become members of a jury in a capital case, and would, therefore, be likely to be inaccurate when responding to questions based on *Witt*. In the language of cognitive social psychology (Markus & Zajonc, 1985), prospective jurors lack a role or event schema (Fiske & Taylor, 1991) for performing as a capital juror. Consequently, they are unable to foresee accurately the requirements of that role. Our data show that this inaccuracy is found with some frequency even when a prospective juror has previously served on one or more felony cases, as all of our respondents had, and even when that prior responsibility included determining penalties to be assessed defendants adjudged guilty, which was true of the previous jurors studied in this research.

The *Witt* Standard and the ADP Juror

Screening based on *Witt* identified only two of the 44 jurors with ADP dispositions, thus appearing to qualify mistakenly a large percentage of juror-eligible respondents who had indicated under separate, more precise questioning that they would consider only the death penalty for a person convicted beyond a reasonable doubt of intentional or first-degree murder. There are several possible explanations for this result. First, it is likely that prospective jurors do not consider, at the time the *Witt* standard is applied, that a person would be disqualified from sitting on the jury in a capital case for believing that the death penalty should be given in all cases in which the defendant is convicted of homicide punishable by death. This is precisely a problem of the prospective juror not understanding the role of a capital juror, which by law includes being able to give meaningful consideration to all of the legally available punishment options for convicted murderers. As stated by Justice White, writing for the majority in *Morgan* (1992, p. 4545), "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so."

Second, courtroom experience during voir dire in capital cases makes it clear that it is extremely difficult to ascertain what meaningful consideration of punish-

ment options really is. What does it mean "to consider," or "to give meaningful consideration?" Thus, a juror candidate bent from the start on giving death to a convicted murderer may nonetheless state or even honestly feel that giving consideration to other options, and then always giving death, meets the standard. Such a person would not feel that his or her attitude would interfere with fulfilling the obligations of a juror.

In an actual trial there are additional reasons, not tied to prospective jurors' schemas about the capital juror role, why ADP jurors may be missed by jury death qualification standards, and some of those may apply to our research. For example, serving on a jury is often regarded as a good citizen's duty, a point used in the courtroom by judges and attorneys alike, and to admit that it would be impossible to be a juror because of one's attitudes may be felt to be failing the test of good citizenship. A related example is the issue of apparent disobedience or lack of compliance connected with disqualification for reasons of inability to perform the role required of a juror. Members of a venire are summoned by the court to serve on the jury; to give personal reasons for not doing so may seem not to follow the court's orders or not to assent to what is requested of them. In fact, in the courtroom this feeling seems at times to be reinforced by attorneys and by the court.

The Respondent in Research and the Juror in Court: Are We Dealing with the Same Issues?

Research will never be able to capture fully the social and psychological forces at work in the courtroom, and it is important to ask about the implications of that fact for studies of death qualification. The issues here include internal validity and external validity (Cook & Campbell, 1979), and applied explanatory power (Dillehay & Nietzel, 1980) or practical significance (Monahan & Walker, 1990). Specific to this study are the following questions: Have we properly screened for *Witt* includables/excludables? Does the CJRPS faithfully assess the juror's role in a capital case? Are ADP jurors properly identified?

The narrow question about the adequacy of our screening under *Witt* (1985) concerns the correspondence of the question to the standard, and we chose a test previously used by Neises and Dillehay (1987). While the *Witt* test as stated by the Court has two levels, "prevent" and "substantially impair," all cases in which a juror's attitudes would prevent the requisite performance would be included in the larger class of impaired performance, which is the focus of the question. Consequently, the specific item wording was designed to cover both levels of interference, and be stated in language clearly comprehensible to any citizen who might be called for jury service.

A broader issue is whether at the time the question is encountered by the respondent he or she has had an experience roughly equivalent to that of a member of the venire being questioned during voir dire. And the fact of the matter is that the circumstances of a juror at that stage of a trial will vary so considerably that it would be difficult to compare the two. Beyond the very general level, there simply is not sufficient uniformity in voir dire (e.g., the number of questions asked, the

phrasing of most of the questions, order in which they are asked, and other topics covered) to make it possible to identify anything resembling a standard (see Fortune, 1980; and for consequences due to variations in voir dire in capital cases, see Nietzel & Dillehay, 1982, and Nietzel, Dillehay, & Himelein, 1987). One important similarity, however, is that our subjects had been answering questions about their feelings about the death penalty and their ability to consider alternative punishments leading into the screening under *Witt*. This much is typical of juror qualification in capital cases.

During voir dire prospective jurors often are asked questions very like those on the CJRPS to determine whether they are qualified to sit as jurors on the case. Thus, the scale items include responding to the facts during the presentation of evidence, adhering to the judge's instructions, deliberating, reaching a verdict, and sentencing. Of course, in any given case there will be other voir dire issues that will be covered that pertain to fulfilling one or more of the functions covered in the CJRPS, such as publicity, mental state at the time of the offense, insanity, and so on. Virtually all of these would be subsumed under one or more of the items on the scale.

Identification of the ADP juror is a serious challenge in court. Under the banner of a strong commitment to justice, all principal actors in the courtroom have an investment in eliminating ADP jurors, but in the adversary system the burden falls on the defense. In this instance the defense must show that the ADP juror would indeed give meaningful consideration to only the death penalty in a trial in which the defendant was found guilty of intentional murder. If this is established, with the juror therefore subject to dismissal for cause, the prosecution then often attempts to rehabilitate the juror, sometimes with the assistance of the judge, not uncommonly getting the juror to state that s/he would consider the other penalty options given by the law. Or at least the juror is brought to say that s/he would of course consider the facts before reaching a decision about the sentence and be willing to discuss the evidence with fellow jurors. By this process jurors who initially appeared as ADP jurors are sometimes qualified by the court, and the proportion of ADP jurors in the venire appears much smaller than it would be if that proportion were determined on the basis of juror candidates' initial pronouncements on giving the death penalty.

The issue of the ADP juror as a research topic was brought to the fore with research on *Hovey v. Superior Court* (1980; see Haney, 1984; Kadane, 1984). The studies that were offered in support of conviction proneness of the death-qualified jury were discredited by the California Supreme Court because ADP juror screening had not been done. Studies by Neises and Dillehay (1987), Luginbuhl and Middendorf (1988), and Haney, Hurtado, et al. (1994) since that time have yielded discrepant estimates of ADP dispositions among juror eligible populations. These disparate estimates of ADP prevalence may well be the result of different indices used to assess ADP dispositions. Other possible explanations include changes over time in death penalty attitudes, with much higher support now than 20 years ago, and regional variations in such attitudes.

Our assessment of ADP status (taken from Neises & Dillehay, 1987) was constructed specifically around the circumstances under which the judgment about sen-

tencing applies. It was based on the idea that the respondent (just as is the case with the juror) needs to understand clearly that the question of assigning death or another punishment arises only after the defendant has been convicted of intentional or first-degree murder. This precise focus is necessary since failure to understand the circumstances allows the respondent (as it does the prospective juror during voir dire in an actual case) to believe incorrectly that the facts about guilt on a capital offense might still be in doubt.

The Objectives of Social Science Research on Death Qualification

Since research cannot emulate rehabilitation and other events in the courtroom, how are we to regard data such as ours on the questions of exclusion of potential jurors using *Witt* as a standard and of the prevalence of ADP and other disqualifying dispositions in jurors?

Properly conducted, voir dire in capital cases is a dynamic, adversary process in which prospective jurors sometimes appear to develop or change opinions about the death penalty, making information about pretrial juror dispositions less interesting. Our contention (see also Neises & Dillehay, 1987), with respect to apparent attitudinal change or attitudinal clarification during voir dire, is that during adversary voir dire a few prospective jurors will clarify their position on giving only death to convicted murderers, and in this process some will discover that they are not as extreme attitudinally as they previously thought. However, it is probable that the majority of those who seemingly change during the give and take of the questioning—and consequently render baseline data less interesting—do not in fact undergo enduring attitude change. What is more likely is that these persons merely accommodate to the circumstances of pressure to qualify, and the views they express to qualify themselves for the jury are temporary and short-lived. For some juror candidates who seem to change their attitudes during voir dire, we would contend that their attitudes have merely been stretched (Cialdini, Levy, Herman, Kozlowski, & Petty, 1976) or that their expressions are conformity or obedience to situational norms or pressure, and will revert to their original position. This reversion will probably occur prior to deliberation on punishment if they should end up on the jury in a capital case. The best estimate overall obtained during voir dire of juror dispositions related to death qualification, then, is likely based on the unrehabilitated attitudes of juror candidates who are well informed about the tasks of a capital juror under the procedures required by law. If the voir dire is skillfully done, these should be highly comparable to views that would be expressed by respondents in a study such as this one or earlier research on *Witherspoon* (e.g., Fitzgerald & Ellsworth, 1984).

In an extensive discussion of the implications of recent case law on death qualification, Thompson (1989, pp. 211–214) has called attention to the difficulties researchers face in devising truly adequate questions to investigate death qualification under *Witt*. His reservations largely grow out of the greater discretion afforded the trial judge under *Witt* compared to *Witherspoon* in deciding whether a juror is qualified. The view he expresses apparently assumes, however, that the main ob-

jective of social science research on death qualification standards is to model the courtroom, and thereby specifically to simulate or predict the rate of dismissals for cause made by judges. While that is indeed appropriate research, we do not see that as our purpose. Rather, we believe that research such as ours and that of Haney, Hurtado, et al. (1994)—and earlier work on the *Witherspoon* standard (e.g., Fitzgerald & Ellsworth, 1984; Neises & Dillehay, 1987)—identifies the prevalence and strength of assessed dispositions as baseline information about juror-eligible citizens. Such information also makes possible the analyses of relationships among prospective jurors' dispositions on death penalty issues, and, specifically with respect to *Witt*, reveals the difficulties that arise in applying a standard that requires prospective jurors to know their role in advance or blindly affirm their willingness to do whatever they are told by the judge with respect to the law.

ACKNOWLEDGMENTS

We are indebted to Ernie Lewis, Kevin McNally, Ed Monahan, and Gail Robinson, all with the Department of Public Advocacy at the time this study was initiated, for their constructive criticisms during the development of the interview schedule and their collegial support. Any shortcomings are, of course, the responsibility of the authors. We would like to thank Lois Chaffins and Jeff Carrico for their fine, dedicated interviewing, and James Richardson, John DeWitt, and three anonymous reviewers for their comments on earlier drafts of this article. A portion of the data analyzed here was presented at the meetings of the Southeastern Psychological Association in Atlanta, Georgia, 1987.

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