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# Death-qualified jurors and the assumption of innocence: A cognitive dissonance perspective on conviction-prone verdicts

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## ARTICLE INFO

### Article history:

Received 17 April 2012  
Received in revised form 17 August 2013  
Accepted 17 August 2013  
Available online 8 September 2013

### Keywords:

Cognitive dissonance  
Death qualified juries  
Assumption of innocence  
Conviction, social psychology

## ABSTRACT

The conviction-prone behavior of death-qualified juries is a phenomenon that has been widely observed, but is not fully understood. This work presents a cognitive dissonance perspective as a possible mechanism that may be contributing to the high rate of conviction in death-qualified juries. This review contends that the selection procedures for death qualification may create juries with attitudes that are contrary to the fundamental assumption of innocence presupposed by the court. As a result of this conflict between juror attitudes and the assumption of innocence, dissonance will occur. One path to dissonance resolution may be the act of conviction. The empirical findings from juror studies support this dissonance interpretation of the conviction-prone status of death-qualified juries. This work also reviews the legal history of the death qualification process in *Witherspoon v. Illinois* (1968) and *Hovey v. Superior Court* (1980) and summarizes the social psychological criticism that process has received.

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## 1. Brief history of death qualification

### 1.1. In the beginning: *Witherspoon v. Illinois*

In 1960, William C. Witherspoon was found guilty of capital murder and condemned to death by an Illinois jury from which any person who had expressed opposition to the death penalty had been systematically excused from service. After the Illinois court rejected his appeals, the U.S. Supreme Court agreed to hear the case in order to author a final opinion on whether a state could constitutionally enact the death penalty based on a conviction from a jury that was selected in this fashion (Gale Group, 1998). The Supreme Court reversed the lower court's ruling and agreed

that the procedures used to compose the jury, which were based on an Illinois statute that explicitly allowed for the elimination of jurors who opposed the death penalty, were unconstitutional.

Witherspoon and his defense successfully argued that such a jury "must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death . . . is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts and return a verdict of guilt" (*Witherspoon v. Illinois*, 1968, p. 516). This decision opened the ultimate question of the guilt-proneness of death-qualified juries, which has given rise to nearly forty years of social scientific research. In terms of procedural change, the *Witherspoon* decision forced states to revise, and in many cases rewrite, their laws concerning jury selection in capital cases (Gale Group, 1998). To date, based on *Witherspoon*, the law allows for the rightful exclusion of only those individuals whose personal beliefs would deter him or her from reaching an

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impartial verdict as to the defendant's guilt or innocence, or whether he or she should never vote to impose the death penalty regardless of the facts of the case (Gale Group, 1998). The logic behind these two conditions is the same: Jurors must be willing and able to follow the law and to apply their judgment to the evidence presented in the case before them (Gross, 1984). Since 1968, the holding of *Witherspoon* has been reaffirmed by the Supreme Court, but the challenge to understand the conviction-proneness of death-qualified juries has not been met (Gross, 1984).

### 1.2. Further challenges: *Hovey v. Superior Court*

In *Hovey v. Superior Court* (1980), two distinct legal challenges were lobbied against decisions rendered by a death-qualified jury. The first challenge related directly to *Witherspoon v. Illinois*, also contending that death-qualified juries are less than neutral on the issue of the defendant's guilt. The second and unique challenge posed in *Hovey* is one of the representativeness of the jury and its implications for a fair trial. The representativeness challenges was based on *Ballew v. Georgia* (1978), which held that five-person criminal juries are unconstitutional because the reduction in jury from six to five have several separate effects that damage interests inherent in the defendant's Sixth Amendment right to trial by jury. The argument was based on the premise that smaller juries are less representative of the community, their performance is impaired, they are more likely to produce aberrant verdicts, and they provide less opportunity for counterbalancing of the individual biases of the members of the jury. The Supreme Court held that all of these effects constitute a constitutional violation.

*Hovey v. Superior Court* (1980) held that unconstitutional because it has the potential to inflict similar damaging effects because the very process of death qualification makes the jurors systematically different from the community at large. Specifically, *Hovey* purported that the death qualification process underrepresents African-Americans and women, which has been subsequently substantiated by social science research (Butler & Moran, 2002; Cowan, Thompson, & Ellsworth, 1984; Summers, Hayward, & Miller, 2010). The issue of representativeness was also applied to the concurrent issue of neutrality. In *Hovey v. Superior Court* (1980), it was stated that "A neutral jury is one drawn from a pool which reasonably mirrors the diversity of experiences and relevant viewpoints of those persons in the community who can fairly and impartially try the case" (pp. 19–20). *Hovey* (1980) emphasized the "constitutional principle of achieving neutrality through diversity" (p. 21) as a legal norm, arguing that death-qualified juries deviate from this norm in a manner that is unequivocally detrimental to capital defendants. In this sense, scholars have contended that the "evil of death qualification, under *Hovey*, is not that it produces erroneous convictions, but that it unfairly increases the chances of conviction" (Gross, 1984, p. 26, italics in original). Perhaps most importantly, the *Hovey* opinion established that the neutrality of juries is in fact an empirical question. The courts have not welcomed social science answers to this question of death qualification with open arms.

## 2. Social psychological review of death qualification

In the aforementioned *Hovey v. Superior Court* (1980), the defense presented a collection of social psychological studies exploring the characteristics of jurors that death qualification purportedly singles out from the general population. One of these studies demonstrated that by restricting the range of attitudes through removing those jurors who do not favor the death penalty created juries that demonstrated a greater tendency to convict (Cowan et al., 1984).

### 2.1. Lack of diversity, conviction-proneness, and jury functioning

In speculating as to how a lack of diversity contributes to conviction-proneness, Cowan et al. (1984) contend that jurors who are excluded from death-qualified juries need not be "better" than the rest of the jury – they need only be systematically "different" to introduce the potential for biased behavior. In experimental settings where death-qualified juries were compared to mixed juries, Cowan et al. (1984) found that mixed juries exhibited superior correct recall of evidence presented than did subjects on death-qualified juries. It should be noted, however, that the increased recall of mixed juries did not appear to result from the correction of any particular type of evidence error, but rather that mixed juries made fewer errors in all categories that were assessed by the study. Thompson, Cowan, Ellsworth, and Harrington (1984) found that death-qualified subjects were biased in the way that they interpreted ambiguous evidence. When interpreting ambiguous cues, death-qualified jurors evaluated the evidence in a way markedly more favorable to the prosecution than did those who would have been excluded under *Witherspoon*. These findings suggest that the biased behavior of death-qualified jurors may begin as early as their understanding and interpretation of evidence.

Table 1 summarizes the contribution of this study to the understanding of the differences between death-qualified and *Witherspoon* excluded jurors. All of the studies that are presented as illustrative of the key differences between death-qualified and *Witherspoon*-excluded jurors are presented in this table as a means of concisely summarizing the evidence presented in this work.

### 2.2. Outcome of the social psychological evidence presented in the Court

The studies discussed above were published in 1984 with a collection of additional scholarly works in a special "death qualification" edition of *Law & Human Behavior*. For *Hovey*, these studies were enough to influence some elements of the judicial opinion. The Supreme Court, however, did not change its standing opinion on the constitutionality of death-qualified juries; citing in their analysis a technicality in one of the studies which had not included a subset of potential jurors who would have automatically voted for the death penalty, regardless of the evidence presented. Though these studies were insufficient to settle the debate regarding the jury selection procedures in place,

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