

EXAMINATION OF CAPITAL MURDER JURORS' DELIBERATIONS: METHODS AND ISSUES

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The study of capital juries remains a subject of critical interest for the public and for legislative and judicial policy makers as well as legal scholars and social scientists. Cowan, Thompson, and Ellsworth established one of the standard methodologies for examination of this topic in their 1984 seminal study by observing the subjects' debate about conviction in a death penalty case utilizing mock juries; other scholars employed different techniques to add more information in the late 1990s. Yet, the question of death qualification and prosecutorial bias remains open to inquiry. This preliminary study found evidence to support bias toward conviction in capital punishment cases while also identifying several methodological problems in examining decision-making through the use of mock juries.

Keywords: capital punishment, capital juries, death penalty, death qualification

The implementation of capital punishment continues to arouse lively discussion in the United States. Many parties contend that capital punishment procedures produce bias to certain parties in our society. One of the sources of alleged bias is the process of death qualification of jurors in capital trials that mandates the disqualification of potential jurors who are opposed to the death penalty as public policy. This occurs by questioning the prospective jurors' beliefs about capital punishment. In order for a juror to be "death qualified," a person must be willing to consider all penalties as appropriate forms of punishment (Butler & Moran, 2002). Critics maintain that the disqualification process produces a jury that is biased in favor of the prosecution's presentation of a capital murder case. If this allegation is true, does a defendant receive an unbiased consideration of guilt or innocence in a capital murder case?

The Sixth Amendment to the United States Constitution mandates an "impartial jury" in all criminal prosecutions. Yet, in April of 2013, death rows in thirty-two states and the federal prison system (including the U.S. Military) held 3,108 people who were tried, convicted, and sentenced to death under procedures that excluded jurors based on their religious or ideological opposition to the death penalty (Death Penalty Information Center, 2014b). Although the United States Supreme Court has approved the practice, critics argue that this exclusion predisposes juries both to convict and to assess the death penalty, thereby negating the concept of an impartial jury. In addition, the exclusion of this group dilutes the representativeness of the jury despite the courts' declaration that the "constitutional principle of achieving jury neutrality through diversity is relevant to a determination of guilt as well as penalty" (*Hovey v. Superior Court*, p. 1311).

The initial focus of excluding those opposed to the death penalty in capital cases originally was cast in terms of the effects on the juror himself and the integrity of the judicial system. United States Supreme Court Justice Joseph Story, sitting as circuit judge, argued that mandatory participation in capital cases by a juror who opposes the death penalty is

to compel him to decide against his conscience, or to commit a solemn perjury . . . To insist on a juror's sitting in a case when he acknowledges himself to be under influences . . . which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into



disgrace and contempt, the proceedings of courts of justice. (*United States v. Cornell*, pp. 655-656)

Although the emphasis has shifted to the effect on the defendant's rights, jury selection in capital cases today routinely incorporates the process of death qualification through voir dire and if a juror cannot be "death-qualified," he or she is excluded from the jury at both stages of the trial—the guilt or innocence stage and the punishment stage. In *Witherspoon v. Illinois* (1968), the Supreme Court stated that

The most that can be demanded of a venire man in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings, that is, only those jurors who would automatically vote against death without regard to the circumstances will be excluded from both the guilt and innocence and punishment stages of trial. (p. 522)

Defendants, legal scholars, judges, and social scientists have argued that this automatic exclusion results in juries that are more likely to convict rather than being neutral fact finders, and indeed, empirical studies by social scientists have explored the issue and determined that death-qualified juries are conviction prone. Cowan and her colleagues employed mock juries drawn from the general public for their study while Wilson (1964) and Goldberg (1970) divided college students into two groups based on whether they had "conscientious scruples" against the death penalty (the legal standard prior to *Witherspoon*) and then asked each group to consider criminal cases. In each instance, the "non-scrupled" respondents were more likely to convict. The same propensity was found by Bronson (1970), who interviewed persons on Colorado jury lists, and by Zeisel (1968), whose subjects had actually served on juries in Illinois and New York. Because *Witherspoon* modified the legal standard for death qualification, these studies have limited application.

Post-*Witherspoon* studies adopted the language and thrust of that decision to compare the conviction proneness of those who would never impose the death penalty with the remainder of the sample. Again, the findings indicated that death qualified juries are conviction prone (Cowan, Thompson, & Ellsworth 1984; Fitzgerald & Ellsworth 1984; Haney 1984; Jurow 1971; Thompson, Cowan, Ellsworth, & Harrington 1984).

The issue of death-qualified juries is a unique nexus of constitutional law, judicial and public policy, and social science. The Sixth Amendment requires that an impartial, representative jury decide the fate of criminal defendants; especially those facing the ultimate penalty, loss of life, but courts have crafted an exception for those opposing the imposition of capital punishment in opinions replete with detailed discussions of various social science studies (*Witherspoon v. Illinois*; *Lockhart v. McCree*; *Hovey v. Superior Court*).

METHOD

The methodology of this preliminary study revived the classical research design of the seminal study of Cowan, Thompson, and Ellsworth by replicating, as closely as possible, the actual decision-making process of jurors and then examining it in the context of the shifting legal and cultural landscape a quarter-century later. Members of death-qualified and non-death qualified panels observed exactly the same presentation that provided an opportunity for different methods of analysis and findings than the studies based on the intense post-sentence interviews conducted by the Capital Jury Project (Bowers, 1996; Sandys & McClelland, 2003).

Two states, Texas and Florida, accounted for 59 percent of the executions carried out in nine states in 2013 (Death Penalty Information Center, 2014a). Examining factors affecting the assessment of the death penalty in Texas, given its continued and historical reliance on capital punishment, is particularly relevant. Across the nation, the death penalty remains high on the public agenda with the abolition of capital punishment in eighteen states (six states in six years) as well as legislation proposed in other states and moratoriums on executions in yet other states (Simpson, 2013).

The overriding purpose of the current study was to explore a way of effectively testing if the process of death qualification of potential jurors biases a jury's decision in favor of the prosecution's presentation of a capital murder case. In order to accomplish this, we attempted to develop and evaluate methods and procedures to measure simulated jury deliberations. Using these procedures, the study also examined if there were differences in the deliberation process between a death-qualified jury and a jury that includes at least one individual who cannot be

“death-qualified.” And, finally, it examined if deliberation differences connect to the jury’s final decision.

Participants

The Cowan, Thompson, and Ellsworth (1984) article legitimized the utilization of the mock jury as a valuable tool to examine capital jury decision making. Adapting that model, students at a medium-sized state university enrolled in a junior-senior level class studying capital punishment were solicited to participate in mock juries examining only the guilt or innocence stage of the trial process. Because the students had already indicated their interest in the topic by enrolling in the elective class and a portion of the semester had transpired, the students were informed about the issues related to capital murder trials, and participation in this study was high; however, students who opted not to participate were given alternative assignments and were not disadvantaged. Each participant completed consent forms that included permission to be videotaped and filled out a juror questionnaire. The juror questionnaire contained the question, “Is your attitude toward the death penalty such that, as a juror, you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?” with the answers “a) I would be unwilling to vote to impose it in any case” and “b) I would consider voting to impose it in some cases.” The answer to this query allowed the participants to be categorized as an “excusable juror,” that is, one who would not assess the death penalty, or as a death-qualified juror, that is, one who would consider the death penalty in the appropriate case.

Fifty-nine students served as jurors for the eight mock juries across two consecutive spring semesters. The size of the jury panels ranged from nine people to five. In accordance with the established legal precedent, juries were identified as either death qualified (DQ) or non-death qualified (NDQ). Each non-death qualified jury contained at least one person opposing the death penalty as established by the answer in the juror questionnaire. Of the eight juries, four were operationally defined as death qualified, and four as not death qualified. Table 1 summarizes the composition and use of all mock juries.

Table 1

Composition of Mock Juries

Jury #	Number of Students	Participation Year	Jury Status
1	Nine	2008	Not Death Qualified
2	Nine	2008	Not Death Qualified
3	Nine	2008	Death Qualified
4	Eight	2008	Death Qualified
5	Six	2009	Death Qualified
6	Seven	2009	Death Qualified
7	Five	2009	Not Death Qualified
8	Six	2009	Not Death Qualified

Procedure

After collecting the informed consent forms and juror questionnaires, each juror was directed to a 4.3 x 9.1 m room within the psychological laboratory at the university where other mock jurors awaited. Each person was given a packet with information about a homicide (including a map of the crime scene and summaries of witness statements), the investigation, and the trial (including jury instructions) (Death Penalty Information Center, 2008). The students were advised that this was an actual case—*Texas v. Graham*, a capital murder trial held in Harris County, Texas in 1981—but were not told the outcome. Once the materials had been read, the jurors elected a foreperson, and the deliberations ensued. An investigator convened the jury, disseminated the trial-information packets, and gave them the jury charge. Only the jurors were present during deliberations, although the students knew that the discussions

were videotaped for later analysis. Upon completion of the deliberations, the foreperson returned the signed verdict to the investigators. Digital video recording was conducted as unobtrusively as possible through a one-way mirror, while accompanying audio recording was done with a microphone placed in the center of the table.

Behavioral Observers Rated Recorded Comments

From a sample videotape of mock jury deliberations, two graduate students (the study's observers/raters), who were unaware of the intent of the study, created coding schemes for the behavioral categories. After considerable training on the boundaries of each category from the sample video, observers generated transcripts of the comments made during all the usable deliberations. From the recorded deliberations, each statement by a juror was classified according to the following five behavioral categories: pro-prosecution—supporting the prosecution's case; pro-defense—supporting the defense's case; neutral—supporting neither the prosecution nor the defense, such as a statement of fact, a clarification, or any ambiguous statement that could not be interpreted; counterstatement—a statement directly following either a pro-prosecution or pro-defense statement that supported the opposing side; or question—any interrogative statement.

RESULTS

As shown in Table 1, the study was originally designed to have four juries that were not death qualified (NDQ) and four that were death qualified (DQ). The juries produced verdicts in all but one case. The results or outcomes of the juries are depicted in Table 2.

Table 2

Outcomes of Mock Juries

Status	GCM	GM	GR	NG	NV
DQ	1	0	0	2	1
NDQ	0	0	0	4	0

Note. DQ = death qualified; NDQ = not death qualified; GCM = Guilty of Capital Murder; GM = Guilty of Murder; GR = Guilty of Robbery; NG = Not Guilty; NV = No Verdict

The study was also designed to analyze jury deliberations. As a result of this study initiating new methods and procedures to analyze the dynamics of jury deliberations, a number of unanticipated problems affected the results. The problems can be categorized into technical and coding problems.

The technical problems included the following: 1) occasions on which there was a partial obstruction of an individual jury member when he or she spoke because of movement of people during discussion and having only one camera recording; 2) changes in audio quality from time to time because of interfering sounds (e.g., bumping or drumming on table) due to microphone placement on the table where the members sat; and 3) periodic loss of the audio channel on the recordings.

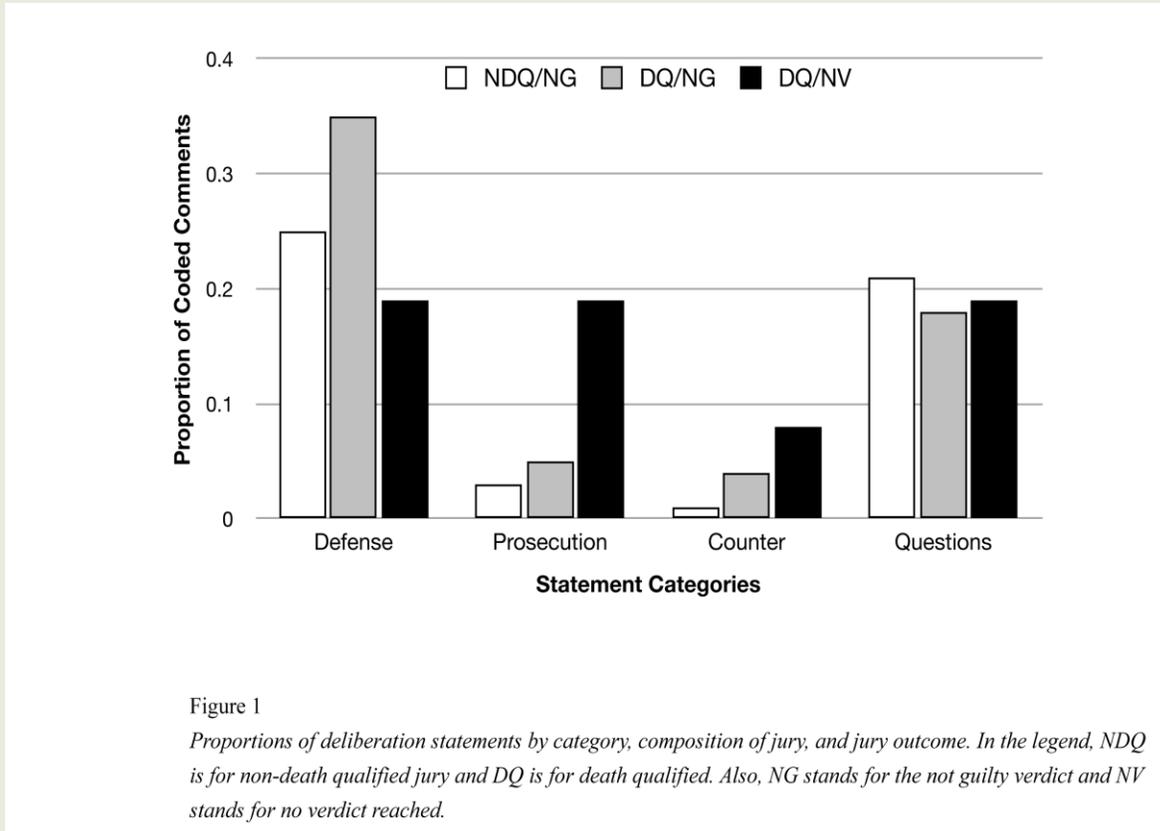
The coding problems were consequences of the technical problems and included the following: 1) variations of audio quality occasionally producing indistinguishable comments and 2) insufficient visual cues of a speaker to assist in classifying comments into one of the five behavioral categories.

Inter-observer Reliability of Raters

Independently, the two raters, who did not know whether any participants were death-qualified or non-death-qualified, coded the comments made in each of the four usable recordings. Inter-rater reliabilities were calculated using percent agreement and Cohen's Kappa. Rating over 1300 distinguishable statements, the overall percent agreement between raters was .70, with the Cohen's Kappa being .61. Only statements in which both raters coded the statement in precisely the same manner were used in subsequent data analysis.

Analysis of Deliberations and Final Decisions

A summary of the proportion of deliberation statements for the four juries that had complete recordings is presented in Figure 1. As shown in Figure 1, two dimensions, composition and outcome, were used to organize the results. Consequentially, analysis of the results centered around two questions: 1) Were non-death qualified/not guilty (NDQ/NG) deliberations different on any of the behavioral categories than death qualified/not guilty (DQ/NG) deliberations? and 2) Were death qualified/no verdict (DQ/NV) deliberations different on any of the behavioral categories than death qualified/not guilty (DQ/NG) deliberations? Examination of the data using Fleiss' (1973) analysis for rates and proportions was used throughout the results. Unfortunately, technical problems prevented analyses of death qualified/guilty (DQ/G) with NDQ/NG, DQ/NG, or DQ/NV.



As illustrated in Figure 1, non-death qualified/not guilty (NDQ/NG) deliberations were not significantly different on the proportion of pro-prosecution comments than death qualified/not guilty (DQ/NG) deliberations. However, death qualified/no verdict (DQ/NV) deliberations (.19) had a significantly higher proportion ($X^2 = 37.29, p < .05$) pro-prosecution comments than death qualified/not guilty (DQ/NG) deliberations (.05).

In regard to pro-defense statements, non-death qualified/not guilty (NDQ/NG) deliberations were not significantly different on the proportion of comments than death qualified/not guilty (DQ/NG) deliberations. However, death qualified/no verdict (DQ/NV) deliberations (.19) had a significantly lower proportion ($X^2 = 13.71, p < .05$) comments than death qualified/not guilty (DQ/NG) deliberations (.35).

Looking across these two analyses, it is interesting that the proportion of pro-prosecution comments and pro-defense comments in the DQ/NV condition were identical at .19. The proportion of counterstatements or questions did not reveal any significant differences among the condition comparisons. Likewise, the proportion of comments classified as neutral also did not reveal any systematic differences.

CONCLUSIONS

The purpose of this exploratory study was to continue the examination of capital jury decision-making in preparation



for more protracted and in-depth research of the topic. Cowan, Thompson, and Ellsworth's 1984 study challenged others to continue their line of inquiry. The current project produced outcome measures (verdicts) that were different for the two groups. As expected, the NDQ juries delivered only not guilty verdicts. The DQ juries produced mixed verdicts. One DQ jury produced a finding of guilty of capital murder. This was the expected result. One DQ jury deadlocked and produced no verdict. Two other DQ juries produced the same results as the NDQ juries, not guilty. This was much unexpected.

The jurors in this research were drawn from two capital punishment classes and the majority of these students were criminal justice majors. It is postulated by the researchers that this factor strongly influenced their decision-making. By this time in their studies, the criminal justice majors had completed the courses entitled: Introduction to Law and Constitutional Rights of the Accused. Both courses would have heightened the students' understanding of the legal standard of guilt "beyond a reasonable doubt." The test instrument had numerous examples that could easily be construed as reasonable doubt. For this reason, the pool for subjects was widened, and the selection process for study participants was altered.

The examination of the process variable, jury decision-making, illustrated issues with the actual data collection rather than producing concrete findings. This preliminary study encountered myriad technical and coding problems forcing the researchers to redesign certain aspects in preparation for the full study including the redesign of the test instruments, the purchase of additional hardware, and revision of the recruitment process for jurors. It is the empirical description of these problems that dominate the findings of this study.

Descriptions of methodological problems are findings that would benefit researchers in subsequent studies in regard to design. We have meticulously detailed these findings above with the hope that these will provide guidance to other interested researchers. Our research continues with new methods devised to overcome the methodological flaws that we reported.

The use of death qualification apparently continues to impact capital jury decision-making. To illustrate, in mid-2013 a Texas defendant was convicted of capital murder in a case based solely on the testimony of one of the participants in the crime. There was no forensic evidence, not even the victim's corpse (Bryant, 2013; McBride, 2013). Anecdotal evidence from a juror indicated that the decision was affected by the composition of the death qualified jury members (Interview with juror, 2013). The question of death qualification and pro-conviction bias remains a viable area for concern in the guilt and innocence stage of capital cases.

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