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I. INTRODUCTION

The issue of death-qualification of juries[1] in capital punishment cases remains both controversial and empirically rewarding. A 1984 issue of *Law and Human Behavior*[2] was largely devoted to this topic, and the issue has been much-debated right up until the present. In recent months, the execution of Robert Alton Harris in California, the first person to be executed in the state in over twenty-five years, has refocused attention on the issue of the death penalty.

The research in this area, and therefore the attendant controversy, may be divided into various thrusts. There have been vigorous debates over whether juries which exclude death penalty opponents are more or less likely to convict a criminal defendant[3] or whether death penalty oppo-

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1. "Death-qualified" juries are juries that "exclude people who are unwilling to impose the death penalty." Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 31 (1984).

2. *See* Claudia L. Cowan et al., *The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984); Fitzgerald & Ellsworth, *supra* note 1; Joseph B. Kadane, *After* Hovey: *A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115 (1984).

3. *See* Rogers Elliot & Robert J. Robinson, *Death Penalty Attitudes and the Ten-*

nents really "mean it" when they say they are against the death penalty.[4] However, one of the most fundamental questions, upon which this Article concentrates, concerns the differences in attitudes and values between "excludable" jurors, those who are opposed to the death penalty, and "death-qualified" jurors. Research has shown death-qualified jurors to be more concerned with crime control and less with due process than excludables[5] and more likely to assume that the defendant is guilty before hearing any evidence presented.[6] Further, death-qualified jurors are less likely to express regret over the prospect of a wrongful conviction.[7] In general, death-qualified jurors deviate from excludables in their attitudes concerning a variety of law enforcement issues.[8] The implication of this research is that a jury so constituted must surely include a degree of bias against the defendant which would be moderated by the inclusion of excludable jurors. Other research has emphasized how the orientation of the jurors toward the death penalty may bias the recall of the facts of the case[9] or their amenability to arguments in mitigation.[10]

The author's intention in this Article is to provide a look at a college population, in particular those participants who would, by the

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dency to Convict or Acquit, 15 LAW & HUM. BEHAV. 389, 402-03 (1991) (finding no correlation between the tendency to convict or acquit and juror position on the death penalty).

4. *See* Robert J. Robinson, *What Does "Unwilling" to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors*, 17 LAW & HUM. BEHAV. 471, 475 (1993) (Although potential jurors may be reluctant to impose the death penalty, most "appear to be willing to vote for the death penalty in certain instances.").

5. Fitzgerald & Ellsworth, *supra* note 1, at 46.

6. *See, e.g.*, Cowan et al., *supra* note 2, at 55-59; Fitzgerald & Ellsworth, *supra* note 1, at 46.

7. *See* Fitzgerald & Ellsworth, *supra* note 1, at 42-45.

8. Cowan et al., *supra* note 2, at 55, 75; *see* Fitzgerald & Ellsworth, *supra* note 1, at 47-48. *See generally* Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77 (1991) (refuting Professor Elliott's claim that excludables might bring unfair bias against the state to deliberations); Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116 (1983) (examining public opinion about the death penalty and concluding that public opinion is too uninformed to be useful to courts). The Ellsworth & Ross study supports the Vidmar & Ellsworth conclusion in their 1974 article. *See* Neil Vidmar & Phoebe C. Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974).

9. Cowan et al., *supra* note 2, at 76; *see* J.V. Roberts, *Public Opinion and Capital Punishment: The Effects of Attitudes Upon Memory*, 26 CAN. J. CRIMINOLOGY 283 (1984).

10. James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 275-79 (1988) (culling juries of those who oppose the death penalty prejudices the defendant's case because excludables are more likely to consider mitigating factors and less likely to consider aggravating ones).

Witherspoon[11] criteria, be classified as excludables (death penalty opponents), and those who would be classified as includables (those who would, as jurors, be willing under certain conditions, to impose the death penalty). The Article first describes the demographic breakdown of each group and then presents attitudinal data which again finds significant differences between these two groups with regard to questions of crime and punishment.[12]

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11. Witherspoon v. Illinois, 391 U.S. 510, 522-23 n.21, (1968). The *Witherspoon* test has two distinct elements. The state may exclude death penalty opponents in a death penalty case when one of the following is "unmistakably clear":

> (1) that [jurors] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or
> (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. (format altered).

Because the definition of excludables and includables has been extensively covered, it will suffice for the purposes of the Article to summarize that "excludables" are those participants who indicate that they are opposed to the death penalty in all cases and would obey the judge's instructions in the determination of guilt or innocence in a capital punishment case. In contrast, "includables" are defined as those who are in favor of the death penalty in certain cases and who also would follow the judge's instructions. *See* Cowan et al., *supra* note 2, at 62-63 (listing the *Witherspoon* qualifying questions used in this study).

The *Witherspoon* test itself has been modified somewhat by subsequent Supreme Court decisions. In *Adams v. Texas*, the Court eliminated the requirement that courts must determine that potential jurors will certainly and automatically vote against the death penalty. 448 U.S. 38, 45-47 (1980). Thus, the Court rejected the "automatically vote against" and "unmistakably clear" language of *Witherspoon*. *Id.* In *Wainwright v. Witt*, the Court affirmed its preference for the *Adams* test. 469 U.S. 412, 420-23 (1985). More recently, the Supreme Court has recognized that a defendant also has a right to challenge jurors for cause, based on the likelihood that jurors will automatically impose the death penalty on conviction. Morgan v. Illinois, 504 U.S. 719 (1992).

12. **A Note from the Author:**

The Article is written in the style favored by the American Psychological Association, and is part of a tradition of research commonly referred to as "Psychology and Law". This approach utilizes the tools and techniques of social science research to investigate the empirical "truth" of various legal positions and arguments. Much of this research has received attention in recent years for dealing with issues like eyewitness testimony, recovered memory syndrome, scientific jury selection, and, in this instance, the death penalty.

Part of this research paradigm involves the use of advanced statistical techniques, which analyze the quantitative data produced by such inquiries. It should be noted that the findings of the tests in this article are explained in everyday English, but the test results are also included for the statistically-minded. These tests are highly technical in

II. METHOD

The general method followed with all participants was the same. As part of their introductory psychology class requirement, students participated in an open "questionnaire day," where a number of experimenters submitted unrelated paper-and-pencil tasks in a pre-collated package. All participants received the basic *Witherspoon* questions early on in their package. When additional information was collected (as described below), it was included in a separate questionnaire in a different typeface toward the end of the package. The specific secondary questionnaires used and the data obtained from them is discussed below.

III. PARTICIPANTS

Participants were obtained from Stanford University and San Jose State University. All participants were recruited from introductory psychology classes and received class credit for their participation. Over four years, seven different questionnaire administrations were performed, yielding a total of 1829 participants.[13] The modal age of participants was eighteen.

IV. DEMOGRAPHIC BREAKDOWN

Based on the *Witherspoon* questions, 20.4% of the 1829 participants were categorized as excludables, and 74.3% were categorized as

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nature, and the reader who would like to know more about them should consult a textbook dealing with descriptive and inferential statistics. However, for the present purpose, there is an easy way to understand them: while the tests cited here (the *t*-test, the X^2 test, the Mann-Whitney), all perform different sorts of analyses, their results are all expressed the same way—as a probability that the result found is nothing more than random error (which is always present when a sample of people are polled). This probability statistic is expressed as *p*, which is always a fraction of 1.00 (which represents certain error). In social science research, results which are more than 5%—.05—likely to be in error, are generally not accepted as being reliably significant.

Thus, in this Article, the result $X^2(2)=14.41$, $p<.05$, indicates that a X^2 test was performed, resulting in a difference score of 14.41, which given the nature of data in this case, was less than 5% likely to be a false result (hence $p.05$). Sometimes exact *p*-values are available, as in the case a little further on in the article, where $t(58)=2.65$, $p=.01$. Here a *t*-test was performed, which yielded a difference value of 2.65, which in this case, was only 1% ($p=.01$) likely to be a false finding.

13. Of these, 652 were from Stanford, and the balance, 1177, were from San Jose State. Post-hoc analyses did not reveal any difference between the groups in terms of their attitude toward the death penalty, or any of the dependent measures described below. Thus, the distinction between the two schools is not mentioned hereinafter.

includables.[14] These proportions are entirely consistent with those reported by earlier authors.[15]

The demographics of the subjects were as follows: 47% of the sample was female, and 53% was male. Women were slightly more prone to be excludables (22.6%) than men (20.6%), but this difference did not prove significant, $X^2(1)=.86$, $p=.354$.

There were some noticeable differences in terms of ethnic identification. Among the sample, 48.5% categorized themselves as European in origin, 29.4% as Asian, 8.9% as Latino/Hispanic, 7.4% as African-American, 4.7% as Native American, and 1.1% as Middle Eastern. Excluding the Middle Eastern group, which was too small to analyze reliably, the following percentage of excludables was noted for each group, in ascending order: Native Americans 14.3%, Asians 16.0%, African-Americans 18.2%, Europeans 21.1%, and Latino/Hispanics 36.4%, $X^2(2)=14.41$, $p<.05$. There are two salient points about this result: the relatively low rate of excludables among Native Americans and Asians and the relatively high rate among Latino/Hispanics.

Information on religion was gathered from only 431 participants. The three largest groups, Catholics, Jews, and Protestants, did not show any significant differences among one another on the question of the death penalty, $X^2(2)=.875$, $p=.646$, although Catholics tended to produce more excludables (17.8%) than Protestants (13.6%). The Protestant group was not broken down into various denominations. Therefore, religious groups that oppose the death penalty, such as Jehovah's Witnesses and Quakers, were not distinguished from other Protestant groups.

Many socio-economic indicators were also gathered from participants, including age, present income, anticipated future income, family class (lower, middle, upper), and support for political party (Democrat/Republican). On none of these measures were there any significant or even interesting differences between the two groups. When asked to categorize their political orientation, however, excludables were more inclined to indicate that they thought of themselves as liberal (3.61 on a 7-point scale) than were includables (4.21), $t(105)=2.13$, $p<.05$. However,

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14. 2.5% were categorized as "nullifiers," individuals who would not follow the judge's instructions with regard to reaching a verdict due to their opposition to the death penalty, and 2.7% were categorized as "automatic death proponents" (ADPs), individuals who would not follow the judge's instructions due to their support for the death penalty. ADPs have been relatively under-researched and may include individuals who have misread the questions. *See* Kadane, *supra* note 2.

15. *See supra* notes 1-11 and accompanying text.

the most provocative differences between excludables and includables was in the area of attitudes.

V. ATTITUDINAL MEASURES

A. *Blackstone's Formula*

"The legal philosopher Blackstone[16] once said that it was better that 10 guilty people go free, than one innocent person be wrongfully imprisoned. Many people feel that in today's modern society, this ratio (10 guilty : 1 innocent) is out of date. What would you say an appropriate ratio should be, which would maximize social justice?" Participants then filled in the blank on a line which read: "I think an appropriate modern ratio to maximize social justice would be _____ guilty people going free for every one innocent person wrongfully imprisoned."

Both excludables and includables produced mean ratings greater than Blackstone's benchmark of 10. However, excludables produced a mean score (38.88) significantly higher than that of includables (25.20), $t(165)=2.20$, $p<.05$. Thus, excludables appeared to be more concerned with wrongfully convicting an innocent person than were includables.[17]

B. *The Purpose of the Criminal Justice System*

A sample of 395 participants was presented with commonly cited philosophical bases for a criminal justice system—rehabilitation, stigmatization, deterrence, restitution for victims, punishment, and incapacitation. The participants were asked to rank all six according to how important they thought each *should* be as the purpose of a criminal justice system.

The two groups, excludables and includables, produced differing orders of priority. For excludables, the most important goal was deterrence, followed by incapacitation, rehabilitation, punishment, restitution for victims, and stigmatization. For includables, the order was punishment, deterrence, incapacitation, rehabilitation, restitution for victims, and stigmatization. Analyzing the comparative ranking of each goal between the groups using the Mann-Whitney[18] procedure revealed that

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16. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 909 (Bernard C. Gavit ed., 1941).

17. Robinson, *supra* note 4, at 472. It is worth noting that the scores for nullifiers and ADPs reflected their respective positions. The mean for nullifiers was 42.02, and the mean for ADPs was 7.00.

18. Mann-Whitney statistical tests compare median scores of groups. Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Exper-*

includables ranked punishment significantly higher than did excludables, $p<.05$. Excludables, in turn, ranked rehabilitation significantly higher than did includables, $p<.05$.

C. *Acceptability of an Insanity Defense*

A subset of sixty participants was presented with the synopsis of a murder case which had recently attracted a great deal of local media attention. In one afternoon, the defendant had suddenly killed his wife, daughters, mother-in-law, sister-in-law, and a co-worker, and had fled to Mexico, from where he was later extradited. An insanity plea was entered. Participants were asked to indicate on a 7-point scale whether they believed that an insanity plea might be a justified defense for this particular defendant (1 = very justified, 7 = not at all justified). Excludables (4.13) were significantly more inclined to find an insanity defense plausible than were includables (5.38), $t(58)=2.65$, $p=.01$. This result supports the 1984 conclusions of Ellsworth, Bukaty, Cowan, and Thompson.[19]

VI. CONCLUSION

As indicated earlier, there were no differences in the present sample between excludables and includables in terms of age, socio-economic indicators, or political party support. There were slight tendencies for more women and Catholics to be excludables, but these were non-significant trends. Latino/Hispanic participants were far more likely to be excludables than were any other group, and Native Americans and Asians were least likely to be excludables. Excludable participants rated themselves as more liberal than did includables. Further, they were more concerned with wrongfully convicting an innocent person, more interested in deterrence and less interested in punishment, and they were more likely to accept an insanity defense than were includables.

In the present sample of California students, with the possible exception of Latinos/Hispanics, there is no evidence that excludables consti-

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imental Approach, 93 MICH. L. REV. 107, 122 n.67 (1994). Mann-Whitney tests "describe the likelihood that the difference between the median scores of two experimental groups is caused by random error." *Id. See generally* SIDNEY SIEGEL & N. JOHN CASTELLAN, JR., NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES (2d ed. 1988) (discussing nonparametric statistics).

19. *See* Ellsworth et al., *supra* note 2, at 89-92.

tute any kind of "cognizable" group in which the Supreme Court might take an interest. Excludables do, however, present as a group of individuals a liberal perspective, concerned with questions of fairness and justice — indeed, apparently far more concerned about issues such as the rights of the defendant than are their includable brethren. While the question of what "kind" of jury, with what beliefs and attitudes, should be allowed to decide guilt and innocence in a capital trial is best settled by philosophers, it is difficult to imagine that the rights of defendants are not in some way being compromised by the exclusion of this group of potential jurors from trials in which the death penalty is a possibility.