

## “Modern” Death Qualification

### New Data on Its Biasing Effects\*

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We report on the results of a comprehensive statewide survey of death penalty attitudes in which respondents were categorized in terms of their death-qualified or excludable status under several different Supreme Court doctrines governing the death-qualification process. We found that although changes in public opinion with respect to the death penalty in general have altered the relative sizes of the death-qualified and excludable groups, significant differences remain between them on a number of attitudinal dimensions, no matter which doctrines are employed to define these groups. We discuss the implications of these recent data, especially with respect to the Supreme Court's continued reference to the death-qualified jury as an index of community standards with respect to the death penalty itself.

Death qualification is the process by which potential capital jurors are screened for their fitness for jury service on the basis of their death-penalty attitudes. Persons holding “disqualifying” attitudes are dismissed from participation. In *Witherspoon v. Illinois* (1968), the Supreme Court established the standard by which prospective jurors could be constitutionally excluded from service on capital juries as one of “unequivocal opposition” (i.e., that a prospective juror could never impose the death penalty, no matter what the facts or circumstances of the case). Since then the process of death qualification has been the subject of extensive legal commentary (e.g., Gross, 1984; Schnapper, 1984; White, 1973) and social science research (e.g., Bronson, 1970; Ellsworth, 1991; Haney, 1984), as well as constitutional challenges based on the contention that it produced unrep-

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representative and conviction-prone juries (e.g., Bersoff, 1987; *Hovey v. Superior Court*, 1980; *Grigsby v. Mabry*, 1985). In *Lockhart v. McCree* (1986), the United States Supreme Court rejected such challenges by questioning the validity of the relevant social science research and concluding among other things that, even if valid, the research itself was not dispositive because juries biased in the ways that death-qualified juries appeared to be could have arisen by chance. Specifically, Justice Rehnquist wrote for the majority that "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a State-ordained process, yet impartial when exactly the same jury results from mere chance" (p. 178).

Because it now appears to be a permanent feature of modern death penalty trials, death qualification continues to have legal and social scientific significance (e.g., Cox & Tanford, 1989; Seltzer, Lopes, Dayan, & Canan, 1986; Thompson, 1989). The process of excluding potential jurors from participation in capital trials solely on the basis of their feelings about the death penalty gives practical, legal importance to the psychological measurement of death penalty attitudes, whether or not the Supreme Court grants it constitutional status. Moreover, as Justice Stevens and others have acknowledged, one of the key "societal factors" the Court has continued to look to "in determining the acceptability of capital punishment to the American sensibility is the behavior of juries" (*Thompson v. Oklahoma*, 1988, p. 831). Thus, the behavior of capital juries, each one of which has been created through a process that includes death qualification, continues to serve as a measure of the "national consensus" on the death penalty and an important index of the extent to which such certain death penalty laws offend evolving standards of decency, the hallmark of an Eighth Amendment analysis.

However, the core research on death qualification—the research that first documented its biasing effects and was used in the litigation challenging its constitutionality—was conducted more than a decade ago. Since that time, at least three important changes have occurred that may have altered the relationship of death qualification to capital juror bias, mooted the concerns of the critics of the process or otherwise vindicated the Supreme Court's judgment that death qualification does not represent a threat to capital jury impartiality. In addition, to the extent to which these changes have altered the composition of capital juries, such juries may have become more—or less—representative of the larger community, thus reflecting on the propriety of the Court's continued reliance on capital jury behavior as evidence of a national consensus on death penalty issues.

The first such change concerns the amount of abstract support for the death penalty that now exists among members of the general public. By virtually all accounts, that support has reached unprecedented high levels over the last decade. Thus, Gallup (1985) reported in the mid-1980s that abstract support for the death penalty reached the highest levels ever recorded in the 49 years of scientific polling. Others reached similar conclusions (e.g., Bohm, 1987; Fox, Radelet, & Bonsteel, 1990–91; Harris, 1986; Zeisel & Gallup, 1989). Of course, changes in the public's abstract attitudes about capital punishment are legally relevant to

estimates of the effects of death qualification because potential capital jurors typically are screened in precisely this way (that is, on the basis of their abstract attitudes toward the death penalty). Thus, it is reasonable to assume that changes in public opinion will produce changes in the size of the group excluded under death qualification, as well as changes in the effects of their exclusion on the pool of jurors who remain to serve on capital juries.

In addition, two important changes occurred during the last decade in the legal standards by which death qualification is conducted that may have affected the biasing effects of this process. Seventeen years after *Witherspoon*, the Supreme Court in *Wainwright v. Witt* (1985) significantly revised the operative standard by which persons were excluded from capital jury service from one of unequivocal opposition to merely holding death penalty attitudes that would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and oath" (p. 852). The significance of the *Witt* opinion was acknowledged by legal practitioners and scholars alike, who speculated that the less precise language and seemingly broader scope of the *Witt* formulation would result in a substantial increase in the size of the excludable group as well as complicating the precise application of the legal standard of exclusion. For example, one death penalty litigator observed that "the Court not only abandoned the *Witherspoon* test for a much less stringent standard, but also invested trial courts with unbridled discretion in the application of the new standard" (Balske, 1985, p. 22). Similarly, a social science expert on death qualification concluded that "[t]he *Witt* opinion abrogates the *Witherspoon* standard and expands the class of individuals who may be excluded from capital juries because of their feelings about the death penalty" (Thompson, 1989, p. 186). Yet, few studies have directly addressed this important topic.

Finally, the size of the group of potential jurors excluded from capital trials may have been significantly affected by an additional doctrinal change affecting the law of death qualification: judicial recognition that a category of persons exist whose *support* of the death penalty is so strong that it is legally disqualifying (sometimes called *automatic death penalty* or *ADP* jurors). In practical terms, the origins of this legal category lay in *Hovey v. Superior Court* (1980), where California Supreme Court Chief Justice Rose Bird distinguished a "*Witherspoon*-qualified" jury from what she termed a "California-qualified" jury along precisely this dimension. She noted that although *Witherspoon* had not directly addressed the issue of whether the Constitution required exclusion of jurors who would automatically vote to impose the death penalty, a broad reading of the relevant California statute providing for the challenge of potential jurors on the basis of "actual bias" did require such exclusion. Until *Hovey*, however, this practice—of excluding jurors at the outermost points of *both* ends of the death-penalty attitude spectrum—was rarely done, even in California. Since *Hovey*, trial and appellate courts have been increasingly sensitive to the issue of *Witherspoon*'s one-sidedness (i.e., the manifest unfairness of the practice by which extreme death penalty opponents were excluded from jury service but extreme

death-penalty proponents were rarely questioned further about their death-penalty attitudes and almost never excluded from service, no matter how extreme their views).<sup>1</sup>

At the federal level, *Witherspoon* (1968) had touched only briefly on this issue in a footnote (pp. 521–522, n. 20), citing a Fourth Circuit case that invalidated a murder conviction by a jury that included a juror who felt it was his “duty” to sentence every convicted murderer to death (*Crawford v. Bounds*, 1971). In *Ross v. Oklahoma* (1988), the Supreme Court noted in dictum that a capital defendant should have the right to remove for cause prospective jurors who stated in voir dire that they would always vote to impose the death penalty (but, because the juror in question had been removed via a peremptory challenge, a reversal was not required). In *Morgan v. Illinois* (1992), the Court finally decided the issue of whether the exclusion of automatic death penalty jurors was constitutionally mandated. Justice White, writing for the majority, held that the impartiality requirement embodied in the due process clause of the Fourteenth Amendment required the exclusion of potential capital jurors who would vote to impose the death penalty in every case. The states of Illinois, Delaware, Missouri, and South Carolina, at least, had apparently refrained from excluding ADP jurors even at the time of *Morgan* (p. 2227, n. 4, and cases cited therein).

Thus, “modern” death qualification now takes place in the context of record-high abstract support for the death penalty, it operates to exclude persons whose death penalty attitudes would merely “impair” them in performing their functions in a capital trial, and it eliminates persons on the basis of extreme death penalty support as well as opposition. Yet, many of the surveys of death penalty attitudes conducted in the United States are now more than a decade old; they cannot speak to any of the effects that the changes in public opinion that occurred during the 1980s might have had on the process of death qualification. In addition, studies of death qualification done before the *Witt* and *Hovey/Morgan* doctrines were established could not have assessed the impact of these more recent legal practices.<sup>2</sup> The present study adds to the contemporary data base on death qualification by addressing some of the effects of the current form of this legally mandated process.

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<sup>1</sup> In *People v. Turner* (1984), Chief Justice Bird noted that death-qualifying voir dire was still less likely to surface extreme death penalty supporters as opposed to death penalty opponents: “[A] far greater percentage of death penalty skeptics identify themselves at voir dire than do death penalty supporters. Review of the voir dire transcripts of automatic appeals decided by this court confirms the existence of the problem. Although death penalty supporters vastly outnumber opponents, it is a rare voir dire transcript where more venirepersons acknowledge support for capital punishment than opposition” (p. 348).

<sup>2</sup> For example, Fitzgerald and Ellsworth’s (1984) sophisticated telephone survey with random sample of 811 Alameda County jury eligible respondents was administered in 1979. Harris’s (1986) telephone interview study of 1,476 adults from nationwide representative sample was administered more recently (November, 1984), but predated the *Witt* and *Hovey/Morgan* doctrinal changes. Similarly, although one of Luginbuhl and Middendorf’s (1988) studies included consideration of ADPs, as required by *Hovey/Morgan*, both predated *Witt*.

## METHOD

Telephone interviews were conducted with a sample of adult California residents.<sup>3</sup> Modern sampling techniques (random digit dialing, or RDD) were employed to maximize the representativeness of the sample of respondents.<sup>4</sup> Our survey included some 40 death-penalty-related items in what was likely the most detailed statewide survey on Californians' death penalty attitudes ever done.<sup>5</sup> The survey also differed from at least some others in the degree to which we attempted to employ legally correct formulations of the related death-qualification questions, as well as to explain to respondents the overall legal procedures by which capital cases were conducted. Thus, within the limitations imposed by survey research methodology, we sought to have our respondents answer many of the death-penalty-related questions in the general legal context that they might be posed in court. For example, we explained that capital cases typically proceeded in a two-stage process and that in California (similar to most states) a defendant was eligible to receive the death penalty only if he or she had been convicted of first-degree murder and at least one "special circumstance" had been found to be true. Following an initial series of items that posed the relevant death-qualifying questions, subsequent items addressed the respondents' general attitudes about the criminal justice system and their beliefs and knowledge about the overall operation of the death penalty in the United States. Respondents were then informed that jurors in an actual capital case would be instructed in the second stage of the trial—the penalty phase—to be guided by the presence or absence of "aggravating" and "mitigating" circumstances in making their decision between the death penalty and life in prison without possibility of parole. They were then asked to indicate whether each specific factor read to them from a list of factors sometimes present in death penalty cases would lead them to favor a life or death verdict.

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<sup>3</sup> Since the 1970s, when the percentage of U.S. households with telephones exceeded 90%, interviews by telephone became "the most popular form of data gathering in survey research" (Frey, 1989, p. 23). See, also, Lavrakas (1987): "By far the most important advantage of telephone surveying is the opportunity it provides for quality control over the entire data collection process. This includes sampling, respondent selection, and the asking of questionnaire items. It is this advantage that almost always recommends the telephone as the preferred approach to surveying" (p. 12).

<sup>4</sup> RDD is a telephone survey technique in which computer-generated digits are assigned to existing telephone prefixes within the target sample area. The advantage of this technique is that it "theoretically provide[s] an equal probability of reaching a household with a telephone access line (i.e., a unique telephone number that rings in that household only) regardless of whether its telephone number is published or listed" (Lavrakas, 1986, p. 33). RDD is generally regarded by survey researchers as superior to any other method of obtaining a representative sample of telephone numbers, and telephone surveys that employ it are generally regarded as superior to mail or face-to-face surveys for obtaining a representative sample of respondents.

<sup>5</sup> It was implemented for us by the Field Research Corporation in December, 1989, with a completion rate of 72%. We are grateful to Amnesty International, the American Civil Liberties Unions of Northern and Southern California, Death Penalty Focus, and the Friends' Committee on Legislation for providing the funds with which to conduct this survey. The authors retained complete autonomy over the design and implementation of the survey and the interpretation of its results.

Table 1. Sizes of Excludable Groups as Function of Applicable Legal Doctrine

Oppose		Favor	
Impaired at guilt due to strong opposition	4.4%	Impaired at guilt due to strong support	6.2%
Could never impose in any case ( <i>Witherspoon</i> doctrine)	5.8%	Would always impose in every case ( <i>Witherspoon &amp; Morgan</i> doctrines)	2.6%
Impaired at penalty due to strong opposition ( <i>Witt</i> doctrine)	8.4%	Impaired at penalty due to strong support ( <i>Witt &amp; Morgan</i> doctrines)	8.6%

## RESULTS

A total of 498 persons were interviewed, yielding a final sample that was composed of 52% men, 19% minority (including Hispanic, African American, and Asian), and averaged 41 years of age. Several things were notable about the results of our death-qualifying questions. The first was that, as perhaps would be expected from changes in public opinion about capital punishment generally over the last decade, the size of the group of persons whose death penalty opposition would disqualify them from jury service in a capital case had diminished since previous empirical studies of this issue. For example, earlier surveys had indicated that approximately 8% to 12% of eligible jurors were *guilt-phase nullifiers*—persons whose death penalty opposition would affect their ability to convict someone in a case where the death penalty was a possibility (e.g., Fitzgerald & Ellsworth, 1984). Only 4.4% of our sample responded in this way. In addition, previous California surveys had identified 11% to 17% of eligible jurors who were *penalty-phase nullifiers* or what have been called *Witherspoon-excludables* (persons who would never vote to impose the death penalty). (See Thompson, 1989, p. 209, and references cited at n. 127.) In our survey, however, 5.8% of the respondents answered in this way. See Table 1.

As expected, application of the *Witt* standard did increase the size of the group of persons who were excludable on the basis of their death penalty opposition: 8.4% of our sample indicated that their opposition to the death penalty would influence or substantially impair their penalty-phase decision making. Thus, although it seems clear that the *Witt* standard results in an increase in the size of the excludable group beyond that created by *Witherspoon*, corresponding changes in the distribution of death penalty attitudes over the last decade have meant, at least for our California sample, that there has been no *net* increase in the size of the group excluded because of death penalty opposition.<sup>6</sup>

<sup>6</sup> A caveat should be made at this point concerning the inherent imprecision in the legal standard of exclusion under *Witt*. Unlike the *Witherspoon* standard, which was categorical (i.e., jurors had to indicate that they would *never* vote to impose the death penalty no matter the facts and circumstances) and required jurors to make it "unmistakably clear" that this was the case before they could be properly excluded, *Witt* is both substantively more ambiguous (i.e., what, exactly, does "prevent or substantially impair" mean?) and allows the trial judge much latitude in deciding whether or not this

We also focused on the other end of the death penalty attitude spectrum—the automatic death penalty respondents—as required by the *Hovey/Morgan* doctrine. Similar effects were found both for the changing distribution of death penalty attitudes over the last decade and for the introduction of a broader *Witt*-inspired ADP standard. Thus, a total of 6.2% of our respondents answered in a way that might qualify them as “guilt-phase excludables” on the basis of their extreme pro-death-penalty beliefs. Under the traditional “reverse-*Witherspoon*” definition of automatic death penalty respondents, our data indicated that there was a slight increase in the number of persons statewide to 2.6% of our sample—up from the generally accepted number of 1% from surveys conducted 10 or more years ago—who were willing to say that they would *always* vote to impose the death penalty irrespective of the facts and circumstances of the case (e.g., Luginbuhl & Middendorf, 1988; Thompson, 1989). We also recognized that *Hovey/Morgan* could be interpreted in such a way that it reflected *Witt*’s broader standard of exclusion, which would very likely expand the category of ADPs. Rather than speculate on the effects of such an interpretation, we agreed with Thompson (1989) that the issue “certainly warrants empirical verification” (p. 210). In fact, when we classified persons on the basis of a broadest possible construction of *Hovey/Morgan*—in essence, a “reverse-*Witt*” ADP standard that included all persons who said their support for the death penalty was so strong that it would prevent or substantially impair their ability to act as jurors in the penalty phase of a capital trial—the size of this group increased to 8.6% of our sample. Thus, although there were still more than twice as many *Witherspoon*-excludables as *Witherspoon*-ADPs in our California sample (5.4% vs. 2.6%), the application of a broader *Witt* standard of exclusion to both ends of the death penalty attitude spectrum produced almost identical numbers of persons who would be disqualified for extreme death penalty support as for opposition (8.6% vs. 8.4%).

In addition to changes in absolute numbers of death penalty opponents and supporters over the last decade, we examined whether the interrelationships between death penalty attitudes and other important criminal justice attitudes and beliefs had been altered during this period. We found that *Witherspoon*-excludable respondents still were significantly different from the remainder of our sample in numerous ways that were consistent with previous research (e.g., Bronson, 1970; Fitzgerald & Ellsworth, 1984). Moreover, when *Witt* rather than *Witherspoon* was used as the criterion for excluding death penalty opponents, the overall pattern of interrelationships was not significantly altered. That is, although *Witt* resulted in a somewhat larger group of death penalty opponents being excluded (an increase from 5.8% to 8.4% of our sample), differences between those persons excused for death penalty opposition and the remainder of the sample were only slightly attenuated. Thus, *Witt*-exclusions still resulted an attitudinally distinct group of potential jurors being denied participation in capital jury service.

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demonstration has in fact been made. On the face of it, then, the *Witt* standard is more difficult to operationalize in a standardized survey in a way that clearly replicates its courtroom application. Studies of death qualification under *Witt* that utilize transcripts of actual voir dire would be especially useful to augment the data and issues we present here.

For example, as Table 2 illustrates, both *Witherspoon*- and *Witt*-excludable subjects were significantly more likely to agree with one of the "due process" attitude statements (concern over the risk of convicting the innocent), and were significantly less punitive on virtually every one of the attitude statements dealing with general orientation toward punishment in the criminal justice system (i.e., they were significantly *more* likely to believe that even the worst criminal should be considered for mercy and that harsher treatment of criminals is not the solution to the crime problem, and significantly *less* likely to believe that criminals should be punished harshly to demonstrate that society cares about crime victims and that it is more important for prisons to punish than to rehabilitate). In addition,

Table 2. Effects of Exclusions for Death Penalty Opposition Under *Witherspoon* and *Witt* Standards

	<i>Witherspoon</i> excludable ( <i>n</i> = 29)	<i>Witherspoon</i> includable ( <i>n</i> = 469)	<i>Witt</i> excludable ( <i>n</i> = 39)	<i>Witt</i> includable ( <i>n</i> = 459)
<i>[Criminal justice attitudes]</i>				
Risk guilty going free to protect innocent	65.5%	38.8%*	64.1%	38.3%*
Even worst criminal deserves mercy	62.1%	30.6%***	53.8%	30.5%**
Harsher punishment <i>not</i> a solution to crime	75.8%	41.8%***	69.2%	41.6%**
Punish criminals harshly for victims	58.6%	84.5%***	64.1%	84.5%**
Prisons should punish more than rehabilitate	6.8%	37.1%***	13.2%	37.2%**
<i>[Conceptions about death penalty]</i>				
Death penalty more expensive	44.8%	24.5%*	41%	24.4%*
Innocent too often executed	62.1%	19.6%***	59%	19%***
Death penalty unfair to minorities	72.4%	39%**	74.4%	38.1%***
LWOP means LWOP	58.6%	24.1%***	61.5%	23.1%***
Death penalty deters murder	6.9%	76.5%***	20.5%	76.9%***
Religious opinion supports death penalty	3.4%	41.2%**	12.8%	41.2%**
Focus only on crime, ignore background	10.3%	54.2%***	12.8%	54.9%***
Retribution alone justifies death penalty	0%	38.6%***	7.7%	38.8%***
<i>[Finds mitigating]</i>				
Felony murder not premeditated	72.4%	38.8%***	76.9%	37.7%***
Under influence of drugs or alcohol	62.1%	33.5%***	53.8%	33.6%**
No prior felonies	69%	45.6%**	74.4%	44.7%**
Convicted person over age 30	58.6%	15.6%***	56.4%	14.8%***
Convicted person from background of poverty	58.6%	18.1%***	53.8%	17.6%***
Convicted person abused as a child	48.3%	36.5%*	53.8%	35.7%*
Would adjust well and contribute in prison	65.6%	37.1%**	61.5%	36.8%**
Never received treatment	58.6%	38.8%*	66.7%	37.7%**
<i>[Finds aggravating]</i>				
Especially brutal murder	13.8%	89.3%***	33.3%	89.3%***
More than one murder victim	3.4%	73.6%***	20.5%	73.6%***
Murder during sexual assault	3.4%	69.3%***	15.4%	69.7%***
Prior violent felony	0%	36%***	7.7%	36.2%***
Defendant expressed no remorse	10.3%	72.5%***	20.5%	73%***

\*  $p < .05$ . \*\*  $p < .01$ . \*\*\*  $p < .001$ .

there were dramatic differences between both *Witherspoon*- and *Witt*-excludable respondents and the rest of our sample on every question we posed concerning beliefs about the general nature and effect of the death penalty (e.g., they were significantly more likely to believe that the death penalty was more expensive than life imprisonment and that a sentence of life without parole means that the person never be released from prison, and significantly less likely to believe that the death penalty deters murders, that only the nature of the crime should be considered in deciding whether the death penalty is appropriate, and that retribution alone is a sufficient societal justification for the death penalty). Not surprisingly, both *Witherspoon*- and *Witt*-excludable respondents were differentially receptive to virtually every potentially mitigating and aggravating feature of a capital case that we posed (i.e., they were significantly *more* receptive to numerous potential mitigating factors and *less* receptive to aggravating ones).

Finally, we used our death-qualifying screening questions to estimate the attitudinal and demographic effects of modern death qualification by identifying the group of respondents in our sample who would likely be death qualified under all current legal doctrines and comparing them along a number of relevant dimensions to those who would be excluded. In order to identify the respondents most likely to survive modern capital voir dire, we used a relatively stringent definition: Only those respondents who met *both* the *Witherspoon* and *Witt* standards of death qualification were included as *Death-qualified* and all others were labeled *Excludable* on the basis of either extreme death penalty opposition or support.<sup>7</sup> Of course, the strongest death penalty proponents also had to be included in this calculation, as they have been with increasing regularity since *Hovey* and as is now required by *Morgan*. By using *both* ends of the *Witherspoon* and *Witt* formulations, 403 of our respondents were categorized as Death-qualified out of our total sample of 498. The 95 Excluded respondents represented 19.1% of our sample.<sup>8</sup>

<sup>7</sup> We reasoned that persons close to the excludable margins at each end of the death penalty attitude spectrum likely would be challenged for cause under one or another of the disqualifying standards, or peremptorily excused by one or the other side. Several studies have suggested that peremptory challenges are used to eliminate those persons who are close to the margins of the exclusion standard but who have not been successfully excluded through cause challenges. See Winick (1982). See, also, *People v. Ashmus* (1991) (prosecutor's use of peremptory challenges to excuse prospective jurors who expressed reservations about capital punishment did not violate capital defendant's federal or state constitutional rights to an impartial jury drawn from a fair cross-section of the community). Cf., also, *Gray v. Mississippi* (1987) and *Ross v. Oklahoma* (1988). In addition, we have reported the results only from the analysis in which the more inclusive category of "reverse-*Witt*" jurors were incorporated into the excludable group. Analyses of differences between death-qualified and excludables in which only "reverse-*Witherspoon*" jurors were incorporated into the excludable group were conducted and yielded somewhat larger differences, and significant differences on some additional dimensions, as would be expected. However, we chose not to report these comparisons because conversations with attorneys conducting death penalty trials, at least in California, have convinced us that most trial courts are now using the broader reverse-*Witt* categorization to identify ADPs, the standard reflected in Table 3.

<sup>8</sup> We have capitalized the terms *Death-qualified* and *Excludable* to refer to the overall categorization of respondents who would most likely remain as death-qualified after the combined excludable categories had been removed from the venire panel. We will employ this notation in the remainder of the discussion.