

The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense¹

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Three hundred venirepersons from the 12th Judicial Circuit in Florida completed a booklet of stimulus materials that contained the following: one question that specified participants' level of support for the death penalty; one *Witt* death-qualification question; a case scenario that included a summary of the guilt and penalty phases of a capital case; verdict and sentencing preferences; a 16-item measure that required participants to rate their receptiveness to the insanity defense on a 6-point Likert scale; and standard demographic questions. Results indicated that death-qualified venirepersons, when compared to excludables, were more likely to endorse certain insanity myths, find the defendant guilty, and sentence the defendant to death. Legal implications are discussed.

In the United States, the jury has a central role in capital trials. In all but a few states that retain capital punishment, the jury has the primary responsibility of pronouncing a sentence of either death or life in prison without the possibility of parole (*Ring v. Arizona*, 2002). This obligation is extremely unusual, considering the fact that it is not constitutionally mandated, and jury sentencing in non-capital trials is almost extinct (Hans, 1986). A primary difference between capital and non-capital trials is that jurors in capital trials must undergo an extremely controversial process called death qualification.

Death qualification is a part of voir dire during which prospective jurors are questioned regarding their beliefs about capital punishment. This process serves to eliminate jurors whose attitudes toward the death penalty would render them unable to be fair and impartial in deciding the fate of a defendant. In order to sit on a capital jury, a person must be willing to

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consider all legal penalties as appropriate forms of punishment. Jurors who pass the aforementioned standard are deemed *death-qualified* and are eligible for capital jury service; jurors who fail the aforementioned standard are deemed *excludable* or *scrupled* and are barred from hearing a death-penalty case. Two United States Supreme Court cases were pivotal in defining the standards for death-qualified and excludable jurors. In *Witherspoon v. Illinois* (1968), the Court ruled that death qualification could exclude

... only those potential jurors 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. (p. 522)

A major change in the standard for death qualification occurred in *Wainwright v. Witt* (1985). According to this ruling, in the opinion of the judge, if a potential juror feels so strongly about the death penalty that his or her belief would "prevent or substantially impair the performance of his duties as a juror, it is grounds for dismissal for cause" (p. 852).

Although the Court sought to enhance the fairness and impartiality of capital juries by utilizing the *Witt* standard, the data indicate that this modification did not have the intended effect. In fact, research has suggested that the adoption of the *Witt* standard has had significant consequences. For example, Dillehay and Sandys (1996) found that 28% of participants who met the *Witt* standard would, contrary to law, automatically impose the death penalty. In fact, 36% of all venirepersons exhibited attitudes toward the death penalty that were so vehement that it prevented them from being impartial in a capital case. In addition, Neises and Dillehay (1987) have found that *Witt* has excluded significantly more potential jurors (21%) than *Witherspoon* (14%), which has resulted in juries that are even less representative.

Death-qualification status, however defined, is more frequent in certain demographic and attitudinal subgroups than others. For example, significant numbers of women, Jews, Blacks, agnostics, atheists, Democrats, and people with low socioeconomic status are excluded from capital jury service (Fitzgerald & Ellsworth, 1984; Hans, 1986; Moran & Comfort, 1986; Robinson, 1993). In fact, jurors who pass the *Witt* standard tend to be demographically distinguishable: They are more likely to be male, White,

financially secure, Republican, and Catholic or Protestant (Hans, 1986). Also, when compared to excludable jurors, death-qualified jurors are more likely to

... trust prosecutors and distrust defense attorneys, consider inadmissible evidence even if a judge instructed them to ignore it, and infer guilt from a defendant's [failure to take the witness stand]. Death-qualified jurors are more hostile to psychological defenses such as schizophrenia. They tend to view prosecution witnesses as more believable, more credible, and more helpful. They are less likely to believe in the fallibility of the criminal justice process, and less likely to agree that even the worst criminals should be considered for mercy. (Hans, 1986, p. 152)

Death qualification also appears to have several biasing process effects. For example, Haney (1984b) argued that the experience of death qualification itself affects jurors' perceptions of both parts of a death-penalty case. Capital voir dire is the only voir dire that requires the penalty to be discussed before it is relevant. Thus, the focus of jurors' attention is drawn away from the presumption of innocence and onto post-conviction events. The time and energy spent by the court presents an implication of guilt and suggests to jurors that the penalty is pertinent, if not inevitable (Haney, Hurtado, & Vega, 1994). Death qualification also forces jurors to imagine themselves in the penalty-phase proceeding. Previous research has found that simply assuming an event will occur increases the subjective estimate that it will (Tversky & Kahneman, 1974).

In addition, during death qualification, jurors are questioned repeatedly about their views on the death penalty. This can have two negative effects. First, jurors can become desensitized to the imposition of the death penalty as a result of repeated exposure to this potentially emotional issue. Second, jurors are forced to publicly commit to a particular viewpoint. Earlier findings have suggested that public affirmation of an opinion actually can cause that opinion to strengthen (Festinger, 1957). Finally, jurors who do not endorse the death penalty also encounter implied legal disapproval by being "excluded" because they are "unfit for capital jury service."

A final United States Supreme Court case is critical in the discussion of death qualification. In *Lockhart v. McCree* (1986), the American Psychological Association (APA) submitted an amicus curiae brief to the Court summarizing the findings of a body of research on death qualification. In this brief, the APA posited that the data demonstrate that death-qualified juries are more pro-prosecution, pro-conviction, and less representative than are juries that are

not death-qualified and that death qualification should be abolished (Bersoff, 1987).

The Supreme Court reviewed the research and criticized the studies presented by the APA as having “serious flaws in the evidence upon which the courts below had concluded that ‘death qualification’ produces ‘conviction-prone’ juries” (*Lockhart v. McCree*, 1986, p. 1764). In essence, the Court ignored the weight of the data, the implications of convergent validity, and declared the data submitted by the APA to be inadequate and legally irrelevant, and ruled that the process of death qualification was, indeed, constitutional (Thompson, Cowan, Ellsworth, & Harington, 1989).

In spite of this ruling, the debate concerning the fairness of capital punishment continues and, in the past few years, has returned to the forefront of American consciousness with a vengeance. In 2003, former Governor George Ryan cited psycholegal research as one of the bases for his decision to issue blanket commutations for all inmates on Illinois’ death row. Several other states have followed suit by either imposing moratoriums on the death penalty or refusing to execute juveniles or the mentally ill. In essence, death qualification is neither moot in law nor settled fact, as it appears that the courts are more willing than ever to consider empirical research when deciding the fairness of the ultimate punishment. Consequently, it is imperative that psycholegal researchers continue to investigate the issues that pertain to capital cases.

One area of research that is in need of exploration is death-qualified venirepersons’ attitudes toward the insanity defense. While the percentage of defendants who plead not guilty by reason of insanity (NGRI) in capital cases is extremely small, the amount of controversy generated by this defense is enormous.

Presently, the United States utilizes two major legal standards of insanity. Approximately one third of the states (including Florida) employ the *McNaughton* rule (*Regina v. McNaughton*, 1843), which excuses criminal conduct if the defendant suffered from a mental illness at the time of the crime and (a) did not know what he or she was doing or (b) did not know that what he or she was doing was wrong. Approximately half of the states and all of the federal courts use the *Brawner* rule (*U.S. v. Brawner*, 1972), which was derived from the American Law Institute’s (ALI) Model Penal Code. The *Brawner* (or ALI) rule states that the defendant is not responsible for his or her criminal behavior if, as a result of a mental illness, he or she lacks substantial capacity to either appreciate the criminality or wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law. Four states do not retain an insanity defense at all. All defendants are presumed sane. Consequently, it is up to the defense to prove insanity beyond a reasonable doubt in every state that utilizes the insanity defense.

Approximately one fourth of the states utilize the guilty but mentally ill (GBMI) jury instruction, which was developed in response to the great controversy surrounding the insanity defense. In the GBMI jury instruction, a defendant need only prove the presence of mental illness at the time of the offense. Although the GBMI jury instruction appears to be similar to the insanity defense, in reality the two are very different. Whereas the GBMI jury instruction hinges on the ability of the defense to prove that the defendant suffered from psychopathology at the time of the crime, a defendant pleading NGRI must prove both the presence of mental illness and substantial cognitive impairment.

The punishments for defendants found GBMI and NGRI are also extraordinarily different. Defendants found GBMI are remanded to a psychiatric hospital until it is deemed that they are no longer mentally ill. When this determination is made, they are sent to prison to serve out the remainder of their sentences. Defendants found NGRI never serve time in prison; rather, they are committed to a secure psychiatric facility until it is deemed that they are no longer a danger to society (Butler, in press).

While the vast majority of people view the insanity defense with great skepticism, research has found that death-qualified venirepersons are even less receptive to it than are their excludable counterparts (Cowan, Thompson, & Ellsworth, 1984; Ellsworth, Bukaty, Cowan, & Thompson, 1984; White, 1987). Consequently, the aforementioned research concluded that capital defendants who plead NGRI face a particularly difficult challenge: attempting to prove their innocence to a jury toward conviction and in favor of the death sentence before the trial even begins.

The vast majority of earlier research was conducted almost 20 years ago and utilized the now-defunct *Witherspoon* rule. It is imperative to investigate whether death qualification affects jurors' endorsements of the insanity defense when they are categorized under the current *Witt* standard. In addition, previous research relating to death qualification has asked venirepersons to classify their beliefs about the insanity defense without including a stimulus case vignette, guilt-phase arguments, penalty-phase arguments, or jury instructions. We felt that providing the aforementioned would enhance the external validity of the study.

There are two purposes to conducting the current study. First, we plan to replicate previous research by investigating the differences between death-qualified and excludable venirepersons' evaluations of the insanity defense under the more current *Witt* standard. Second, we plan to extend previous research through the utilization of a sample and methodology that are externally valid. Based on the findings of similar studies, it is hypothesized that death-qualified venirepersons, when compared to excludables, will be more likely to do the following: (a) convict the defendant; (b) sentence the

defendant to death; (c) have negative attitudes toward mental illness; (d) endorse insanity myths; and (e) be less receptive to legal standards of insanity.

Method

Participants

The study participants consisted of 300 venirepersons (female, 59%; male, 41%) who had been called for jury duty (via a random selection of driver's licenses) at the 12th Judicial Circuit in Sarasota, Florida. Participants' median age was 55 years, and the median income was \$65,000.

The ethnic origin of the sample was as follows: 94% were White/Non-Hispanic; 2% were White/Hispanic; 1% was Black/Hispanic; 1% was Black; and 2% were of an ethnic origin other than what was specified on the questionnaire. One percent of respondents had some high school education; 22% had completed high school; 32% had some college or junior college; 24% had a college degree; and 21% had a postgraduate or professional degree.

Eighteen percent of the venirepersons had served on a jury before. A comparison reveals that the sample closely resembles the demographic breakdown of the 12th Judicial Circuit. Consequently, representativeness does not appear to be a pertinent issue.

Stimulus Case

First, venirepersons read the summary of testimony presented during the guilt phase of a capital trial involving the murder of the defendant's wife and children. The scenario was constructed with the assistance of an attorney experienced in capital cases that utilized the insanity defense. Specifically, the hypothetical case vignette depicted a man who called 911 after he had asphyxiated his wife, son, and daughter. After his arrest, police learned that the defendant had a long history of psychiatric disturbances and had killed his family because he felt that they deserved a better life. After participants read the evidence presented during the guilt phase, they were asked to select a verdict: (a) guilty; (b) not guilty; or (c) not guilty by reason of insanity.

Second, venirepersons who had convicted the defendant read the summary of arguments and testimony presented during the penalty phase of the aforementioned capital trial. Participants were then asked to specify their sentence preference: (a) death; or (b) life in prison without the possibility of parole. Finally, venirepersons read jury instructions for the concept of

reasonable doubt, the charge of first-degree premeditated murder, and the defense of insanity.

Predictor Variables

First, venirepersons specified their level of support for the death penalty. This was assessed in two ways. Participants were asked to circle the statement with which they agreed most: "The death penalty is never an appropriate punishment for the crime of first-degree murder"; "In principle, I am opposed to the death penalty, but I would consider it under certain circumstances"; "In principle, I favor the death penalty, but I would not consider it under certain circumstances"; and "The death penalty is the only appropriate punishment for the crime of first-degree murder."

Second, venirepersons were asked to indicate if they felt so strongly about the death penalty (either for it or against it) that their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Participants who answered *No* to this question were classified as death-qualified, while those who answered *Yes* were classified as excludable.

Attitudes Toward the Insanity Defense

Sixteen items were constructed to assess attitudes toward the insanity defense (see Appendix). Venirepersons were asked to read each question and to indicate their opinion on a 6-point Likert scale ranging from 1 (*strongly disagree*) to 6 (*strongly agree*).

This measure is divided into three subscales. The first subscale contains three items that measure attitudes toward mental illness. Higher scores on the mental illness subscale are indicative of more negative attitudes toward psychopathology. The second subscale contains 10 questions that measure endorsements of insanity myths. Higher scores on the myths subscale are indicative of higher endorsements of insanity myths. The third subscale contains three items that assess knowledge of the legal standards of insanity. Higher scores on the legal standards subscale are indicative of higher endorsements of the legal standards of insanity.

Procedure

Permission to collect data at the courthouse was obtained from the Director of the Jury Pool, Janis Carrera, under the assumption that she had the opportunity to review the proposal before the research was undertaken.

After the proposal was approved, the data were collected during January 2003 through April 2003. Volunteers were solicited from an area designated for prospective venirepersons who had not been assigned to a particular case. Because the aforementioned venirepersons had not been selected for jury service and were free to go home, there was little concern that their participation in this study would impact any of the trials in progress.

Prior to their participation, venirepersons read an informed-consent form, which described the nature of the study, ensured that their participation was completely voluntary and anonymous, and reiterated that they would not receive compensation for their participation. Venirepersons also were given a contact number in case they were interested in the final results of the study once the data were collected and analyzed.

Participants then completed a booklet of measures. First, venirepersons responded to one question specifying participants' level of support for the death penalty and one *Witt* death-qualification question. Second, participants completed a list of 16 questions that assessed their attitudes toward the insanity defense. Third, venirepersons were asked to read the guilt phase of a capital case, a summary of the jury instructions, and choose a verdict (i.e., guilty, not guilty, or not guilty by reason of insanity). Fourth, if participants found the defendant guilty, they were instructed to read the penalty phase and select a sentence (i.e., death or life in prison without the possibility of parole). Finally, venirepersons answered standard demographic questions. The questionnaire took approximately 15 to 20 min to complete.

Results

Eight percent ($n = 25$) of participants felt that the death penalty is never an appropriate punishment for the crime of first-degree murder. Thirty-seven percent ($n = 112$) of participants opposed the death penalty, but would consider it under certain circumstances. Forty-three percent ($n = 129$) of participants favored the death penalty, but would not consider it under certain circumstances. Eleven percent ($n = 34$) of participants said that the death penalty is always an appropriate punishment for the crime of first-degree murder.

Twelve percent ($n = 37$) of participants felt so strongly about the death penalty that they said their views would prevent or substantially impair the performance of their duties as a juror in a capital case. Consequently, these venirepersons were classified as *Witt* excludables. Fourteen percent of women ($n = 25$) were excluded based on their beliefs about the death penalty, whereas 10% of men ($n = 12$) were excluded based on their beliefs about the death penalty.

Sixty-six percent ($n = 197$) of venirepersons found the defendant guilty. One percent ($n = 6$) of venirepersons found the defendant not guilty. Thirty-three percent ($n = 99$) of venirepersons found the defendant NGRI.

Sixty-seven percent ($n = 175$) of death-qualified venirepersons found the defendant guilty. Two percent ($n = 6$) of death-qualified venirepersons found the defendant not guilty. Thirty-one percent ($n = 82$) of death-qualified venirepersons found the defendant NGRI. Sixty percent ($n = 22$) of excludable venirepersons found the defendant guilty. None of the excludable venirepersons found the defendant not guilty. Forty percent ($n = 15$) of excludable venirepersons found the defendant NGRI.

The distribution of sentence also showed no evidence of ceiling or floor effects. Of the participants who convicted the defendant of the murders of his wife and children, 28% ($n = 55$) of venirepersons recommended the death penalty, while 72% ($n = 142$) suggested a sentence of life in prison without the possibility of parole. Of the participants who convicted the defendant, 29% ($n = 51$) of the death-qualified venirepersons elected to sentence the defendant to death, whereas 71% ($n = 124$) of the death-qualified venirepersons voted to sentence the defendant to life in prison without the possibility of parole. Of the participants who convicted the defendant, 18% ($n = 4$) of the excludables elected to sentence the defendant to death, whereas 82% ($n = 18$) of the excludables voted to sentence the defendant to life in prison without the possibility of parole.

The aforementioned distributions of verdict and sentence were statistically significant. A chi square reveals a significant effect of death qualification on verdict, $\chi^2(2) = 182.54$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to find the defendant guilty. Another chi square shows a significant effect of death qualification on sentence, $\chi^2(2) = 39.62$, $p < .001$. Death-qualified venirepersons, as opposed to excludables, were more likely to sentence the defendant to death.

A MANOVA reveals a significant effect of death qualification on participants' attitudes toward mental illness, endorsements of insanity myths, and knowledge of legal standards of insanity, $F(16, 283) = 2.07$, $p = .01$, $\eta^2 = .07$. Univariate tests demonstrate that death-qualified venirepersons, as opposed to excludables, were more likely to endorse three insanity myths: that the insanity defense is used on a frequent basis, $F(1, 298) = 12.72$, $p < .001$, $\eta^2 = .04$; that the insanity defense is a "legal loophole," $F(1, 298) = 8.92$, $p = .003$, $\eta^2 = .03$; and that if a person is found NGRI, he or she is released immediately back into society, $F(1, 298) = 6.71$, $p = .01$, $\eta^2 = .02$. Univariate tests do not reveal a significant effect of death qualification on knowledge of legal standards of insanity or attitudes toward mental illness.

Discussion

This study clearly demonstrates a relationship between death qualification and attitudes toward the insanity defense. As hypothesized, death-qualified participants were more likely to convict the defendant. Also as predicted, death-qualified venirepersons who had found the defendant guilty were more likely to sentence the defendant to death.

In addition, death-qualified venirepersons were more likely to endorse certain insanity myths: that the insanity defense is used on a frequent basis; that the insanity defense is a "legal loophole"; and that if a person is found NGRI, he or she is released immediately back into society. This finding may be because certain venirepersons may be more familiar with the aforementioned myths, as opposed to other myths that might require more specialized knowledge of the law (e.g., it's easy to "fake" insanity; insanity is a medical, not a legal term; in order to be found NGRI, a person must have a documented history of mental illness).

One surprising finding is that death qualification had a minimal impact on participants' knowledge of legal standards of insanity. It is noteworthy that venirepersons do not lend much weight to the legal standards that separate sane defendants from insane defendants. Another unexpected result is that death qualification had a negligible effect on participants' attitudes toward mental illness. It appears that all venirepersons, regardless of their attitudes toward the death penalty, are similarly skeptical of defenses involving psychopathology (Butler, in press).

However, the current study is not without its methodological limitations. First, this study was largely correlational in nature, as it would have been impossible to assign participants randomly into categories of *death-qualified* and *excludable*. Consequently, causation cannot be inferred.

In addition, questions on a written survey measuring venirepersons' beliefs about the death penalty and classifying venirepersons as death-qualified or excludable (which were answered confidentially and anonymously) have limited external validity. During the voir dire conducted in an actual trial, prospective jurors are questioned both verbally and in front of other jurors. Defense attorneys often try to rehabilitate excludable jurors who express opposition to the death penalty, rather than allow them to be dismissed immediately for cause. However, it is the judge, as opposed to the juror, who makes the final decision as to whether a prospective juror is death-qualified or excludable.

Also, venirepersons were predominantly Caucasian, older, politically conservative, and of higher socioeconomic status. While the sample was representative of the 12th Judicial Circuit in Florida, it may not be representative of other jurisdictions. In addition, having participants read a

summary of the guilty and penalty phases of a capital trial can hardly be generalized to the experiences of jurors who experience a death penalty trial *in vivo*. All cases utilizing the insanity defense are unique; thus, it would be impossible to conclude that the facts presented in this case are representative of all cases involving an insanity defense. Finally, deliberations (a salient part of any trial) were not included in this study.

In spite of the aforementioned issues, the results of this study may have broad legal implications. The present findings replicate earlier research concluding that the process of death qualification results in the seating of differentially partial jurors (Butler & Moran, 2002; Diamond, 1993; Luginbuhl, 1992; Lynch & Haney, 2000; Wiener, Prichard, & Weston, 1995). In addition, the current study extends previous findings by demonstrating the devastating effect that death qualification, combined with preexisting attitudes toward the insanity defense, has on capital defendants who plead NGRI.

So, what are we to do? The U.S. Supreme Court has concluded definitively that the death-qualification process is constitutional (*Lockhart v. McCree*, 1986). However, psycholegal research continues to suggest otherwise. Even more importantly, some courts are beginning to listen. In the most pronounced stance against capital punishment made by a Supreme Court Justice since the late Harry Blackmun's 1994 statement that he would "no longer tinker with the machinery of death," Supreme Court Justice John Paul Stevens recently told a convention of attorneys and judges that the United States "would be much better off if we did not have capital punishment."

As long as the United States continues to utilize the death penalty, it is reasonable to conclude that the government has a legitimate interest in having jurors who are able and willing to impose the ultimate punishment. However, it appears that this guarantee may substantially impair capital defendants' right to due process (Luginbuhl & Middendorf, 1988).

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Appendix

Strongly Disagree 1 2 3 4 5 6 Strongly Agree

Note. (L) = legal standard; (M) = myth; (MI) = mental illness.

1. If a person is unable to appreciate the wrongfulness of his or her conduct, then he or she should be found not guilty by reason of insanity (NGRI). (LS)
2. The insanity defense is used on a frequent basis. (M)
3. The insanity defense is a "legal loophole." (M)
4. If a person is unable to control his or her conduct, then he or she should be found not guilty by reason of insanity (NGRI). (LS)
5. If a person is found not guilty by reason of insanity (NGRI), he or she is immediately released back into society. (M)
6. The insanity defense leads to acquittals in the majority of cases in which it is used. (M)
7. If a person suffers from a mental disease or defect that substantially impairs his or her capacity to either appreciate the wrongfulness of their

conduct or to control his or her conduct, they should be found not guilty by reason of insanity (NGRI). (LS)

8. Most mental illnesses are within a person's control. (MI)
9. Many defendants "fake" insanity to escape punishment. (M)
10. It's easy to "fake" insanity. (M)
11. Insanity is a medical, not a legal, term. (M)
12. Most serial killers, mass murders, and spree killers plead not guilty by reason of insanity (NGRI). (M)
13. Psychiatrists and psychologists who testify in insanity trials are simply "hired guns" (i.e., they will say anything if paid enough money). (M)
14. If a person suffers from a mental disease or defect, it is usually his or her own fault. (MI)
15. Mentally ill people usually look crazy. (MI)
16. In order to be found not guilty by reason of insanity (NGRI), a person must have a documented history of mental illness. (M)