Capital Jury Selection In Florida and Texas - A Quantitative Distinction Without a Legally Qualitative Difference?

Judge Hugh D. Hayes∗

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Abstract

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KEYWORDS: death, jury, Florida
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I. Introduction

...punishment is justified on the grounds that wrongdoing merits punishment. It is morally fitting that a person who does wrong should suffer in proportion to his guilt, and the severity of the appropriate punishment depends on the depravity of his act. The state of affairs where a wrongdoer suffers punishment is morally better than the state of affairs where he does not, and it is better irrespective of any of the consequences of punishing him.¹

¹ Hugh D. Hayes is a Circuit Court Judge, State of Florida. Judge Hayes received his B.A. in 1970 at the University of Georgia, and his J.D. from the University of Florida in 1972. This article is in partial fulfillment of the requirements for the Master of Judicial Studies degree at the University of Nevada-Reno in cooperation with the National Judicial College. The author would like to express special appreciation to Prof. James Richardson, University of Nevada-Reno for his suggestions on the subject matter of this article.

This article examines the death qualification process for jurors in the two states in the United States with the greatest number of people currently on "death row". In Sections II and III, the article reviews the recent historical origins and the social science studies of the death qualification process for jurors. Section IV provides an in-depth examination of the capital voir dire procedures utilized in Florida and Texas. Section V reviews the most recent and significant United States Supreme Court cases which addressed both the death qualification issue as well as its correlation: whether death qualification produces a conviction-prone jury. Section VI offers alternatives to insure that the Florida legal system remains neutral in its application of the laws and procedures regulating capital offenses, while concomitantly saving the citizens of Florida significant amounts of tax dollars. The Article pulverily concludes that even though Florida and Texas use two very different procedural methods for selecting their juries in capital cases, the resulting legal qualifications of both juries are actually the same, and that particularly in the case of Florida, the time and costs to the taxpayers are substantially reduced.

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2. As of December 1987, those states with the greatest numbers of persons awaiting execution on death row were:

**FLORIDA:**
- Total: 282
- Race: 103 Black; 162 White; 16 Hispanic; 1 Native American
- Sex: 4 White Females; 1 Black Female; Rest Males
- Method of Execution: Electrocution
- Source: Information Services 904-488-0420

**TEXAS:**
- Total: 258
- Race: 98 Black; 121 White; 33 Hispanics; 5 Native American; 1 Asian
- Sex: 3 Females; Rest Males
- Method of Execution: Lethal Injection
- Source: Public Information Office 409-295-6371

**CALIFORNIA:**
- Total: 211
- Race: 80 Black; 91 White; 32 Hispanic; 4 Native American; 4 Asian
- Sex: All Males
- Method of Execution: Gas Chamber
- Source: Communications Office 916-445-7688

7. Id. at 298. According to 71 A.B.A. J. April 1985 at 53, the first of more than 14,000 legal executions in America was that of George Kendall, who was convicted of setting fire to a bar and shot by a Virginia firing squad in 1608.
8. Of the 3,865 executions between 1930 and 1982, 3,340 were for murder (86%), 455 for rape, and 70 for other offenses, including armed robbery, burglary, espionage, sabotage, and kidnapping. Since 1977, all executions have been for murder. Id. at 53.
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II. Historical Background of Death Qualification

It has been traditionally understood that citizens will attempt to meet their duties and obligations as impartial jurors in a case, and that in doing so, they may base their life and death recommendations not only on the law and legally relevant evidence, but also on the pre-existing beliefs and conscientious scruples, bring with them to the courtroom. For these conscientious scruples, jurors may be challenged. The United States Supreme Court, as early as 1892, reviewed a Texas murder case in which the prosecutor, at the impaneling of the jury asked:

... put to fourteen of the jurors summoned this question: "Have you any conscientious scruples in regard to the infliction of the death penalty for crime?", and each of them answered that he had scruples, and was thereupon challenged for cause. To all this the defendants at the time objected, "because the jury in the United States court has nothing to do with the penalty, but passes alone upon the guilt or innocence of the defendants, ... and because the defendants were unlawfully deprived of the service of each of said jurors."

Unfortunately for the defendants, this view was not fully embraced by the United States Supreme Court because the Court not only sustained the government's challenge for cause, but also noted that "A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."

This general proposition allowing the scrupled jurors to be struck for cause continued without substantial challenge or empirical study until 1968 when the United States Supreme Court was asked to review the case of Witherspoon v. Illinois. Witherspoon had been convicted of murder in 1960 by a Cook County, Illinois jury that had been selected...
pursuant to a state statute which authorized unlimited challenges to the state of those jurors who had conscientious scruples against capital punishment, or who were opposed to capital punishment per se. The intent and construction of the statutes were clearly not in doubt as far as the trial judge or the prosecutor were concerned, and nearly one half of the venire of prospective jurors was successfully challenged for cause by the state.

Obviously, Witherspoon and his counsel were somewhat dismayed and quite perplexed by this jury selection procedure and after being convicted of murder and sentenced to death, Witherspoon argued on appeal that the sixth and fourteenth amendments guaranteed to him a jury chosen at random from a cross section of the community, whereas the Illinois statute caused the disqualification for cause of jurors having scruples against capital punishment and subjected him to trial by a jury which favored the prosecution in deciding the issues of guilt or innocence.

The United States Supreme Court found that the research presented by Witherspoon was too tentative and fragmentary to support his argument but that since the jury had to express the conscience of the community on the ultimate question of life or death, the sentence of death could not be carried out "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (In the years which followed, the effect of this decision was to require the prosecution and defense attorneys to divide prospective jurors into four groups based upon their attitudes toward capital punishment.)

9. Id. at 512.
10. Id. at 513-14. The trial judge said early in the voir dire "Let's get those conscientious objectors out of the way without wasting any time on them."
11. Id. at 516.
12. Id. at 519-20.
13. Id. at 522.
14. WHITE, THE DEATH PENALTY IN THE EIGHTIES, 162 (1987). The group would consist of (1) those who favor or are neutral toward the death penalty; (2) those who oppose the death penalty but are willing to vote for it in some cases (the "weary" jurors); (3) those who will never vote for the death penalty but could be fairly deciding the guilt or innocence of a defendant in a capital case (the automatic life imprisonment group), or the "Witherspoon excludables"; (4) those whose opposition to capital punishment is so strong that it would prevent them from making an impartial determination about the defendant's guilt (the "nullifiers."). Id.

Interestingly, Justice Stewart, in writing for a five man majority of the Court, additionally felt compelled to point out that in 1968, less than half of the people in the United States (42 percent) believed in the death penalty and that such a jury composition as Witherspoon's could not speak for the community. Things are substantially different now (up to 86 percent of the people in the United States believe in capital punishment) than in 1968.

15. Witherspoon, 391 U.S. at 520.
16. The Media General Inc./Associated Press public opinion poll was conducted by Media General Research among a representative sample of 1,125 adults across the nation living in telephone households. Interviews were conducted between November 7 and November 14, 1986, during the hours when men and working women could also be reached. Up to three call-backs were made to reach the appropriate respondent. The telephone sample was drawn using a random method by Survey Sampling, Inc., of Westport, Connecticut. It included listed and non-listed telephone households. The data projects to an estimated 161 million adults in telephone households.

Findings similar to those of the Media General/AP poll can be found in the SUPERBOOK OF CRIMINAL JUSTICE STATISTICS — 1986, United States Department of Justice, Bureau of Justice Statistics, the Hindelang Criminal Justice Research Center (1987).

Cambridge Survey Research, in a study (40369) for Amnesty International conducted a survey among 104 respondents, age 18 and older, throughout the State of Florida. The survey was conducted June 5th through June 12th 1985. The Summary stated that "Nearly nine in ten adults (85%) support the death penalty, with 67% strongly supporting the death penalty." Interestingly, the study found that the preeminent factor in support for the death penalty was the protection of society and that these great percentages could possibly be reduced if the citizens were given viable alternatives, such as life imprisonment without parole and a system of life imprisonment where the criminals worked and contributed their earnings to victims' support fund or directly to the families of victims.

In September, 1984, 68% of lawyers favored the carrying out of capital punishment sentences already imposed by the courts, according to the Law Poll conducted for the ABA Journal and reported in Vol. 71 ABA JOURNAL 44 (1985).

Even in California, 80% of the voters favored the death penalty in November 1986. Times, 17 November 1986 at page 53. However, this could have been due to the unusually heightened voter awareness of the death penalty debate since Justices Rose Bird, Grodin and Cruz Reynoso (who were viewed as opposed to the death penalty) were up for retention election on 4 November 1986 — they were not retained by the California voters.

The California position regarding the death penalty has been distinctive among the American courts. Nationally, state high courts have reversed death sentences in only 43 percent of the cases decided. The federal courts have reversed such sentences in less than 10 percent of the capital cases reaching them. In contrast, the California Supreme Court has overturned these sentences in almost 95 percent of the cases decided as of September 1986. Rose Bird and the Politics of Accountability in California, 70 JURI-
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III. The Social Science Studies

Spurred by the generally favorable and supportive response of the justices in the Witherspoon case, and particularly in light of the renewed commitment of the states to impose the penalty of death following the Court's pronouncement in Furman v. Georgia and Gregg v. Georgia, the social scientists earnestly began to study the psychology of personality and its application to jury selection, as well as group dynamics in the courtroom and in the jury room. However, while there were some vague analogies between the social sciences and "legal" science in the areas of constructive and traditional decision-making policies, there were and still are some substantial albeit subtle differences.

CATURE, August-September 1986, at 86.

The impact of the new 5-2 majority of appointees by newly elected Gov. George Deukmejian began to be seen when the new California Supreme Court ruled on a felony murder case in October 1987 and overturned the 1983 intent-to-kill ruling of Carlos v. Superior Court, 35 Cal. 3d 131. By a 6-1 majority, the court held that a minority of those who kill someone in the course of a crime can be sentenced to death even if the murder was unintentional. People v. Anderson (Crim. No. 32387) 87 LAJ DAR 746. At California moves closer to its first execution in twenty years, not only do the death row prisoners realize that they lost their "patron saint" in Rose Bird, and likewise there is a new "cancer ward effect" in the relationships of the appellate attorneys and their clients. See CAL. LAW, Dec. 1987 at 24, and NALT. LAW J., Nov. 2, 1987.

17. Witherspoon, 391 U.S. at 520. Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence — given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.


22. Lykken, David T., The Validity of Tests: Caveat Empor, 27 JURIMETRICS J. 264 (1987): The Theory of tests distinguishes between reliability, the consistency with which the test produces the same result in the same circumstances, and the validity, the probability that the test result is accurate or true.

The real "bomblet" planted in Justice Stewart's opinion, even though somewhat obtuse in its initial impact, was the now significantly famous and quite expensive Footnote 18, 19 which essentially invited the social scientists of America to study empirically the relationship of the death qualification process on jurors' attitudes with its resultant propensity and bias in favor of guilt and conviction. This they eagerly did and a new industry was spawned, which produced some poignant yet provocative findings.

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between the two systems. "Legal systems are designed to guarantee "due process" as well as, perhaps even instead of, guaranteeing a "true" decision. Legal rules of evidence, designed to treat many unrelated cases, are consequently quite different from scientific standards of proof, which stress repeatability and reliability."26

Professor Welch White in his book, The Death Penalty in the Eighties, argues that empirical questions should be distinguished from ordinary factual questions:

Empirical questions pertain to phenomena or relationships that extend beyond the events of a particular lawsuit . . . in asserting that death-qualified juries are more likely to convict that non-death-qualified juries, the Witherspoon defendant was answering an empirical question. He was not making a claim that pertained to his particular case; rather, he was asserting that a certain phenomenon exists in the world at large.27

Thus, one is faced with a proposition which may be an oxymoron: Is the Law really a legal science, and if so, can it be empirically tested or quantified, proved or disproved, as one would test a proposition for the social sciences? Well, it may depend on who is asking and who is answering the question. In other words, if the courts do not buy it, what do you have? In fact, as the challenge to death qualification has moved from the research journals to the courts, most state and federal courts have rejected the empirical attack upon death qualification.28 It has been accurately argued that the two basic problems in the judicial effort to assess social science claims are firstly, the judiciary's
own tentativeness and skepticism in evaluating complex empirical evidence, and secondly, the failure of the social scientists to fully translate the empirical evidence into appropriate normative issues. Possibly a third encompassing or fundamental reason would be that most judges, unlike Justice Blackmun, do not have a mathematics background, and historically, most pre-law curricula at the nation’s law schools neither offered nor emphasized the practical value of empirical studies or statistics. Be that as it may, let us now review a few of these empirical propositions.

Although some studies have expressed the general proposition that gains in representativeness from expanded jury pools may be lost because jurors are needlessly disqualified from juries during voir dire and the empirical evidence available on the effectiveness of voir dire may suggest that it is useful neither in identifying biased jurors nor in preventing negative socialization, most of the more recent studies demonstrate that there is a strong and direct relationship between jury attitudes in favor of guilt after the death qualification process has begun. Most of these later studies reached the first stage of their legal significance in the case of Hovey v. Superior Court of Alameda County, the second stage of legal significance in Griggsby v. Mahry, and arguably their third and last legally significant stage in the frontal assault (and possibly legal lobotomy) of Lockhart v. McCree and McClusky v. Kemp.

Essentially, the California Supreme Court in Hovey (Justice Bird writing for the majority) was faced with two issues, only the second of which is important for this article. First, the court addressed the issue of whether the class of prospective jurors—who were then excluded for cause under the Witherspoon standards from both phases of the trial should be narrowed to permit a specific subcategory to serve at the

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27. Hovey v. Superior Court of Alameda County, 28 Cal. 3d 1, 168 P.2d 1301, 168 Cal. Rptr. 128 (Cal. 1980).
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The second issue or challenge to the pre-1980 system for selecting a jury for a capital case focused on the voir dire procedure by which the jury was selected, rather than on the composition or functioning of the jury itself. The court’s decision dealt with the concept of a constitutionally neutral jury and in reaching its conclusion, the court relied almost totally on the holdings of the United States Supreme Court in Witherspoon, Ballew v. Georgia, and the then 1979 unpublished, and since 1984 published, controlled study by Dr. Craig Haney, professor of psychology at the University of California at Santa Cruz.

Briefly stated, the methodology utilized by Haney consisted of using 67 adult men and women living in Santa Cruz County who responded to a newspaper advertisement asking for subjects to participate in a study of juror decision making. The subjects were randomly assigned to either experimental or control conditions and shown a videotape of a simulated voir dire. The videotapes were identical except that the experimental tape included a 30-minute segment of death qualification. All subjects then answered a 17-item questionnaire designed to assess their attitudes about the trial and its participants.

The results of the study suggested that the jurors in the “experimental” group were strongly influenced by the process of death qualification and approached the evidentiary stage of the criminal trial in a frame of mind that differed significantly from that of the jurors in the

31. Hovey, 28 Cal. 3d at 16, 616 P.2d at 1307, 168 Cal. Rptr. at 134.
32. Id. at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173.
33. Id. at 18, 616 P.2d at 1309, 168 Cal. Rptr. at 136.
34. Witherspoon, 391 U.S. at 515.
35. Ballew v. Georgia, 435 U.S. 223 (1978). The Court held five person criminal jury selection of the Sixth Amendment, and provided significant precedent for interpreting the cumulative effects of death qualification. The Court identified several effects that a reduction in jury size might produce, including a dilution in the attitudinal and demographic representativeness of juries, and an increase in their tendency to commute.
36. Hovey, 28 Cal. 3d at 75, 616 P.2d at 1351, 168 Cal. Rptr. at 178.
38. Hovey, 28 Cal. 3d at 76, 616 P.2d at 1351, 168 Cal. Rptr. at 178, and Hovey, supra note 26 at 122.
39. Id. at 76, 616 P.2d at 1351, 168 Cal. Rptr. at 178.

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“control” group who had not been exposed to the process. Exposure to the death-qualification process increased the subjects’ belief in the guilt of the defendant and their estimate that he would be convicted. It also increased their estimate of the prosecutor’s, defense attorney’s and judge’s belief in the guilt of the defendant. The death-qualification process led the subjects to perceive both the prosecutor and the judge as more strongly in favor of the death penalty, and to believe that the law disapproved of people who opposed the death penalty. It likewise led jurors to choose the death penalty as an appropriate punishment much more frequently than persons not exposed to it. Thus, persons who had been exposed to death qualification not only differed from non-death-qualified subjects, but they differed in ways that were consistently prejudicial to the interests and defendants. 

The California Supreme Court found that their voir dire process in capital cases thus produced certain side effects which shaped the jury’s attitude toward a death sentence and the most practical and effective procedure available to minimize the untoward effects of death qualification was individual sequestered voir dire. Because juries would then witness only a single death qualifying voir dire, each juror would arguably be exposed to significantly less discussion and questioning about the various aspects of the penalty phase before hearing any evidence of guilt. This would minimize the tendency to presume guilt and expect conviction.

Interestingly, the Attorney General for California indicated in oral argument that he had no objection to the court adopting the rule for sequestered voir dire in capital cases as it would “... get rid of a lot of [the concerns raised by the Haney study] by sequestered voir dire.”

However, the four-member majority acknowledged, as argued by the three-person minority, that the rule of sequestered voir dire in capital cases would not alleviate all the untoward effects of the voir dire procedures due to the Witherspoon criteria, and likewise, it would be unknown whether such personal voir dire would or would not entail the same dangers of inducing bias as the then current (pre-1980) procedures for voir dire.

The Hovey dissent, led by Justice Richardson, reiterated the same reasons mentioned by the majority, but he likewise reminded the majority that almost eight years prior the California Supreme Court had approved a system of voir dire examination whereby inquiries to prospective jurors were channeled from counsel to the trial court, rather than directly to each individual juror. (Justice Bird did not become a member of the Court until her 1977 appointment by then Governor Jerry Brown.) Justice Richardson pointed out that the Court had gone on record to approve this “method of curtailing the inordinate time consumed in the process of the selection of jurors. Thus the appellate cases have referred to ‘the waste of valuable time involved’ and to the ‘tedious’, irksome and time-wasting prolongation of individual questions of individual jurors by one side and then the other.” Clearly, questioned the minority, if the earlier process was tedious, repetitious and time-wasting, what would individual/sequestered voir dire lead to?

Even though the minority in Hovey pointed out some of the positive and practical aspects of collective voir dire, such as (1) the educational value of observing the interrogation of the other prospective jurors in each other’s presence, thus better understanding the interplay and role of the juror, the court and counsel and (2) greater clarification through concrete application with other prospective jurors the trial judge’s necessarily abstract explanation of legal principles, the observation with the most irrefutable impact on the majority’s position was the fact that sequestration would not inhibit the tendency of any prospective juror to prejudge the guilt issues, because the supposedly undue emphasis upon penalty issues would still occur. 

Even though there were many other empirical studies and attitudinal surveys performed, many of them were criticized on a legal and of voir dire.

45. Hovey, 28 Cal. 3d at 83, 616 P.2d at 1355, 168 Cal. Rptr. at 183.

46. Rose Bird and the Politics of Accountability in California, 70 JUDICATURE 81 (1986).


48. Id. at 84, 616 P.2d at 1356, 168 Cal. Rptr. at 183.

49. Id.

50. Law and Human Behavior, supra note 26. The Articles contained in this Volume are identified as follows: Gross, Determining the Neutrality of Death-Qualified Jurors: Judicial Appraisal of Empirical Data, at 7.
Hayes: Capital Jury Selection In Florida and Texas - A Quantitative Dat

The Hoye dissent, led by Justice Richardson, reiterated the same reasons mentioned by the majority, but he likewise reminded the majority that almost eight years prior the California Supreme Court had approved a system of voir dire examination whereby inquiries to prospective jurors were channeled from counsel to the trial court, rather than directly to each individual juror.44 (Justice Bird did not become a member of the Court until her 1977 appointment by then Governor Jerry Brown). 44 Justice Richardson pointed out that the Court had gone on record to approve this "method of curtailting the inordinate time consumed in the process of the selection of jurors. Thus the appellate cases have referred to 'the waste of valuable time involved' and to the 'delays', irksome and time-wasting prolongation of individual questioning of individual jurors by one side and then the other...""45 Clearly, questioned the minority, if the earlier process was tedious, repetitious and time-wasting, what would individual/sequestered voir dire lead to? Even though the minority in Hoye pointed out some of the positive and practical aspects of collective voir dire, such as (1) the educational value of observing the interrogation of the other prospective jurors in each other's presence, thus better understanding the interplay and role of the juror, the court and counsel and (2) greater clarification through concrete application with other prospective jurors the trial judge's necessarily abstract explanation of legal principles,46 the observation with the most irrefutable impact on the majority's position was the fact that sequestration would not inhibit the tendency of any prospective juror to prejudice the guilt issues, because the supposedly undue emphasis upon penalty issues would still occur.47 Even though there were many other empirical studies and attitudinal surveys performed,48 many of them were criticized on a legal and

40. Id., at 76, 616 P.2d at 1351, 768 Cal. Rptr. at 178.
41. Id., at 79, 616 P.2d at 1353, 616 Cal. Rptr. at 189.
42. Id.
43. Id., at 81, 616 P.2d at 1354, 616 Cal. Rptr. at 182.
44. 616 P.2d at 1354. Also in accord, see Jones, Voir Dire and Jury Selection, 22 Trial, Sept. 1986 at 60: Eighty percent of jurors have reached a verdict by the 1987
methodological basis, with the exception of the study by Fitzgerald and Ellsworth, because the findings for “excludable” jurors failed to omit those jurors who would have been removed from jury panels because of their inability to adjudicate guilt impartially. It was argued that the inclusion of these “nullifiers” was improper given the current jury-qualification standards. This arguably would produce an overstatement of the magnitude of attitudinal differences between excludable and includable jurors. The other studies had great value, however, in confirming the clear trend in survey findings.

The dispute as to whether the Witherspoon death-qualified jury can be legally constituted for the potential penalty stage and yet be sufficiently protected from a propensity toward guilt through the sequestered voir dire seemingly is a classic contradiction in terms which social scientists have attempted to redress without much success. Indeed, Haney, in a later 1982-83 analysis of the death-qualification process effect correctly stated the enigma:


Cowan, Thompson and Ellsworth, *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, at 53.


Thompson, Cowan, Ellsworth and Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, at 95.


Finch and Ferraro, supra note 23, at 37.

Id. at 38.

Id., at 38.

The problematic nature of the death-qualification process stems largely from this anomalous fact: it requires penalty to be discussed long before penalty is relevant. The attention of prospective jurors is drawn away from the presumption of innocence and on to postconviction events. This anomaly is structural and is built into the very nature of death qualification.

Thus, it does not matter what types of questions are asked of the prospective jurors by the attorneys or the judge in voir dire, or for that matter, whether the voir dire process is done en masse or on a sequestered basis. The psychological, emotional, and attitudinal bias or impact occurs the moment (or arguably during the days) the jurors are passed upon for Witherspoon death qualification. Thus, it is the legal/statutory basis for the use of the juror which fundamentally “discombobulates” the social sciences. We hark back to the Saks and Hastie analogy of the so-called “legal sciences” and the social sciences.

Haney’s above-referenced analysis of the process effect demonstrated that whether voir dire was en masse or sequestered, prospective jurors were still questioned about their own death-penalty attitudes. The implication of guilt that was carried by initial discussion of guilt was still present, as was the effect of cognitively anticipating the penalty phase. Individual jurors were still exposed to the question of death penalty imposition long before they had to decide it, and were still required to publicly commit themselves to be willing to impose it. Thus, the core features of the death qualification process were retained, absent their repetition.

Haney found that individual sequestration may, however, create some special problems of its own. Since the death-penalty questions were clearly distinguished or separated during voir dire, the prospective juror was likely to infer that this was the most important aspect of the case because there were special questions asked of the juror privately rather than as part of the general guilt-stage questions asked of the jurors as a whole, i.e., before the open jury panel. Second, some potential jurors felt “on the spot” when questioned individually and without

55. Saks and Hastie, supra note 20, at 1-3.
57. Id.
58. Id.
methodological basis, with the exception of the study by Fitzgerald and Ellsworth,84 because the findings for "excludable" jurors failed to unite those jurors who would have been removed from jury panels because of their inability to adjudicate guilt impartially. It was argued that the inclusion of these "nullifiers" was improper given the current jury-qualification standards.88 This arguably would produce an overstatement of the magnitude of attitudinal differences between excludable and includable jurors. The other studies had great value, however, in confirming the clear trend in survey findings.88

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57. Id.
58. Id.

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the other panel members who acted as a support group or provided comradeship to each other in this foreign, and for most, first time experience. Thus, in the name of reducing the repetitiveness of death qualification, Haney determined that the court may inadvertently increase the symbolic significance and emotional intensity. Because the basic problems with the process appeared structural and systemic, they were essentially guaranteed to occur every time death qualification took place. Thus it may be, as Haney argued, that the only effective cure to these biasing effects was to prohibit the death qualification of guilt-phase jurors. This obviously would require a substantial change in the statutes and criminal rules of procedure for most of the 37 states which currently have death-penalty laws on their books; however, it could be

59. Id. at 149.
60. Id. at 151.
61. As of November 15, 1987, the statistics kept by the NAACP Legal Defense and Educational Fund, Inc. (LDF) in Death Row, U.S.A., reflected:

| Jurisdictions with Capital Punishment Statutes: 37 |
| Sentences Imposed in 34 |
| States in italics have statutes but no sentences imposed | Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming, |
| Jurisdictions without Capital Punishment Statutes: 14 |
| Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, North Dakota, Rhode Island, West Virginia, Wisconsin, |

The total number of death row inmates, as well as sex and race, according to LDF are:

| Total: 1977 |
| Sex: Male, 1956 (98.9%) |
| Female 21 (1.06%) |
| Race: White 1,012 (51.19%) |
| Black 814 (41.175%) |
| Hispanic 116 (5.87%) |
| Native American 26 (1.32%) |
| Asian 8 (0.40%) |
| Unknown 1 (0.05%) |

Thirteen states use electrocution, five use the gas chamber, two are military personnel, and sixteen use lethal injection. The trend has been toward lethal injection so that, Utah for example, originally authorized a firing squad but now also offers lethal injection as an alternative. The same is true for the State of Washington: hanging/lethal injection; Delaware: hanging/lethal injection; North Carolina: gas/lethal injec-

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done, thus breaking the legal/social sciences impasse.

One last social science finding which should be mentioned, even though briefly, supports Haney's suggested procedural change concerned the "formal" versus "informal" death-qualification process. Professor Winick's Florida study discovered that the formal process of death-qualification could be followed by further, informal death qualification through voir dire. In essence, prosecutors could use information obtained during the death-qualification process to weed out scrupulous jurors through their peremptory challenges. Arguably, the defense could use the same formal versus informal process to alter the final composition of their jury as well, such as getting more "authoritarians" off the panel. The net effect could be neutralization and status quo. However, this argument may prove more apparent than real because the proportion of scrupulous jurors is often so small that the defense cannot realistically counterbalance the prosecution's practice through a responsive use of peremptory challenges. Because Winick's study reflected that the number of scrupulous jurors remaining for service after death qualification was six percent (from the original 13 percent), he concluded that capital juries would represent a narrow range of attitudes toward capital punishment, ranging from supportive to neutral.

IV. Capital Jury Selection in Florida and Texas

With the jolting impact of the United States Supreme Court's decisions in Furman v. Georgia* and Gregg v. Georgia,** the states that still wanted capital punishment penalties set out to codify and re-codify the 1968 Witherspoon pronouncements. In approximately 29 of the 37 states now authorizing the death penalty, the jury makes the penalty

The loss of the spectacle of brutality or grotesqueness facilitating the public's unveciness over the manner and fact of capital execution. See Texas Official and Prisoner Fear Banality of Execution, NEW YORK TIMES, Thursday, July 2, 1987.


63. Id. at 48-49.
64. Id. at 50-53.
65. 408 U.S. 238 (1972).

https://nsuworks.nova.edu/nlr/vol12/iss2/9
the other panel members who acted as a support group or provided comradery to each other in this foreign, and for most, first time experience. Thus, in the name of reducing the repetitiveness of death qualification, Haynes determined that the court may inadvertently increase the symbolic significance and emotional intensity.69 Because the basic problems with the process appeared structural and systematic, they were essentially guaranteed to occur every time death qualification took place. Thus it may be, as Haynes argued, that the only effective cure to these biasing effects was to prohibit the death qualification of guilt-phase jurors.70 This obviously would require a substantial change in the statutes and criminal rules of procedure for most of the 37 states which currently have death-penalty laws on their books;71 however, it could be

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determination, although in three of these (Florida, Alabama, and Indiana) the judge has the discretion to override a jury's recommendation of life imprisonment, and in four of these (Arizona, Idaho, Montana, and Nebraska), the judge decides the penalty. 67

The article will next discuss two of these states, Florida and Texas, with the purpose of reviewing the methods utilized by each state in selecting its death-qualified juries. The article will analyze or compare the basis and potential differences in cost, manpower and time required to move a defendant from the pretrial stage to the execution stage.

Florida

Florida's post-Furman and Gregg recodification of its death penalty was swift, and its constitutionality was upheld by the United States Supreme Court in 1976. 68 As in most other jurisdictions, Florida's statute was the product of compromise and hard bargaining. Both the Florida Senate and the House of Representatives had come to accept Governor Reubin Askew's proposal for a bifurcated trial with statutory guidelines for sentencing. The two houses differed, however, on whether judges or juries should make the decision on the appropriate sentence or penalty to be imposed. 69 The Senate essentially wanted to let the jury make all the determinations, but the House and Governor Askew wanted to let the jury determine guilt or innocence (presumably this was still a Witherspoon-qualified jury) but leave the sentencing aspect to a three-judge panel. This panel would include the trial judge and two judges from outside the circuit appointed by the Chief Justice of the Florida Supreme Court. 70 The conference committee's final effort produced the current system whereby the jury determines guilt or innocence and then makes an advisory sentence to the trial judge, who has the final decision-making authority. This advisory process, including the judge's right to a "jury override," was intended to produce a symmetry in the roles of jury and judge, although there

70. Id. at 302.
71. Id. at 302.
(b) Examination. The court may then examine each prospective juror individually or may examine the prospective jurors collectively. Counsel for both State and defendant shall have the right to examine jurors orally on their voir dire. The order in which the parties may examine each juror shall be determined by the court. The right of the parties to conduct an examination of each juror orally shall be preserved.

There are no statistics the author has been able to find which accurately analyze the time frames for selecting a capital jury in Florida. However, in conversations with attorney Mark Ferraro (formerly with the Hillsborough County State Attorney, and co-author of the Finch and Ferraro article referenced in footnote 23), it was estimated that in picking a capital jury in Tampa, Florida, 75% of the cases took one day and 25% of the cases took two days.

Similar results were obtained from conversations with attorney Abraham Lasser of the State Attorney's Office. For the capital cases tried in April, May and June of 1987, the average time to pick a death qualified jury was 2.8 days, and this may be a little high because one of the cases involved multiple defendants.

74. Id.
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Thus, the final result was that Florida, like most other jurisdictions, provided for a unitary voir dire system 91 but, in capital cases, utilized a bifurcated procedure 92 separating the trial of guilt from the penalty determination of either life imprisonment without the possibility of parole for twenty five years, or death. 78

In the area of jury voir dire, Florida has experienced little if any argument since the state's founding. In 1982 the Florida Supreme Court ruled that the purpose of the voir dire examination "is to ascertain [potential jurors'] qualifications and whether they would be absolutely impartial in their judgment." 93 This is necessary to guarantee a defendant's right to an impartial jury. 94

Thus, the trial judge has broad power in controlling the scope and the conduct of the voir dire examination. The judge may refuse to allow counsel to retread ground covered in the Court's initial examination, 95 and may limit other areas of inquiry. 96 However, the Court's discretion is subject to the essential demands of fairness, in that

71. Id. at 302.
72. FLA. R. CRIM. P. 3.300(b).

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73. FLA. STAT. § 775.082(1) (1985).
74. Id.
cient examination must be allowed to discover and develop facts which may lead to a showing of actual bias or prejudice. The trial court may allow questioning of the jurors individually, with the other members of the panel absent, if the circumstances indicate that such a method would lessen the spread of prejudice, but this is discretionary, and the defendant has a heavy burden in showing that the trial judge has abused his discretion.

A review of the applicable Florida case law regarding the issue of sequestered versus group voir dire reveals an amazing sparsity of appellate review in the state court system and only a couple of reviews by the United States federal courts. We shall briefly examine these cases with more emphasis on the only one which drew any written commentary by the United States Supreme Court, Davis v. Florida.

In Branch v. State, the defendant had been convicted of the offense of conspiracy to commit robbery and robbery of a Kwik-Serve grocery in the town of Mulberry, Florida. Because of the extensive pretrial publicity and notoriety generated in the case, the defendant asked for a change of venue, which was denied. The defense then asked for the opportunity to individually voir dire the prospective jurors outside the presence of the remaining prospective jurors. This was likewise denied and upheld by the state appellate court as within the sound discretion of the trial court and further the record upon review demonstrated no abuse of discretion.

In Jones v. State, the defendant was convicted in Miami of involuntary sexual battery with force likely to cause serious personal injury. The defendant appealed, arguing that the trial court had erred in not allowing individual and sequestered voir dire of the prospective jurors on the general due process requirements such as presumption of innocence and the State’s burden of proof. The appellate court found this procedure was discretionary with the trial judge, and that no abuse of discretion was demonstrated in the record by refusing to allow questions of the prospective jurors concerning their ability to apply particular propositions of law.

In Stone v. State, the defendant was convicted of murder in the first degree, with the jury recommending and the judge sentencing the defendant to death. The defendant had argued that the trial court should have sua sponte ordered or consulted with counsel on a change of venue because the murder had occurred in Union County, in which two of the state’s major penal institutions were located, and that the venue was prejudiced because the prison system was a major source of revenue, directly or indirectly, for the residents of the county. No such motion was ever filed. However, during the voir dire examination, defense counsel did request a sequestered examination "so that those who had specific knowledge of the crime would not contaminate the others’ minds." The Florida Supreme Court found this to be discretionary with the trial court and that the record reflected no abuse of discretion. Petition for Certiorari to the United States Supreme Court was denied with only Justices Brennan and Marshall dissenting, arguing that because the death penalty was in all circumstances cruel and unusual punishment violative of the eighth and fourteenth ammendments, that the sentence of death should be vacated.

In Washington v. State, the defendant was convicted of sexual battery upon a person under 11 years of age and of attempted lewd assault upon persons under the age of 14 years, for which he received life imprisonment. The Court ruled that "Washington’s request for sequestered voir dire is addressed to the discretion of the trial court... There was no abuse of discretion in this proceeding."

Davis v. State is the most recent Florida case to be reviewed at the United States Supreme Court level. In Davis, the defendant had appealed to the Florida Supreme Court after having been convicted of the first degree murders of a woman and her five and ten year old...

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80. Branch v. State, 212 So. 2d 29 (Fla. 1968).
84. Id. at 30.
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102. Id. at 30.
daughters, for each of which the jury had recommended the death penalty and the trial judge ordered the same. Due to the extensive media coverage and publicity, the defense requested to be allowed to conduct individual and sequestered voir dire of the prospective jurors, which was denied. The Florida Supreme Court ruled that “The purpose of conducting voir dire is to secure an impartial jury. Davis has demonstrated neither the partiality of his jury nor an abuse of discretion by the trial court, and we find no merit to his claim.”  

Upon petition for certiorari to the United States Supreme Court, which was denied, Justices Marshall and Brennan again dissented on the basis that individual sequestered voir dire should have been granted because of the extensive pretrial publicity and notoriety the case had received in the media. During voir dire at least ten of the forty veniremen had admitted having prior knowledge about the case, and since the trial judge refused to allow these jurors to be questioned individually, the defense claimed that their Sixth Amendment rights to a fair and impartial jury were denied because they had not been able to learn the specific information these jurors had heard or read. They argued that to have pursued such a line of questioning in front of the entire jury pool undoubtedly would have contaminated the remainder of the venire. The dissent argued that “exposure to news accounts of the crime with which he is charged [does not] alone presumptively deprive[e] the defendant of due process.” It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

The question presented, from the minority’s viewpoint, was not whether the jury selected was actually biased against the defendant, but whether he was unconstitutionally deprived of the opportunity to uncover such bias and to exercise his for-cause challenges to root it out. Most significantly, the minority pointed out: “[T]his Court has not addressed whether, and upon what threshold showing, individual voir dire is constitutionally required to guarantee a defendant’s right to have sufficient information brought out on voir dire to enable him to exercise his challenges in a reasonably intelligent manner.” Justice Marshall then went on to state that there was ample precedent for the individual voir dire procedure in those cases involving the damaging effect of sensational pretrial publicity which, taken as a whole, raised a significant possibility of prejudice. The dissent concluded: “Trial judges certainly have broad discretion over the structuring of voir dire, but as federal and state courts have recognized, the extent and nature of pretrial publicity may necessitate individual voir dire to assure fair process in the selection of an impartial jury.”

Thus, at least two of our current United States Supreme Court justices have stated a willingness to grant certiorari to address, for the first time on a national scale, whether, and upon what showing, the United States Constitution would require trial judges, pursuant to the Sixth and Fourteenth Amendments, to grant individual and sequestered voir dire. The impact of this position would clearly transfer the previously held concept in Florida from a state review based upon a somewhat ambiguous standard of “abuse of discretion” to a presumably more structured United States constitutional standard of review based upon “a fair and impartial jury”. Unfortunately, the beauty and effectiveness of either phrase may in reality only be in the mind of the individual who writes on the subject last. Clearly, this is subject matter which most states would not willingly accede to the federal courts because it may only be realistically reviewed on a case by case basis.

The Eleventh Circuit Court of Appeals may have set the standard nine days prior to Justice Marshall’s dissent (and effectively accomplished for Florida what Justice Marshall was not able to persuade his fellow justices to do) when the Eleventh Circuit ruled in the habeas corpus case of Jordan v. Lippman. The Eleventh Circuit had previously issued the opinion of Bonner v. City of Prichard, where the court had adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on 30 September 1981. Thus, United States v. Davis, and United States v.

93. Davis, 461 So. 2d at 70.
95. Id. at 914 (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975)).
96. Id. (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)).
97. Id. at 914-15 (quoting United States v. Rackter, 557 F.2d 1046, 1048 (4th Cir. 1977) (emphasis in original)).
98. Id. at 915. See also Nebraska Press Association v. Stewart, 427 U.S. 339, 602 (1976) (Brennan, J., concurring in judgment); United States v. Davis, 583 F.2d 196, 196 (5th Cir. 1978); United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981); (ABA Standards for Criminal Justice § 8.3.5 (2d ed. 1980)).
100. Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985).
102. Davis, 583 F.2d 190.
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Upon petition for certiorari to the United States Supreme Court, which was denied, Justice Marshall and Brennan again dissented on the basis that individual sequestered voir dire should have been granted because of the extensive pretrial publicity and notoriety the case had received in the media. During voir dire at least ten of the forty veniremen had admitted having prior knowledge about the case, and since the trial judge refused to allow these jurors to be questioned individually, the defense claimed that their Sixth Amendment rights to a fair and impartial jury were denied because they had not been able to learn the specific information these jurors had heard or read. They argued that to have pursued such a line of questioning in front of the entire jury pool undoubtedly would have contaminated the remainder of the venire. The dissent argued that "Exposure to news accounts of the crime with which he is charged [does not] alone presumptively deprive[e] the defendant of due process." It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

The question presented, from the minority's viewpoint, was not whether the jury selected was actually biased against the defendant, but whether he was unconstitutionally deprived of the opportunity to uncover such bias and to exercise his for-cause challenges to root it out. Most significantly, the minority pointed out: "[T]his Court has not addressed whether, and upon what threshold showing, individual voir dire is constitutionally required to guarantee a defendant's right to have sufficient information brought out on voir dire to enable him to exercise his challenges in a reasonably intelligent manner." Justice Marshall then went on to state that there was ample precedent for the individual voir dire procedure in those cases involving the damaging effect of sensational pretrial publicity which, taken as a whole, raised a significant possibility of prejudice. The dissent concluded: "Trial judges certainly have broad discretion over the structuring of voir dire, but as federal and state courts have recognized, the extent and nature of pretrial publicity may necessitate individual voir dire to assure fair process in the selection of an impartial jury."

Thus, at least two of our current United States Supreme Court justices have stated a willingness to grant certiorari to address, for the first time on a national scale, whether, and upon what showing, the United States Constitution would require trial judges, pursuant to the Sixth and Fourteenth Amendments, to grant individual and sequestered voir dire. The impact of this position would clearly transfer the previously held concept in Florida from a state review based upon a somewhat ambiguous standard of "abuse of discretion" to a presumably more structured United States constitutional standard of review based upon "a fair and impartial jury". Unfortunately, the beauty and effectiveness of either phrase may in reality only be in the mind of the individual who writes on the subject last. Clearly, this is subject matter which most states would not willingly accede to the federal courts because it may only be realistically reviewed on a case by case basis.

The Eleventh Circuit Court of Appeals may have set the standard nine days prior to Justice Marshall's dissent (and effectively accomplished for Florida what Justice Marshall was not able to persuade his fellow justices to do) when the Eleventh Circuit ruled in the habeas corpus case of Jordan v. Lippman. The Eleventh Circuit had previously issued the opinion of Bonner v. City of Prichard, where the court had adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on 30 September 1981. Thus, United States v. Davis, and United States v.

93. Davis, 461 So. 2d at 70.
95. Id. at 914 (quoting Murphy v. Florida, 421 U.S. 794, 799 (1975)).
96. Id. (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)).
97. Id. at 914-15 (quoting United States v. Rucker, 557 F.2d 1046, 1048 (4th Cir. 1977) (emphasis in original)).
Hawkins\textsuperscript{103} had become a part of the law of the Eleventh Circuit, which was comprised of Alabama, Florida, and Georgia. Jordan had been convicted in state court of mutiny and murder for his actions while a prisoner at the Reidsdale, Georgia state prison. The prison had historically been the scene of many race related problems and this had been the primary cause of the riot in July 1978 in which Jordan had become involved. After the voir dire had apparently been completed on a Friday (700 pages of transcript),\textsuperscript{104} the trial judge had given the 42 jurors a fairly complete and standard admonition about maintaining a fair and impartial attitude about the case. He said that they should neither discuss the case with anyone, nor expose themselves to the media, nor otherwise allow themselves to become contaminated.\textsuperscript{105} That weekend there was a major civil rights march and protest, a cross burning, and a confrontation with white supremacists. On Monday, the defense requested to further voir dire the jury both generally and on an individual basis. Though the trial judge denied the sequestered voir dire, he paid some degree of deference to a limited reopening of the general voir dire. However, the court's manner and procedure, as described by the Eleventh Circuit, demonstrated that the judge's inquiry fell woefully short, and "...in the instant case was not merely inadequate, it was nonexistent."\textsuperscript{106} Judge Anderson, writing for the three-judge banc, laboriously reviewed in great detail the appropriate Fifth and Eleventh Circuit cases which dealt with the requirement of more specific and sequestered voir dire when there was such potentially damaging pretrial publicity and media coverage. Essentially, however, the base cases ruled upon by the court were still United States v. Davis\textsuperscript{107} and Irvin v. Dowd.\textsuperscript{108} The Court found that when pretrial publicity is a factor, a juror's conclusory statement of impartiality was insufficient. The Court adopted the Davis language that:

\begin{quote}
Under the circumstances of this case, where the nature of the publicity as a whole raised a significant possibility of prejudice, the cursory questioning by the court was not enough. The court should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial, and should have
\end{quote}

\begin{itemize}
\item[103.] Hawkins, 658 F.2d 279.
\item[104.] Jordan, 763 F.2d 1265.
\item[105.] Id. at 1270.
\item[106.] Id. at 1281.
\item[107.] Davis, 583 F.2d 190.
\item[108.] Irvin, 366 U.S. 717.
\end{itemize}

Thus, the Eleventh Circuit held that the voir dire procedure was inadequate to protect Jordan's rights to an impartial jury and due process under the Sixth and Fourteenth Amendments. Seven years later, Jordan was afforded a new trial.\textsuperscript{110} Judge Anderson in a footnote points out why the court cannot rely on conclusory statements by jurors of their impartiality: "...continual protestations of impartiality from prospective jurors are best met with a healthy skepticism. ..."\textsuperscript{111}

Interestingly, one cannot read Jordan without perceiving some fundamental and yet perplexing or even distressing facts. On the one hand, one can clearly sense a profound satisfaction and respect for the United States Constitution at work in protecting the rights of the defendant against neglect or abuse from the "system". Concomitantly, the case provides a guarantee that the law of the Constitution will not close its eyes to racism, blind prejudice, or raw emotion when examined in the light of a clearer and calmer day. On the other hand, Jordan provides an absolutely perfect diagram or blueprint of how to make the wheels of justice come to a temporary standstill or to effectuate the slogan "justice delayed is justice denied"... to everyone, including the victims. We dare not accuse or imply ill for any man's morals or ethics, but if these demonstrations had been conjured up purposefully or as part of an ulterior plan to guarantee judicial error and review, the blueprint could not have been better drawn.

Some disturbing questions remain, however. How long does one wait to bring such a case to trial, assuming you do not run afoul of the speedy trial rule? How many dollars will taxpayers "render unto Caesar" to move the venue of a case and send all the witnesses, state employees, and judges to far away hotels and restaurants? At what point will the state capitulate and determine that a plea to a lesser included offense is a cheaper and a better use of their annual budgetary tax dollars than to realistically seek out truth and justice? Indeed, what is the cost of truth and justice? Yes, it is neither truth nor justice per se, but the journey and the search...
Hayes: Capital Jury Selection in Florida and Texas - A Quantitative Dist

Capital Jury Selection

determined for itself whether any juror's impartiality had been destroyed.109

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110. Id. at 1281-82.
111. Id. at 1281.
Texas

In 1980, it took the California Supreme Court dozens of witnesses and volumes of social science surveys to conclude in Hovey that, in capital cases, death qualification of the jury would be done individually and in sequestration. Possibly to the surprise of some social scientists and legal scholars, the State of Texas had utilized the system of an individual and sequestered voir dire in capital and non-capital cases for more than seventy years prior to California's decision in Hovey. This was not to say, however, that individual sequestered voir dire had been embraced in Texas with open arms, nor that its application had been unlimited in scope.

In 1973, in the case of Cooley v. The State, the Texas Supreme Court issued an opinion establishing the rule for the proper method of impaneling juries in the Texas district courts. During the next 38 years, either through custom or practice, it became an accepted procedure to have individual sequestered voir dire. The purpose of the procedure was to prevent prejudice in the minds of potential jurors, and failure to allow this was found to be reversible error in the 1911 case of Streight v. State. Streight was a case involving great pretrial media publicity (they even hanged and burned the trial judge in effigy when he released the defendant on bond). There was also enormous public interest because Ms. Streight had apparently shot her husband while he was asleep in bed. In fact, the courts' review of the incidents reads like a classic "battered wife syndrome" defense.

The Texas Court of Criminal Appeals reversed the defendant's conviction because a motion for a change of venue had been improperly denied. However, the court stated that while it would not have been such error as to require the reversal of a case, absent a showing of injury to the defendant, the court's refusal to exclude the veniremen from the courtroom during the selection of a jury could have prejudiced the defendant's rights; in an extreme case this would have constituted sufficient grounds for a reversal. The court reasoned that this would be especially true if it had been shown that by the trial court's refusal, the defendant had been prevented from asking proper questions for fear of creating a prejudice in the minds of the veniremen.

In 1921, the Court of Criminal Appeals, using Streight as its precedent, issued a trilogy of cases which quite firmly set the binding principle of individual sequestered voir dire. Crow v. State was the lead-off case, and it set the basic guidelines for the other cases which followed. The defendant in Crow had been charged with a murder by poison and had requested to have the veniremen excluded from the courtroom until each prospective juror could be called in one at a time for examination on voir dire. The defendant had likewise requested that all the jurors had been selected, they be retired from the courtroom in the charge of an officer. The appeals court found that to some extent this decision must be left to the discretion of the trial judge due to several practical and collateral factors, such as: the convenience of the arrangement of the courtroom; the necessity of other facilities for conducting the trial; and the administration of the selection process. However, based upon the experiences of the appellate court judges, it was found to be much more satisfactory to conduct the voir dire in exactly the manner suggested by the defense. The appeals court reasoned that because of their unfamiliarity with court proceedings, unguarded expressions from the veniremen would frequently inject embarrassing answers which might work to the harm of either the state or the defense.

However, in the 1924 case of Hennington v. State, it became clear that even if one relied upon Streight, the defendant was the one charged with the burden of proving injury if the trial judge refused to grant individual sequestered voir dire. The defendant in this case had been convicted and sentenced to 99 years for rape, which in and of

112. Hovey, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr., at 128.
115. Id., 138 S.W. at 744.
116. Id., 138 S.W. at 746.
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116. Id., 138 S.W. at 746.
117. Price, Battered Women Syndrome: A Defense Begins to Emerge, 194
    N.Y.L.J. at 1, col. 3 (November 29, 1985).
121. Id. at 154, 230 S.W. at 153.
122. Id.
123. Id.
itself was not an unusual sentence in 1924. However, there was a somewhat intriguing aspect to this case. The defendant's attorney had asked the trial judge for permission to voir dire and interrogate the veniremen individually with reference to their relationships to certain "secret organizations." Counsel feared that such an inquiry might inure to the defendant's prejudice if it were made in the presence of some veniremen to whom the questions were not directed. (In 1988, one can only wonder, fairly or unfairly, whether the "secret organization" had just three initials, and what the defendant's race was.) Nevertheless, on appeal, the trial judge's denial of the attorney's request was found to be harmless error since there was no harm demonstrated on the record by trial counsel. *Hensington* was followed by *LeFors v. State*, a case in which the defendant had been convicted of robbery. The trial judge had refused to grant an individual sequestered voir dire, and the appellate court had found no injury and no abuse of discretion.

A clear trend appeared to be developing. In those cases where a capital offense was charged, the appellate courts appeared to be more sensitive to the defendant's request for sequestered voir dire. In non-capital cases, however, the defendant's arguments did not fare as well — no injury was shown, and there was no abuse of discretion by the trial court.

In 1948, the conflicts had become more clearly drawn and what had been gradually passed from common law to case law found statutory support in the Texas Code of Criminal Procedure.

The statutory authority of a right to individual voir dire was not, however, without its vocal detractors. In a 1950 University of Texas Law Review article, District Judge Stout wrote of lawyers and judges who commonly complained that the practice of separate examination of each juror in a capital case was responsible for a great loss of time and that it sometimes took "a week or more in the selection of a jury of twelve men to try one charged with a capital crime — quite often more time being consumed in the selection of a jury than in the remainder of the trial." Imagine what Judge Stout would say today.

126. Id.
128. TEX. CODE CRIM. PRO. ANN. art. 612 (Vernon 1948).
130. Id. at 34.

131. Voir Dire Quarterly Report for 1 September 1985 to 1 September 1986 and 1 January to 1 September 1987 (Special thanks to Judge Mary Bacon and the Clerk of Courts for Harris County, Texas.)

The average time for capital jury selection is 10-12 week in Alameda County (Oakland, California). (Special thanks to Atty. Joseph Hurley, Alameda County Prosecutor's Office.)

It appears that the longest voir dire in the U.S. occurred in the California case of People v. Jackson, No. A-80233, Lancaster Supreme Court, in which the defendant was tried for the murder of a 23-year-old girl whose body was never found. The sequestered voir dire took nine months with 129 court days and cost the taxpayers one-half million dollars to pick the panel of 12 jurors and 6 alternates. The defendant was acquitted. See L.A. Times, Feb. 14, 1984 at 3, col. 6.


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When he would find that the average time to pick a jury in Harris County (Houston) is four weeks.130

That there were many arguments for sequestered voir dire has been clearly demonstrated in the preceding cases, however, the complaints of Stout and others for the potential abuses which could occur were not without some foundation. They argued that counsel, whether for the prosecution or the defense, could put a juror...

...even though otherwise qualified, through a literal “trial” or ordeal, with the hope that counsel might be able to develop some cause for challenge, when human decency and ordinary notions of good conduct and fair play would forbid such tactics if the remaining jurors were present to witness the “trial” of such juror... The very nature of the matter (collective voir dire) is conducive to a reasonable examination and forbidding to an extreme one, since no capable lawyer is going to be so senseless as to make the jury mad at him or his client by asking unreasonable, tricky or foolish questions just as he is not going to leave any proper question unasked.131

Interestingly, Judge Stout’s admonitions may not have fallen on deaf appellate ears because the appellate decisions gradually became more restrictive on the type of case in which a defendant could obtain a sequestered voir dire. In Johnson v. State,132 the defendant was prosecuted for injuring the property of another. The appellate court held...

126. Id.
130. Id. at 34.
131. Voir Dire Quarterly Report for 1 September 1985 to 1 September 1986 and 1 January to 1 September 1987 (Special thanks to Judge Mary Bacon and the Clerk of Courts for Harris County, Texas.)

132. Stout, supra note 129 at 35-36.
that, absent excessive pretrial publicity or prejudice, it was neither error nor a denial of due process to disallow the defendant's request for sequestered voir dire. The culmination of this trend occurred around 1973 when the courts established a "bright line" of demarcation in the cases of Hogan v. State134 and Branstley v. State,135 where the court ruled that only in capital cases in which the state makes it known that it plans to seek the death penalty did a defendant have the absolute right to a separate examination of each juror. This was in accord with Article 35.17 "Voir Dire Examination" of the Texas Code of Criminal Procedure.136 The interpretative commentary by Judge W. A. Morris in United States v. Smith, 455 S.W.2d 747 (Texas 1970). Article 35.17 Voir Dire Examination

1. When the court, in its discretion so directs, in a misdemeanor or non-capital felony case, or in a capital case in which the state's attorney has made known that he will not seek the death penalty, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

2. When the state's attorney has made known that he will seek the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or the defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court. Acts 1966, 59th Leg., vol. 2, p. 317, ch. 722.

137. The Interpretative Commentary to the 1965 statute provided by the Honorable W. A. Morrison provides:

In order to reduce the expense of law enforcement, hasten the disposition of criminal cases and improve the public image of the administration of criminal justice, the Committee proposed and the Legislature accepted that the Court in capital cases should propound questions to the prospective jurors as a group concerning the basic rules of law applicable in all criminal cases. This should save one-half the time normally consumed in

Even though some observers may be surprised with the 75 years sequestered voir dire experience of the Texas state courts, it can be justifiably argued that Texas is the oldest if not leading authority with "hands on" knowledge of the subject. Thus, it is interesting to note the Texas trend from granting sequestered voir dire in all felony cases to just those listed as capital felonies. Likewise, even though approximately 85% of the Texans currently support the death penalty,137 it’s hard to imagine that this level of support has ever been substantially lower in the past.

As for the Texas federal court system, the Fifth Circuit Court of Appeals ruled on the use of sequestered voir dire as it relates to constitutional due process grounds and the Sixth Amendment's guarantee to a fair trial and impartial jury in United States v. Davis.138 Davis involved an international raid in which the defendant's son and several other American prisoners were spirited away from a Mexican jail by armed persons who had crossed into Mexico from the United States.
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136. Tex. Code Crim. Proc. Ann. art. 35 § 17 (Vernon 1965). The Legislature, in adopting the 1965 Code of Criminal Procedure, sought to eliminate unnecessary differences between selection of juries in capital cases and non-capital cases retaining certain distinctions in capital cases where the state was seeking the death penalty. See Smith v. State, 455 S.W.2d 748 (Texas 1970).

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139. United States v. Davis, 583 F.2d 190 (5th Cir. 1978).
The defendants were charged with violating federal weapons laws as well as financing and assisting in the assault against a friendly foreign government. This case attracted extensive news coverage, and the defendants argued that the extent and nature of the publicity raised a significant possibility of prejudice to the jury selection process.

Though the defendants were convicted at the trial court level, their convictions were overturned on appeal because of the combination of extensive pretrial publicity and the trial court's failure to fully examine the defense claim for sequestered voir dire. The court reasoned that even though every case did not require an individual voir dire, if it was reviewed on appeal, the court would look at each set of facts on a case by case basis and that it

... is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant's case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an independent determination whether the jurors' impartiality was destroyed.140

Davis is the seminal case for both the Fifth141 and Eleventh Circuit142 Courts of Appeals and has withstood the test of constitutional challenge in so far as it rests upon a defendant's Sixth Amendment rights under the Constitution.

At this point it might be helpful to summarize and compare the Texas position with that of Florida.

In the Florida state courts, the defendant's right to an individual sequestered voir dire may be provided for in the Rules of Criminal Procedure,143 but it is totally discretionary with the judge and will not be set aside unless the defendant can prove an abuse of discretion.144 In the Texas state courts, by comparison, the defendant's right to an individual sequestered voir dire is guaranteed in capital felonies by state statute.145 state case law,146 and in some cases, in the trial judge's discretion.147 However, in the Fifth and Eleventh Circuit Courts of Appeal it is clear that, based upon a sufficient amount of pretrial publicity, and where the possibility of prejudice is great, it is the trial judge's responsibility to inquire specifically of each juror to determine whether their impartiality has been destroyed.148 General questions to the jurors will not be sufficient, and the facts will be reviewed on a case by case basis on the constitutional grounds of due process and the right of each defendant to a fair and impartial jury pursuant to the Sixth Amendment of the United States Constitution.149 Lastly, at least two of our United States Supreme Court Justices have expressed a willingness to address whether, and upon what showing, the Constitution requires trial judges to grant individual voir dire.150

V. Lockhart v. McCree and McClesky v. Kemp

The next area of analysis will discuss two of the United States Supreme Court's latest pronouncements regarding capital jury selection, including the structural and systematic problems inherent in the voir dire process.

Lockhart v. McCree

The social science studies reviewed by the California Supreme Court in the 1980 Hovey151 decision were neither shelved nor forgotten by the California science community. Instead, they were updated and made ready for the next acceptable death penalty case in which the studies could be seriously argued and reviewed by the courts. Such a case was found in the 1983 Arkansas case Grigsby v. Mabry,152 which eventually

140. Id. at 197.
145. TEXAS R. CRIM. P., art. 35 § 17 (Vernon 1965).
148. United States v. Davis, 583 F.2d 190 (5th Cir. 1978); Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985).
149. Jordan, 763 F.2d 1265.
150. Id.
151. Hovey v. Superior Court of Alameda County, 28 Cal. 3d, 1, 616 P.2d 1301 (1980).
The defendants were charged with violating federal weapons laws as well as financing and assisting in the assault against a friendly foreign government. This case attracted extensive news coverage, and the defendants argued that the extent and nature of the publicity raised a significant possibility of prejudice to the jury selection process.

Though the defendants were convicted at the trial court level, their convictions were overturned on appeal because of the combination of extensive pretrial publicity and the trial court’s failure to fully examine the defense claim for sequestered voir dire. The court reasoned that even though every case did not require an individual voir dire, if it was reviewed on appeal, the court would look at each set of facts on a case by case basis and that it

...is for the court, not the jurors themselves, to determine whether their impartiality has been destroyed by any prejudicial publicity they have been exposed to. Therefore, when there has been publicity that would possibly prejudice the defendant’s case if it reached the jurors, the court should first ask the jurors what information they have received. Then it should ask about the prejudicial effect and it should make an independent determination whether the juror’s impartiality was destroyed.144

*Davis* is the seminal case for both the Fifth144 and Eleventh Circuit144 Courts of Appeals and has withstood the test of constitutional challenge in so far as it rests upon a defendant’s Sixth Amendment rights under the Constitution.

At this point it might be helpful to summarize and compare the Texas position with that of Florida.

In the Florida state courts, the defendant’s right to an individual sequestered voir dire may be provided for in the Rules of Criminal Procedure,144 but it is totally discretionary with the judge and will not be set aside unless the defendant can prove an abuse of discretion.144 In the Texas state courts, by comparison, the defendant’s right to an individual sequestered voir dire is guaranteed in capital felonies by state statute.144 State case law,144 and in some cases, in the trial judge’s discretion.144 However, in the Fifth and Eleventh Circuit Courts of Appeal it is clear that, based upon a sufficient amount of pretrial publicity, and where the possibility of prejudice is great, it is the trial judge’s responsibility to inquire specifically of each juror to determine whether their impartiality has been destroyed.144 General questions to the jurors will not be sufficient, and the facts will be reviewed on a case by case basis on the constitutional grounds of due process and the right of each defendant to a fair and impartial jury pursuant to the Sixth Amendment of the United States Constitution.144 Lastly, at least two of our United States Supreme Court justices have expressed a willingness to address whether, and upon what showing, the Constitution requires trial judges to grant individual voir dire.144

V. *Lockhart v. McCree and McCleskey v. Kemp*

The next area of analysis will discuss two of the United States Supreme Court’s latest pronouncements regarding capital jury selection, including the structural and systemic problems inherent in the voir dire process.

*Lockhart v. McCree*

The social science studies reviewed by the California Supreme Court in the 1980 *Honey* decision were neither shelved nor forgotten by the social science community. Instead, they were updated and made ready for the next acceptable death penalty case in which the studies could be seriously argued and reviewed by the courts. Such a case was found in the 1983 Arkansas case *Grigsby v. Mabry*,144 which eventually

140. Id at 197.
143. Fla. R. Crim. P. 3.300 (g).
145. TEXAS R. CRIM. P., art. 35 § 17 (Vernon 1965).
148. United States v. Davis, 583 F.2d 190 (5th Cir. 1978); Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985).
149. Jordan, 763 F.2d 1265.
150. Id.
made it to the United States Supreme Court as Lockhart v. McCree and on conflict certiorari with Smith v. Balkom and Spinkellink v. Wainwright.

One of McCree's claims concerned the effects of voir dire questions on prospective jurors' attitudes toward the death penalty and he cited in support of his argument Haney's 1979 study on "The Biasing Effects of the Death-Qualification Process.

The federal district court accepted this claim and concluded that independently of the compositional effects of voir dire, and even in addition thereto, the voir dire process itself increased the likelihood that the jury which ultimately sat on the case would be more likely to convict than the same jury absent its exposure to the death-qualification process.

The district court additionally found that the sequestration of jurors would only enhance the process effects in the juror’s mind by allowing more time and attention to be spent focusing on the death penalty, and this would be especially true because, even without sequestration, death qualification could take days or weeks in a capital case.

In summarizing its position, the district court found that death qualification was comparable to saturaing the jury pool with pretrial publicity, which would be unconstitutional pursuant to Irvin v. Dowd.

The district court's proposed remedy was to have the court alone initially inquire of the prospective juror’s on their ability to be fair and impartial in accordance with the evidence and the court’s instructions on the law as presented at the trial. If none of the jurors responded negatively, then the court would further inquire of the jurors' attitudes about the death penalty. If the juror indicated some reason that he or she could not fairly and impartially try the issue of the defendant’s guilt, then the juror would be isolated or sequestered from the others and further inquiry made of the reasons. If the reason proved to be

153. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom, Lockhart v. McCree, 476 U.S. 162 (1986). James Grigsby, the habeas corpus petitioner with whose case McCree's had been consolidated, died prior to the district court's decision so his case became moot.


156. Lockhart, 476 U.S. at 145.


158. Id.

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156. Lockhart, 476 U.S. at 145.
158. Id.

scruples against the death penalty, then further death qualification would be permitted and the juror excused for cause if it was established that he or she was in fact a "nullifier". This procedure would also have partially prevented the improper use of death qualification information by the prosecution or the defense in deciding upon the use of peremptory challenges. The district court concluded that the only effective way for the state of Arkansas to handle the problem was to have a bifurcated trial with two juries, essentially one non death-qualified for guilt or innocence and one death qualified for the penalty stage. (The Arkansas Supreme Court found this to be impractical and the worst of all solutions.)

On appeal to the Eighth Circuit Court of Appeals, a majority of judges found the district judge's opinion to have substantial merit and agreed that the defendant's Sixth Amendment rights had been violated. The appeals court, however, did modify the lower court's decision by leaving it to the state to determine the procedure for an impartial jury in the guilt or innocence stage of the trial. The Eighth Circuit suggested several alternatives, including: selecting enough alternative jurors at the outset to replace "Witherspoon excludables" at the penalty stage; shifting the sentencing duty to the judge; or using an advisory jury at the penalty phase which need not be unanimous in its recommendation.

When this case reached the United States Supreme Court on conflict certiorari, Justice Rehnquist, writing for a six to three majority, reversed, finding that the removal (before the guilt phase of a capital trial) of prospective jurors whose opposition to the death penalty would impair or prevent the performance of their duties at the sentencing phase was not unconstitutional. The Court found most of the sociological studies to either have serious evidentiary flaws or to be only marginally relevant to the issues before the Court.

With regard to the Eighth Circuit's ruling that death qualification violated McCree's rights under the Sixth and Fourteenth Amendments to a jury selected from a representative cross section of the community, the Court ruled that it had never (1) invoked the fair cross section principle to invalidate the use of either for-cause or peremptory chal-
legees to prospective jurors, or (2) required petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. The majority reasoned that to extend the cross-section requirement to petit juries would be unworkable and unsound. Additionally, the Court pointed out that its prior jury representativeness case, whether based on the fair cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, had involved such groups as blacks, women and Mexican-Americans. Death qualification, unlike the wholesale exclusion of these three prior listed classes or groups, was carefully designed to serve the state's legitimate interest in obtaining a single jury that could properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.

The Court in McCree further stated that unlike blacks, women and Mexican-Americans, the "Witherspoon excludables" were singled out for exclusion in the capital cases on the basis of an attribute that was within the individual's control:

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who are not subject to removal are allowed to serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "Witherspoon excludable" includes only those who can and will conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness".

The Court, citing Spaziano v. Florida, concluded by observing that they were unwilling to say that there was any right way for a state to set up its capital-sentencing scheme, and that McCree's position would, in actuality, require the Court to adopt a position that the Constitution could require a certain mix of individual viewpoints on the jury. This would force the trial judges to undertake the Sisyphean task of "balancing" juries, making sure that each jury contained the proper number of Democrats and Republicans, young persons and old persons.

165. Id. at 147-48.
166. Id. at 149.
167. Id. at 149-50.

white-collar executives and blue-collar laborers, and so on, with the logical conclusion that this procedure could require the elimination of peremptory challenges. This, the Court was clearly not prepared to do.

Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

When all is said and done, there can be no doubt that from the majority's point of view, Lockhart v. McCree was intended to settle any lingering questions that legal scholars or social scientists had developed after Witherspoon. Indeed, the first sentence of Justice Rehnquist's opinion clearly addresses any misconceptions or delusions which may have arisen in the eighteen year interim.

Likewise, the majority did not let the social science studies, with their emphasis on empirical evidence, stand in the way of their reliance on the factual and legal issues specific to Arredia McCree. However, the majority was sufficiently impressed with the empirical trends demonstrated in the social science studies to assume for the purposes of their opinion that the studies were, "both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.

The result of this decision was to send a message to the social scientists once again, as had been previously done in Adams v. Texas, that the capital legal process is not an exact science and that the jury process inherently requires an exercise of judgment and discretion. Even Justice Marshall's dissent recognized the shortcoming in the data of the social science empirical studies and that, "Yet until a state permits two separate juries to deliberate on the same capital case and return simultaneous verdicts, defendants claiming prejudice from death

169. Id. at 155.
170. Id. at 147.
171. Id. at 154. Also see Adams v. Texas, 448 U.S. 38 (1980).
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It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of “Witherspoon excludables” includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, “death qualification” hardly can be said to create an “appearance of unfairness.”

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It is fair to say that the acceptance of Lockhart has been divided pretty much among philosophical and social science lines. If you wanted to get a clear and definitive reading from the Supreme Court, then you probably like Lockhart because of its first paragraph and particularly because of its 6 - 3 breakdown. If, however, you are more of the social science type and believe that it should be a valuable analytical tool for the "legal science", you may not be so happy.176 But, as one of the former justices would say, "And there you have it."

**McCleskey v. Kemp**

After the Lockhart decision was rendered in 1986, no one was too surprised by the court's decision in **McCleskey v. Kemp.**177 What was surprising, however, was the narrowness of the decision (5-4). In boxing parlance, Lockhart and McCleskey were the "one-two punch" to social science and the empirical studies' approach to the "science" of law.

In 1978, Warren McCleskey, a black man, was convicted in Atlanta, Georgia, of armed robbery and the murder of a white police officer. The jury recommended the penalty of death, and the court followed the jury's recommendation.

On appeal, McCleskey argued that his eighth and fourteenth amendment rights had been violated. He placed substantial reliance on a statistical study (the Baldus study)178 to demonstrate a disparity in the imposition of the death sentence in Georgia based on the murder victim's race, and to a lesser extent, the defendant's race. The empirical study evidence established that the capital sentencing rate for all white-victim cases was almost 11 times greater than the rate of black-victim cases — while blacks who killed whites were sentenced to death at nearly 22 times the rate of blacks who killed blacks, and more than 7 times the rate of whites who killed blacks.179

Justice Powell, writing for the majority, framed the issue: "This case presents the question whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that petitioner McCleskey's capital sentence is unconstitutional under the Eighth or Fourteenth Amendment."180 In deciding that McCleskey's rights had not been violated, the majority, as in Lockhart, made its ruling while assuming, for purposes of argument, that the statistical studies were valid.181

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173. Id. at 147.
176. Add to this category the following observations: "In dealing with this empirical question, the court engaged in an exercise of reductionism that evoked memories of the nursery rhyme, "Ten Little Indians". Instead of reducing the little Indian to one, the court reduced fifteen studies to none. White, The Death Penalty in the Eighties, 162 (1987).

180. Id. at 1761.
181. Id. at 1766, note 7. In addition to pulling their hair out (if applicable), the social science professors probably felt poignant and akin to Alice in Wonderland as she exclaimed that everything seemed to be getting "curiouser and curiouser!" Carroll.
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In response to McCleskey’s fourteenth amendment equal protection claim, the court found that in order to prevail, McCleskey had to prove that the decision makers in his case acted with discriminatory purpose. Since McCleskey was relying on Baldus’ empirical study, this was next to impossible since empirical studies are models which show the effect on the average; they do not depict the experience of a single individual. The court stated that the statistical proof must present a “stark” pattern to be accepted as the sole proof of discriminatory intent, and that “implementation of these laws necessarily requires discretionary judgments. Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion had been abused.”

In response to McCleskey’s eighth amendment claim of arbitrary and capricious application of the death penalty and its disproportional application as applied to him, the Court reviewed its prior decisions finding the death penalty to be an acceptable punishment for murder, and ruled that the Georgia statute provided the necessary “controlled discretion” through “objective standards so as to produce non-discriminatory application.” The Court reiterated that there could be no “perfect procedure for deciding which cases governmental authority should be used to impose death,” and that so long as safeguards were provided to make the criminal procedure as fair as possible, “we decline to assume that what is unexplained is invidious.”

The majority was concerned that an acceptance of McCleskey’s argument would throw into question the principles underlying the whole criminal justice system, not just those cases involving capital offenses.

[Other claims could apply with equally logical force to statistical disparities that correlate with the race or sex of other actors in the criminal justice system, such as defense attorneys or judges. A claim could — at least in theory — be based upon any arbitrary.

AILEE IN WONDERLAND, Chapter Two, Line One (1865).
183. Id. at 1760-61; see also White, supra, note 14.
185. Id. at 1769.
186. Id. at 1769-72.
187. Id. at 1772, referring to Gregg v. Georgia, 428 U.S. 153.
189. Id. at 1780.
190. Id.
191. Id. at 1790.
192. Bernstein, Supreme Court Review, Vol. 23, No. 9, TRIAL 99-100, September 1987: “This opinion is a national tragedy. It truly makes one wonder how far our nation has progressed since the Black Codes of the 1880’s.”
193. McCleskey v. Kemp, NEW YORK LAW JOURNAL, Wednesday, June 5, 1987: “. . . the Court simply dismissed the cumulative evidence of two centuries with the bland wave of a footnote.”
195. Florida has continued to follow the Lockhart majority in Adams v. Wainwright, 484 So. 2d 1211 (Fla. 1986); Funchess v. Wainwright, 486 So. 2d 592 (Fla. 1986); Middleton v. State, 495 So. 2d 748 (Fla. 1986); and Massey v. State, 12 Fla. L. Weekly 603 (Fla. 11 Dec. 1987), citing to Lockhart and Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986), cert. denied, 107 S. Ct. 291 (1986).
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VI. Remedial Measures To Insure a Fair Status Quo

So, what can we do to foster and continue a fundamental fairness and objective application of the law to all persons? Several principles are worthy of consideration. The first principle we must genuinely accept (as opposed to giving mere lip service) is that a death-qualified jury is a conviction-prone jury. This proposition has been argued for almost 30 years, and some empirical studies are sufficiently valid, and some state courts have already impliedly (if not openly) utilized such data in their decisions. Justice Marshall's proposal to scientifically prove the principle is not necessary if the empirical studies were sufficient for Bullw, they should be sufficient for Lockhart and McCleskey.

A second principle which the courts must acknowledge concerns the possibility of prosecutorial abuse of the death-qualification process. But this is not an accusation against the State—or its motives—but is a valid observation which requires the court (as well as the defense and prosecution) to remain ever vigilant to ensure that the criminal justice system is administered constitutionally and fairly to all citizens.

Thirdly, even though Florida's capital punishment scheme is less time consuming and less costly when compared to the states of Texas and California, the implementation of the death penalty process is still quite expensive and may in fact cost more than the implementation of life sentences without the possibility of parole.

Thus, any proposals to improve the current capital punishment models would need to include the salient factors discussed above. In so doing, the new model would appear something like this:

A. Modified Witherspoon qualification of jurors on guilt phase, and

B. Judge[s]-made decision on penalty phase.

It would still be necessary to death-qualify the jury in all capital cases in order to comply with Witherspoon and its progeny; however, the method would result in a distinct modification to jury composition. This is because the automatic-life-imprisonment group would not have to be excluded since they would not be participating in the penalty stage. Thus, a significantly large subset (consisting of 11% to 17%) of the formerly excludable jurors would now be capable of serving on the jury panel. In addition to the saving of time and cost during the voir dire process, the resulting panel would more clearly constitute a representative cross-section of the community as that term is interpreted in the sixth amendment.

The imposition of sentence or penalty by the judge alone, without a jury recommendation, is currently used by four states, and the United States Supreme Court "has never suggested that jury sentenc

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202. White, supra note 14 at 162: The automatic life imprisonment group are those who will never vote for the death penalty but could be fair in deciding the guilt or innocence of a defendant in a capital case, as compared to the "nullifiers", those whose opposition to the death penalty is so strong that it would prevent them from making an impartial determination about the defendant's guilt.


It must be posited that a true scientific analysis of every principle of law would eventually prove that no person is capable of sitting in judgment of another without there resulting ipso facto a degree of subjectiveness, discretion and prejudice. Obviously, it would not be advantageous for our society to come full circle and return to the original Law of Nature. For then, we would eventually be required to reinvent Mr. Locke and Mr. Hobbes — this is neither necessary nor desirable.

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A second principle which the courts must acknowledge concerns the possibility of prosecutorial abuse of the death-qualification process. This is not an accuser against the State—or its motives—but a valid observation which requires the court (as well as the defense and prosecution) to remain ever vigilant to ensure that the criminal justice system is administered constitutionally and fairly to all citizens.

Thirdly, even though Florida’s capital punishment scheme is less time consuming and less costly when compared to the states of Texas and California, the implementation of the death penalty process is still quite expensive and may in fact cost more than the implementation of life sentences without the possibility of parole.

Thus, any proposals to improve the current capital punishment models would need to include the salient factors discussed above. In so doing, the new model would appear something like this:

A. Modified Witherspoon qualification of jurors on guilt phase, and

B. Judge[s]-made decision on penalty phase.

It would still be necessary to death-qualify the jury in all capital cases in order to comply with Witherspoon and its progeny; however, the method would result in a distinct modification to jury composition. This is because the automatic-life-imprisonment group would not have to be excluded since they would not be participating in the penalty stage. Thus, a significantly large subset (consisting of 11% to 17%) of the formerly excludable jurors would now be capable of serving on the jury panel. In addition to the saving of time and cost during the voir dire process, the resulting panel would more clearly constitute a representative cross-section of the community as that term is interpreted in the sixth amendment.

The imposition of sentence or penalty by the judge alone, without a jury recommendation, is currently used by four states and the United States Supreme Court. “has never suggested that jury sentenc-

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202. White, supra note 14 at 162. The automatic life imprisonment group are those who will never vote for the death penalty but could be fair in deciding the guilt or innocence of a defendant in a capital case, as compared to the “nullifiers”, those whose opposition to the death penalty is so strong that it would prevent them from making an impartial determination about the defendant’s guilt.


As to the possibility of this subset falling to the prosecutor’s peremptory challenge rather than for cause, see Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH. L. REV. 1, 39 (1983).

ing [in a capital case] is constitutionally required."

Our proposed model could use either one judge or a panel of three judges to hear the mitigating and aggravating factors of the penalty phase. The advantages of using judge(s) at this stage are several.

First, judges are trained in the rules of law and proper trial procedure. Judges can more competently glean from the appellate opinions the requisite standards and definitions for reviewing aggravating factors (such as Florida’s “great risk of death to many persons.”), and they are more cognizant and appreciative of the defense arguments regarding proportionality.

Secondly, judges can represent the conscience of the community just as capably as twelve randomly selected individuals from the community who have been Witherspoon qualified and subject to arbitrary preemptory challenges. Judges are more representative of the middle class of America; and this result is similar, if not identical, to the final composition of the jury selected after the voir dire and striking process of prosecuting and defense attorneys. Additionally, having a judge fill this component would provide more stability and uniformity in sentencing patterns.

Thirdly, the use of a judge in the penalty stage of the proceedings would save time and resources because the attorneys could get straight to the point and not be required to educate a jury of “civilians” each time they went through the penalty process.

Granted, there are those judges who do not like to make such tough decisions without the advisory recommendation of a jury. This “sharing the responsibility or blame effect” may mollify some judges, but it has no legally significant place in the capital-sentencing phase any more than it does in the non-capital-sentencing phase.

Likewise, some defense counsel may claim that it is error to place the penalty phase in the hands of one or more judges because either the judges do not accurately represent the conscience of the community or the judges would be more inclined to impose the sentence of death over the sentence of life.

On the other hand, the prosecutor may not be in favor of the judges administering the penalty phase, not because of their lack of faith in the judge’s abilities, but instead, because prosecutors may not wish to have that 11% to 17% of “Witherspoon excludables” put back into the jury venire.

Clearly, neither the court, the prosecutors, nor the defense attorneys can have all of it their way. The two-jury system has been suggested as an answer to capital punishment excesses, but it must be soundly rejected as unduly burdensome and costly. The only practical model is the one suggested at the beginning of Section VI, a modified Witherspoon qualified jury at the guilt phase and a judge(s)-made decision at the penalty phase. If the defense suspects that the state might use death qualification as a means of getting a more favorable jury (although the suggested model would seem to discourage this practice), then the prosecutor might be required to make an ex parte showing to the trial court of sufficient aggravating factors which would warrant the imposition of the death penalty.

This model will adequately and effectively alleviate some of the concerns created by the Lockhart and McCleskey social science studies. It will reduce the time and expense required to select a jury and fairly prosecute any defendant charged with a capital offense. No system is perfect; there is always some give and take involved. Yet, as Benjamin Franklin stated to his fellow delegates in the late summer of 1787, “Thus I consent, Sir, to the Constitution because I expect no better, and because I am not sure that it is not the best.”

Clearly, there is an ongoing balancing of rights and responsibilities which a modern society incurs in order to protect its members from those individuals who act in a depraved and merciless manner. Even the psychoanalyst Freud, in Civilization and Its Discontents, argued that justice should be the first objective of civilization and that when a majority of people have joined together and substituted their collective will for that of any one individual’s, then “civilization” has been achieved.

However, to make justice work effectively, especially in the case of murder, we might observe along with Sir William Blackstone that

206. Skene, supra note 69, at 302.
208. Kusdion, supra note 174, at 295.
210. FREUD, CIVILIZATION AND ITS DISCONTENTS, 47 (1961): “One is irresistibly reminded of an incident in the French Chamber where capital punishment was being debated. A member had been passionately supporting its abolition and his speech was being received with tumultuous applause, when a voice from the hall cried out: ‘Oui, messieurs les assassins commences!’ — It’s the murderers who should make the first move!”
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It has been well observed, that it is of great importance, that the punishment should follow the crime as early as possible, that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible fight, than as the necessary consequence of transgression. 211

VII. Conclusion

This article has reviewed the historical background of the death qualification process in the United States, placing general emphasis on the decisions in Witherspoon v. Illinois, Lockhart v. McCree, and McCleskey v. Kemp. Our particular interest has been directed to the capital jury selection process of Florida and Texas.

The research has demonstrated that although the capital jury selection procedures of both states have been constitutionally validated by the United States Supreme Court, the procedures utilized by Florida take substantially less time and save the taxpayers of Florida significantly more money than the procedures utilized by Texas. The article proves that the differences in capital jury selection between the two states may result in a sociologically quantitative distinction without a legally qualitative difference.

Lastly, the article proposed some significant amendments to the Florida death qualification process in order to insure not only a constitutional but likewise a fair and equitable application of Florida’s death-penalty statute.

211. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 1765-1769, Book IV, Ch. 32, at 397.

Post-Dissolution Cohabitation of Alimony Recipients: A Legal Fact of Life

Evan J. Langbein*

In a November, 1983 article published in the Florida Bar Journal, I discussed the issue of continued alimony payments to a recipient cohabiting with a third party. The article concluded with an assessment that the issue “appears here to stay.”

A re-examination of legal developments since then persuades me to a more definite conclusion: unmarried cohabitations following a dissolution of marriage is a legal fact of life. Cohabitation is an amorphous legal and social phenomenon. It lacks the legal certainty and consequences of a remarriage, but often reflects an endurance and interpersonal commitment outlasting remarriage.

Because the concept of unwed cohabitation is nebulous, it is not surprising that court decisions dealing with the problem furnish no clear legal doctrines. Traditionally, courts have found less difficulty dealing with de jure remarriage of an alimony recipient. The almost automatic legal consequence is termination of alimony payments by the former spouse making payments. This is particularly true when the

* Evan J. Langbein is a member of The Florida Bar since 1973. He served as a law clerk to Judge Norman Hendry of the District Court of Appeals, Third District, 1973-75. He presently is a sole practitioner in Miami, Florida, emphasizing civil appellate and trial work. He is a graduate, with honors, of the University of Florida law school, a past Chairman of the Dade County Bar Association’s Appellate Court Committee, and a member of the American Bar Association, General Practice Section. Mr. Langbein is admitted to practice before the United States District Court, Southern District of Florida, the United States Eleventh Circuit Court of Appeals and the United States Supreme Court.

2. Id. at 658.

The court has certified its decision in Wright to the Florida Supreme Court as one of great public importance. The certified question is: