HIDDEN KILLERS AND IMAGINED SAINTS: WHY COURTS FAIL TO IDENTIFY UNCONSTITUTIONAL JURORS IN DEATH PENALTY CASES

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ABSTRACT

What if half of the people in the jury pool for a capital case are unqualified to sit—and the lawyers are not accurately identifying and removing them? And what if the lawyers are actually identifying the wrong people as unqualified and removing them instead?

This appears to be the case. The Constitution prohibits jurors who will always (or never) vote to impose the death penalty. As developed in this Article, the existing social science suggests that 5–30% of potential jurors may be automatic death penalty (ADP) voters and between 2–34% may be automatic life sentence (ALS) voters. Further, lawyers are not accurately identifying them. Researchers have surveyed jurors who sat in capital cases and found that a stunning 14–57% were ADP voters, while 2–7% were ALS voters. Meanwhile, qualified venirepersons are being tossed out. Researchers have found that 60–65% of those classified as ALS could vote for death in some circumstances, and at trial, this would result in the exclusion of life-leaning venirepersons. The high rate of improperly included ADP voters along with the high rate of improperly excluded life-leaning voters stacks the jury pool against the defendant. This unfair and unreliable process calls into question whether the death penalty is constitutional as applied.

What can we do about it? This Article draws on the social sciences to show that there are two likely sources for this inaccuracy. First, potential jurors make it through the selection process because lawyers ask questions that invoke social desirability bias. This means that the potential jurors answer in ways that will portray themselves in the best possible light, even if that answer does not reflect what they really feel. Next, the lawyers fail to define "capital murder" when questioning potential jurors. The lawyers do not specify that "capital murder," in most jurisdictions, is willful, deliberate, premeditated murder. Potential jurors who are ADP may be thinking, "Well, I

would vote for life if the defendant didn't mean to kill the victim; or the killing was an accident; or was in self-defense; or the defendant was adequately provoked; or the defendant was insane." They think they can vote for life in some circumstances—but under those circumstances, the defendant would not be death-eligible. This Article then provides suggestions for addressing these two sources of error.

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INTRODUCTION

The death penalty is being imposed in an arbitrary manner. Potential jurors who will always (or never) vote to impose the death penalty in a capital case are being included on juries because the

lawyers in capital cases are not properly conducting voir dire.[1] The inclusion of these jurors violates the Constitution because jurors must be able to consider the circumstances of the offense and the character and record of the accused when deciding whether life or death is the appropriate punishment.[2] This requirement prevents sentences from being imposed in an arbitrary manner and is a "constitutionally indispensable part of the process of inflicting the penalty of death."[3] If potential jurors are irrevocably predisposed to one sentence or the other once they know that the defendant has been convicted of capital murder, they will ignore the evidence and the resulting sentences will be unreliable.[4]

While that is a clear constitutional mandate, potential jurors (known as venirepersons) who do not satisfy that requirement are still sitting in judgment in death penalty cases.[5] Researchers surveyed jurors that sat in capital cases and found that among those sampled, 2–7% were automatic life sentence (ALS) voters and a stunning 14–57% were automatic death penalty (ADP) voters.[6] These jurors were "false negatives," meaning the lawyers did not identify them as disqualified during the voir dire process.[7] Improperly including ADP jurors (the hidden killers) violates the defendant's constitutional right to an impartial jury, and if the trial ends in a death sentence, that trial result will be unreliable and could lead to the ultimate miscarriage of justice.[8] Improperly including ALS jurors could frustrate the government's legitimate interest in exercising its executive powers if those ALS voters lead to the result of a life sentence.

But this is not the only problem. In addition to false negatives, there appears to be a serious problem with "false positives," where the lawyers identify venirepersons as disqualified when they are not.[9]

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1. *See infra* Part II (discussing problems with lawyers' methods of questioning).

2. *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

3. *Id.* at 304; *see also* Furman v. Georgia, 408 U.S. 238, 277, 295, 309 (1972).

4. *See* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1505 tbl.6 (1998).

5. *See id.*

6. *Id.*; *see also* Marla Sandys & Adam Trahan, *Life Qualification, Automatic Death Penalty Voter Status, and Juror Decision Making in Capital Cases*, 29 JUST. SYS. J. 385, 388 (2008); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 69 tbl.14 (2000).

7. *See infra* Part II.

8. *See* Morgan v. Illinois, 504 U.S. 719, 728–29 (1992).

9. *See infra* Section IV.B.

Researchers have found that 60–65% of subjects classified as ALS could vote for death in some circumstances and so were not ALS.[10] Improperly excluding these life-leaning venirepersons (the imagined saints) violates the defendant's constitutional rights to an impartial jury and renders any death sentence unreliable—had those venirepersons been included, the result may have been different. Further, researchers found that 27% of those classified as ADP could vote for life in some circumstances and so were not ADP.[11] Excluding them could frustrate the government's legitimate interests.

What is wrong with the voir dire process that allows this to happen? Prosecutors and defense counsel are failing to accurately identify disqualified venirepersons because they are not asking the right questions—ones that validly and reliably identify this status.[12] Or they are being improperly prevented from asking the right questions by judges and the judges are not themselves asking valid and reliable questions.[13] The purpose of this Article is to expose the two most significant problems that prevent lawyers from validly and reliably identifying unqualified venirepersons. The first problem is using questions that call for socially desirable responses and the second problem is asking questions without defining capital murder.[14] This Article then provides suggestions to improve the identification of unqualified venirepersons.[15]

Getting this right is critical. As will be developed in this Article, research has shown that 5–30% of those sampled were ADP and 2–34% were ALS.[16] The pool of venirepersons showing up at the courthouse is likely full of disqualified potential jurors—possibly up to half—and properly identifying them is a constitutionally indispensable part of a reliable death penalty process. Further, because the rate of false negatives for ADPs is much higher than that for ALSs (meaning many hidden killers may improperly sit on a panel while only one or two ALS voters might) and because the rates of false positives for ALS is much higher than for ADP (meaning several

10. *See infra* Section IV.B.
11. *See infra* Section IV.B.
12. *See infra* Part II.
13. *See, e.g.*, United States v. Tsarnaev, 968 F.3d 24, 45, 47–48 (1st Cir. 2020); State v. Smith, 159 P.3d 531, 540–41 (Ariz. 2007); Hojan v. State, 307 So.3d 618, 622–24 (Fla. 2020). While judges have discretion on how the questions are asked, the Constitution mandates inquiry into this disqualification, either by the judge or trial attorneys. *See* Fed. R. Crim. Proc. 24.
14. *See infra* Parts III, IV.
15. *See infra* Section VI.
16. *See infra* Table 3.

imagined saints will be wrongly excused while only a few death-leaning venirepersons will be), these errors serve to load the jury pool against the defendant. A system that fails to identify these venirepersons is not just unreliable, it is unconstitutional.

This Article starts by defining the test for disqualification. Lawyers (judges, prosecutors, and defense counsel) need to understand the test before they can ask questions that will identify venirepersons who fail it.[17] The Supreme Court has used two different sets of language to describe the disqualification test, one from *Witherspoon v. Illinois* (the venireperson 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) and one from *Wainwright v. Witt* (the venireperson's death views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath).[18] We will see that the substantive test has settled within the *Witherspoon* language: knowing that the defendant has been convicted of capital murder, the venireperson is irrevocably predisposed to one sentence or the other.[19]

After a quick stop to develop the concepts of validity and reliability, this Article unpacks the two primary problems in identifying venireperson disqualification: questions that suffer from social desirability bias, and questioning done without first defining capital murder. Questions that suffer from social desirability bias use language that calls on venirepersons to give socially desirable responses rather than responses that most accurately identify their underlying belief systems.[20] This bias appears to cause high rates of false negatives among ADP venirepersons, but does not affect ALS venirepersons the same way.[21] The other significant problem is the failure to define what capital murder is and is not.[22] This leads to high rates of false negatives for ADP venirepersons because they think they can vote for life in some circumstances—but under those circumstances, the defendant would not be death-eligible. This problem also leads to high rates of false positives for ALS among life-

17. Social scientists would say that we need to have a "clear idea of what [you] wish to measure." ROBERT F. DEVELLIS, SCALE DEVELOPMENT: THEORY AND APPLICATIONS 105 (4th ed. 2017).

18. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968); Wainwright v. Witt, 469 U.S. 412, 424 (1985).

19. *See infra* Section I.D.

20. *See infra* Part III.

21. *See infra* Part III.

22. *See infra* Part IV.

leaning venirepersons because they do not recognize that they *can* vote for death in some egregious circumstances. The Article concludes with suggestions for how lawyers can validly and reliably identify unqualified venirepersons.

I. THE TEST FOR VENIREPERSON DISQUALIFICATION

Voir dire questions need to be directed toward a basis for challenge, so our first step is to define the relevant test: when is a venireperson disqualified from serving on a capital case because of his or her views on the death penalty? Unfortunately, the Supreme Court's work here has not been consistent, and we need to apply some rigor to arrive at the test and to understand what it means.[23] During the development of the test, the Court was doing several things: defining the substantive test, setting a burden of proof for the trial judge, and determining how much deference an appellate court should give to the trial judge's application of that rule to a particular venireperson.[24] Our concern is the substantive test.

Presumably, venirepersons come to the courthouse with some macro-level public policy opinions and moral views about the death penalty. We assume that if they arrive with these macro-level opinions and views, they will be more predisposed for one penalty or the other when they are placed in a micro-level trial scenario. Some hold those views more strongly than others, and for some, those views may be so strong that they would frustrate the government's legitimate interest in exercising its executive powers or would violate the defendant's Sixth and Fourteenth Amendment rights to an impartial jury.[25] The legal problem is, how strong of a predisposition is too strong?

The Supreme Court started with a clear test: an irrevocable predisposition is too much.[26] If the predisposition is so strong that a venireperson would not be able to vote for death or life in any case of capital murder—as in, that disposition can never be reversed, no matter what evidence is introduced—then the venireperson is not

23. *See infra* Section I.A.–C.

24. *See* Wainwright v. Witt, 469 U.S. 412, 428 (1985) (providing that appellate courts are to apply a presumption of correctness to the lower courts' holdings); Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) (setting forth a substantive test for venireperson disqualification that sets the parameters for lower courts' decisions).

25. *See infra* Section I.D.

26. *See* 391 U.S. at 522 n.21.

qualified to sit.[27] But what about lower levels of predispositions? What about a venireperson who is strongly predisposed to one side or the other, but who might, in rare circumstances, be able to change his or her mind? Are they disqualified? What about *any* level of predisposition? Logically, if a venireperson has any predisposition before trial, then the juror is not impartial at the start of the trial—they are starting from a side and therefore partial. So how partial is impartial?

During the evolution of the test, the Court appeared to move the disqualifying level of predisposition to "substantial[] impairment."[28] But on close examination, we will see that the disqualification point has remained at an irrevocable predisposition, and the Supreme Court has come to recognize that, too.

A. The Starting Point

The genesis for the disqualification standard is *Witherspoon v. Illinois*.[29] In *Witherspoon*, the state statute allowed for causal challenges of a venireperson who had "conscientious scruples against capital punishment, or . . . is opposed to the same."[30] The state supreme court had interpreted this test liberally, allowing causal challenges for those who "might hesitate" to return a death verdict.[31] Using these rules, the prosecution in *Witherspoon* eliminated forty-seven of the venirepersons—nearly half of them.[32] Only five of those who were removed said that they would never vote for death under any circumstances.[33] Six others said they did not believe in the death penalty, but they were excused without determining whether they could still return a verdict of death.[34] Thirty-nine (including four of those six) expressed scruples against the death penalty and were also excused without determining whether they could still return a verdict of death.[35]

To the Court, it was "self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that

27. *See id.*
28. *See* Lockhart v. McCree, 476 U.S. 162, 164 (1986).
29. *See Witherspoon*, 391 U.S. at 522 n.21.
30. *See id.* at 512.
31. *See id.* at 512–13.
32. *See id.* at 513.
33. *See id*. at 514.
34. *See id.*
35. *See id.* at 514–15.

impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments."[36] The Court noted that a juror could be firmly committed to the abolition of the death penalty as a public policy matter and still vote for the death penalty in a particular case.[37] Because the state entrusts discretionary judgment on the life and death decision to jurors—both those who oppose the death penalty as public policy and those who support it—a jury purged of these citizens could no longer speak for the conscience of the community when choosing between life and death.[38] Using this process, the state unconstitutionally "produced a jury uncommonly willing to condemn a man to die."[39]

As a prospective test, the Court said that jurors must be able to consider both punishments and cannot be irrevocably committed to vote against the death penalty before the trial has begun.[40] Excludable jurors are those who "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."[41] The Court continued, "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion."[42] Based on this, the government could only exclude those who would automatically vote against life under all circumstances, but not anyone who was able to vote for the death penalty in some circumstances.[43] If these venirepersons were excluded, that would be constitutional error.[44] The Court did not directly address the application of the facts to these rules, but stated the state could have excluded the five venirepersons who said that they would not even consider returning a death penalty, but not those who said they could.[45]

Note, the source of this test was the jury impartiality requirement of the Sixth and Fourteenth Amendments.[46] But at least as it relates to

36. *Id*. at 518.
37. *See id*. at 514 n.7.
38. *See id.* at 519–20.
39. *Id.* at 521.
40. *See id.* at 520–21.
41. *Id*. at 522 n.21.
42. *Id.*
43. *See id.*
44. *See id.* at 522–23.
45. *See id.* at 520.
46. *See id.* at 518.

being partial against the death penalty, jurors who were partial but who could still consider death could not be excluded.[47] Some partiality was allowed and could not serve as a ground for a causal challenge.[48] If we think of the set of all possible capital defendants, if a subset of capital defendants exists—no matter how small—for whom the venireperson could vote for death, then the venireperson is qualified.

In addition to the substantive test, the Court gave a proof threshold for trial judges to use when determining whether that test was satisfied: a trial judge could not find that someone who said he or she had scruples against the death penalty would automatically vote against the death penalty unless the potential juror said so unambiguously, such that it was unmistakably clear that they would automatically vote for life.[49]

B. The Language Morphs

Twelve years later, in *Adams v. Texas*, the Court examined *Witherspoon*'s application to a Texas statute that was significantly different than the one analyzed in *Witherspoon*.[50] Under the Texas code, the death penalty was mandatory in certain situations.[51] First, the jury had to convict the defendant of a capital offense (killing of a law enforcement officer, felony murder, murder for remuneration, murder during an escape, or murder of a prison employee by prison inmate).[52] Second, the jury was required to make the following factual findings: whether the defendant's conduct was done deliberately and with the reasonable expectation that someone would die, whether there was a probability that the defendant would pose a future danger, and if provocation was raised during the trial, whether the defendant's response to that provocation was unreasonable.[53] The first factual finding essentially added a mental state (negligence or recklessness as to the result) to the capital offenses if one did not already exist, and the third allowed adequate provocation to mitigate capital murder down to noncapital murder.[54] Once the jury decided on those factors,

47. *See id.* at 522 n.21.
48. *See id.*
49. *See id.* at 515 n.9, 522 n.21.
50. *See generally* Adams v. Texas, 448 U.S. 38 (1980).
51. *See id.* at 40 n.1.
52. *See id.* at 40.
53. *See id.* at 40–41.
54. *See id.*

the jury's role was over.[55] If the jury had answered affirmatively, then death was mandatory; if not, then life was imposed.[56]

The Texas Code required venirepersons to be informed that the imposition of life or death was mandatory based on their factual findings, and a venireperson could be disqualified if, knowing that rule, that rule would affect his or her deliberations on the factual findings.[57] The prosecution's concern was that some people might vote "no" on a factual finding as a way to defeat the mandatory imposition of the death penalty.[58] In this case, the prosecution objected to several jurors who stated that the rule would affect their deliberations.[59] The resulting panel found the required factual findings did exist, which resulted in the mandatory imposition of death.[60]

The Court reviewed *Boulden v. Holman* and *Lockett v. Ohio*.[61] *Boulden* was very similar to *Witherspoon*, with venirepersons excused simply for saying they had a fixed opinion against the death penalty or did not believe in it.[62] In *Lockett*, the trial judge asked four venirepersons, is "your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"[63] They replied that they would not take the oath and were excused.[64] The *Lockett* Court found that that was not an error because the venirepersons made their positions unmistakably clear, satisfying *Witherspoon*'s evidentiary threshold.[65] From those cases, the *Adams* Court synthesized this rule: "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[66] New to the rule is "substantially impair;" however, nothing in *Boulden* or *Lockett* suggests this language or allows us to define it from the context.

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55. *See id.* at 41.
56. *See id.* at 40–41.
57. *See id.* at 42.
58. *See id.*
59. *See id.*
60. *See id.*
61. *See generally* Boulden v. Holman, 394 U.S. 478 (1969); Lockett v. Ohio, 438 U.S. 586 (1978).
62. *Boulden*, 394 U.S. at 482–83.
63. *Lockett*, 438 U.S. at 596.
64. *Id.*
65. *Id.*
66. Adams v. Texas, 448 U.S. 38, 45 (1980).

The Court said the state did have a legitimate interest in excluding jurors who were unable or unwilling to answer the factual questions impartially, where "partial" meant having conscious distortion or bias.[67] In this context, that meant those jurors who would answer "no" to a factual question because they knew that vote could be a proxy for voting for life. They would vote "no" for that reason and not because of the evidence presented. The state went further, arguing that *Witherspoon* stood for the simple proposition that these automatic life venirepersons were excludable, not that excluding venirepersons who fell short of that violated the Constitution.[68] The Court rejected that, stating that *Witherspoon* stood for the inverse—the state *cannot* exclude these *other* venirepersons.[69] This affirmed the *Witherspoon* rule that venirepersons are allowed to be partial (here, for life); however, they cannot be irrevocably predisposed.[70]

While the Court in *Adams* announced this new "substantially impaired" language, when it came to analyzing whether the state improperly excluded venirepersons, the Court applied language much more akin to "prevent" than whatever the Court meant by "substantially impair." The Court asked whether the excused jurors were so irrevocably opposed to the death penalty that they would ignore the law or violate their oaths.[71] In this case, the excused venirepersons did not say they would automatically vote for life.[72] All they said was that they might be "affected" by the knowledge that a death sentence might result from the trial, and the Court said that could just mean that they might take their roles more seriously because of the gravity of their decisions.[73] As in *Witherspoon*, the record did not reflect that these venirepersons could not return a death sentence, so the Court reversed.[74] The line between unqualified and qualified still appeared to be between those who would automatically vote for life and those who could vote for death in some circumstances.

Five years later, in *Wainwright v. Witt*, the Court addressed the difference between the *Witherspoon* language (automatic) and the *Adams* language (prevent or substantially impair).[75] In response to

67. *Id.* at 46.
68. *Id.* at 47.
69. *Id.* at 47–48.
70. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).
71. *See Adams*, 448 U.S. at 50–51.
72. *See id.* at 49–50.
73. *See id.*
74. *Id*.
75. Wainwright v. Witt, 469 U.S. 412, 424 (1985).

questions about whether she had beliefs about the death penalty that would interfere with her sitting as a juror, the challenged venireperson in *Witt* said, "I am afraid it would" and "I think so."[76] She was then excused (Witt's defense counsel did not object).[77] On appeal, Witt argued that these statements did not "unambiguously" or "with unmistakable clarity" manifest that she was an automatic life voter.[78] In reasoning that took up the bulk of the opinion, the Court rejected the high *Witherspoon* proof thresholds and also introduced a deferential standard of review for appellate courts to use when reviewing a trial judge's decision.[79]

Relevant here is the Court's discussion of the "automatic" language from the *Witherspoon* case.[80] The Court formally dispensed with this language and replaced it with the *Adams* "prevent or substantially impair" language, and some of the Court's reasoning does help define the "prevent or substantially impair" phrase.[81] In *Witt*, the Court noted that the *Witherspoon* language was rooted in the jurors' discretion to vote for life or death while *Adams* was rooted in a factual decision.[82] A test that said "'automatically' vote against death" was too narrow for these other schemes where the vote might not be for the final sentence.[83] If the venirepersons death penalty views prevented them from following some legal structure other than the final life or death vote, the state could still exclude them.[84] The Court also noted that the source of the right to an unbiased jury is the Sixth Amendment—not some capital punishment-specific reasoning derived from the Eighth Amendment.[85] However, that observation is generally unhelpful because *Witherspoon* was also grounded in the Sixth and Fourteenth Amendment's "impartiality" standard.

While making that point, the Court stated:

> [T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is

76. *Id.* at 416.
77. *See id*.
78. *Id.* at 443.
79. *See id.* at 417–19.
80. *Id.* at 424.
81. *Id.*
82. *Id.* at 421–22.
83. *Id.* at 422.
84. *See id.*
85. *See id.* at 423.

> entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.[86]

At first glance, the language "quite likely" seems to inform what level of predisposition is too much. However, that language just describes the *degree of confidence* that the venireperson is biased, not the *level of bias* held by the venireperson. Still unresolved is how biased is too biased.

If we look strictly at the word "biased," which the language above seems to suggest that we do, that would mean *no* predisposition is allowed—*any* predisposition toward a party means that a venireperson is biased. However, under *Witherspoon*, a venireperson could have a strong predisposition for one party, and provided that they could follow the state's laws, they could not be excluded.[87] Next, the *Witt* Court expressly endorsed that rule: "Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths."[88] That last phrase, "by not following their oaths" means that the venirepersons would not set aside their beliefs and consider the evidence—they would be automatic.[89] The Court continued, "*Witherspoon* simply held that the State's power to exclude did not extend beyond its interest in removing those particular jurors."[90] Automatic venirepersons can be removed, but not others with lower levels of predispositions.[91]

The *Witt* Court certainly changed the proof thresholds such that the venireperson's irrevocable predisposition does not have to be unambiguous or unmistakably clear—if the venireperson is "quite likely" irrevocably predisposed, the trial judge can sustain the challenge. The *Witt* Court certainly announced a new, deferential standard that appellate courts should use when reviewing the trial judges' decisions. But the substantive test from *Witherspoon* remains. The level of disqualification is irrevocably predisposed. The *Witt* Court did not equate "substantially impaired" with "substantially predisposed."

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86. *See id.*
87. *See id.* at 426.
88. *Id.* at 423.
89. *Id.*
90. *Id.*
91. *See id.*

C. The Return to Irrevocable Predisposition

A year later, the Court decided *Lockhart v. McCree*.[92] In *Lockhart*, the trial judge removed "those prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty."[93] These venirepersons were disqualified under both the *Witherspoon* and *Adams–Witt* language so their exclusion was not an issue.[94] Instead, McCree argued that once these venirepersons were removed, the resulting jury was slanted toward the government.[95] The Court rejected that argument, and some of that explanation informs our inquiry into the definition of "substantially impair[ed]."

The Court said that juries can and do have jurors of varying predispositions: "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."[96] The Court also cited cases from outside the capital context (which the *Witt* Court says is where we should look to define "impartial") that suggest that some level of partiality is acceptable.[97] For example, in *Irvin v. Dowd*, the Court said:

> [T]he mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is [in]sufficient to rebut the presumption of a prospective juror's impartiality . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.[98]

So, we know "impartial" does not mean "no predisposition." Some predisposition is allowed, and the Constitution only prohibits those predispositions that render the venireperson unable to consider the facts and apply the law.[99] Further, the *Lockhart* Court stated that strong predispositions are also allowed, provided the venireperson is not foreclosed:

> 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

92. *See generally* Lockhart v. McCree, 476 U.S. 162 (1986).
93. *Id.* at 166.
94. *See id.* at 167.
95. *See id.* at 177.
96. *See id.* at 177–78, 183–84.
97. *See id.* at 178.
98. 366 U.S. 717, 723 (1961).
99. *See Lockhart*, 476 U.S. at 178, 184.

> so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.[100]

Importantly, the *Lockhart* Court cited *Witherspoon*, *Adams*, and *Witt* when calibrating how partial is too partial.[101] Some predisposition is allowed. Even a strong predisposition is allowed if the venireperson remains receptive to the evidence and to voting contrary to that predisposition.[102] "Substantial impairment" does not appear to have value in terms of measuring how much is too much. Instead, "too much" still equals "automatic."[103] Following *Lockhart*, *Witt* appears to stand much more for the proof thresholds and deference to the trial judge than the substantive test.[104]

Two cases that followed closely behind *Witt* and *Lockhart* also suggest that the substantive test is still "automatic." In *Darden v. Wainwright*, the venireperson was asked, "[D]o you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"[105] The venireperson replied, "Yes, I have" and was excused without defense objection.[106] The Court cited *Witt*'s "prevent or substantially impair" language and noted that, "[t]he precise wording of the question asked of [the venireperson], and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstance recommend the death penalty."[107] The Court equated "prevent or substantially impair" with "unwilling under any circumstances," which is a reflection of the *Witherspoon* test.[108] Ultimately, the Court said that the trial court's ruling was entitled to deference (as in *Witt*, the defense counsel did not object at trial).[109]

Next, in *Gray v. Mississippi*, the venireperson said that she did not have conscientious scruples against the imposition of the death

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100. *Id.* at 175.
101. *See id.* at 182.
102. *See id.* at 183.
103. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985).
104. *Lockhart* appears to have gone even further on the proof thresholds, shifting the burden to the defense such that someone who says that they are firmly opposed to the death penalty now needs to make clear, probably on defense rehabilitation, that they can still vote for death. *See* 476 U.S. at 176.
105. 477 U.S. 168, 175–76 (1986).
106. *Id.* at 178.
107. *Id.* at 175, 178.
108. *Id.* at 177 n.3, 178.
109. *See id.* at 178.

penalty and that she thought she could vote for death, but the trial court still granted a government challenge for cause.[110] The Court looked to both *Witherspoon*'s "irrevocably committed to vote against the [death] penalty" language and *Adams–Witt* "prevent or substantially impair" language, and perhaps recognizing that "substantially impaired" does not have any meaning, stated that "[t]here is no need to delve again into the intricacies of that standard" when deciding that this venireperson was qualified.[111] The Court reinforced the language in *Lockhart* that says venirepersons with firm beliefs against the death penalty are still allowed to serve provided they are open to both penalties and reinforced the language from *Witherspoon* that the government's interest in excluding a venireperson ends with those who would not be able to vote for both.[112] While referencing *Adams* and *Witt*, the Court appeared to apply the *Witherspoon* irrevocably predisposed language.[113]

The last of the formative cases is *Morgan v. Illinois*.[114] All of the previous cases dealt with government challenges to life-leaning venirepersons. In *Morgan*, the Court applied those principles to defense challenges of death-leaning venirepersons who demonstrate that they will vote for death under all circumstances.[115] There, the trial court asked the venirepersons if they would automatically vote for life regardless of the facts and excused seventeen of them.[116] When the defense requested that the trial court ask whether jurors would automatically vote for death no matter what, the trial court refused.[117] Affirming a rule previously announced in dicta from *Ross v. Oklahoma*,[118] and citing *Adams* and *Witt* for the "prevent or substantially impair" language, the Court found that a juror who would automatically vote for death, like a juror who would automatically vote for life, is not impartial and must be removed.[119] The Court said:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence

110. 481 U.S. 648, 653 n.5, 655 (1987).
111. *See id.* at 657–59.
112. *See id.* at 658.
113. *See id.* at 658–59.
114. *See generally* 504 U.S. 719 (1992).
115. *See id.* at 724–25.
116. *See id.* at 722–23.
117. *See id.* at 723.
118. *See* Ross v. Oklahoma, 487 U.S. 81, 85, 92 (1988).
119. *Morgan*, 504 U.S. at 728–29.

> of either aggravating or mitigating circumstances is entirely irrelevant to such a juror.[120]

Certainly, automatic death penalty jurors are unqualified. Further, the *Morgan* Court appeared to recognize that the *Witherspoon* "automatic" language is the real standard: "[I]t is clear from *Witt* and *Adams*, the progeny of *Witherspoon*, that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."[121] The Court did not say when other death-leaning venirepersons might not be impartial, just that automatic venirepersons were not.[122] However, the Court's previous reasoning related to automatic life voters suggests that if the death-leaning venireperson could vote for life in some circumstances, they would be qualified.[123] If we think of the set of all possible capital murderers, if there exists a subset—no matter how small—of capital murderers for which the venireperson could vote for life, then the venireperson is qualified.

D. The Final Stages

Since *Morgan*, the landscape has changed such that the Court is now unlikely to directly address the substantive test again. In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) became law and included a deferential standard that federal courts must apply when reviewing writs of habeas corpus arising from state adjudications.[124] The AEDPA states that writs cannot be granted unless the state court's decision involved an unreasonable application of clearly established federal law or an unreasonable determination of the facts.[125] When combined with the deferential standard announced in *Witt* (a standard that applies to federal courts reviewing rulings by both federal and state trial judges), federal appellate courts will now rarely reach the substantive test or apply facts to that test; instead, appellate courts will uphold the trial court's decision to excuse a juror by applying the deferential standard of review.[126] The next two cases reflect this but do provide some context for the substantive test, and

120. *Id.* at 729.
121. *Id*. at 728.
122. *See id.* at 728–29.
123. *See id.*
124. *See generally* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.
125. *See* 28 U.S.C. 2254(d).
126. *See, e.g.*, Uttecht v. Brown, 551 U.S. 1, 20 (2007).

these cases appear to show that the Court has returned to where we started—irrevocable predisposition.

In *Uttecht v. Brown*, the trial court excused a venireperson who initially said that he could return a death sentence in severe situations and that there were circumstances in which the death penalty would be appropriate.[127] When pressed on what those situations could be, the venireperson could not come up with a scenario that fell within the parameters of the law.[128] The law in the state was that the defendant would never be released from parole, but the venireperson could only articulate scenarios where a convicted murderer was released from prison and killed again.[129] When the prosecution challenged the venireperson for cause, the defense counsel did not object.[130]

On several occasions, the Court short-handed the *Adams* and *Witt* test even further to "substantially impair[s]" by dropping "prevent[s]."[131] The Court never used the word "automatic," likely because this venireperson had given some statements that indicated that he was not automatic and could vote for death in some circumstances.[132] However, it appears the Court side stepped this by characterizing the voir dire such that it looked like this venireperson would only vote for death in situations that did not exist within the state's legal framework.[133] In this state's framework, under the Court's characterization of the voir dire, he was automatic. Ultimately, the Court did not address the application of the facts of the voir dire to the legal standard for exclusion; instead, it found that the excusal was not unreasonable by relying on the deferential standards for reviewing a trial judge's decision and state court decisions under the AEDPA.[134] The Court also included reasoning that hinted at waiver by the defense.[135]

This case does not advance the meaning of "substantial impairment" except for the following point.[136] In dicta, the Court

127. *See id.* at 14–15.
128. *See id.* at 15.
129. *See id.* at 14–15.
130. *See id.* at 15.
131. *Id.* at 7, 8, 9, 17, 18, 22 (2007). This includes a section where the Court summarized all the relevant law. *Id.* at 9.
132. *See id.* at 15.
133. The actual voir dire differs from the Court's characterization of it, and in the actual voir dire, the venireperson appeared to be able to vote for death in other situations. *See id.* at 33.
134. *See id.* at 9, 20.
135. *See id.* at 19.
136. *See id.* at 20.

stated, "the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment."[137] The record does not support the Court's characterization, though, as it appears that the venireperson may have been initially confused, but once that confusion was cleared up, he clearly stated that he could vote for the death penalty:

> Q: But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?
>
> A: I could consider it, yes.
>
> Q: Then could you impose it?
>
> A: I could if I was convinced that was the appropriate measure.[138]

The Court may have recognized that many critical readers would notice that under previous case law (particularly *Gray*), with these answers, this venireperson should not have been excused. So, the Court tried to characterize him as "considerabl[y] confus[ed]" and then tried to equate that with substantial impairment.[139] The first problem with this is that the voir dire does not support this characterization, as the dissent points out.[140] Once the venireperson understood the law, he clearly stated that he could still impose the death penalty.[141] Further, including "considerabl[y] confus[ed]" in the "substantially impaired" test is illogical.[142] The "substantially impaired" test is used to see if a venireperson's death penalty views would substantially impair his or her ability to follow the law.[143] It is not used to see if a venireperson has trouble understanding an unfamiliar set of rules. If the venireperson is confused, the judge is obligated to explain the law. If a venireperson has a cognitive problem such that he or she still cannot understand even after the judge has tried to help, that would be the basis of a different challenge for cause that is unrelated to death penalty views. Because the Court made that statement in dicta and because it is not well-reasoned, it does not seem

137. *Id.*
138. *Id.* at 33.
139. *Id.* at 20.
140. *See id.* at 36 (Stevens, J., dissenting).
141. *See id.*
142. *See id.* at 18, 20.
143. *See id.* at 9.

appropriate to include "considerable confusion" in the meaning of "substantially impaired."[144]

The last case is *White v. Wheeler*.[145] There, when the prosecution asked whether the venireperson could not, with absolute certainty, state whether he could realistically consider the death penalty, the venireperson stated, "I think that would be the most accurate way I could answer your question."[146] The trial judge excused the venireperson and that decision was upheld through the state courts but overturned via a writ of habeas corpus by a federal appellate court.[147] In a summary disposition, the Court reversed the lower federal appellate court, stating that it has misapplied the deferential standards of review found in the AEDPA and *Witt*.[148]

In this opinion, the Court seemed to recognize that the language in *Witherspoon* and *Witt* measure the same thing, as the Court refers to the substantive test as the "*Witherspoon–Witt*" test.[149] And, the Court indicated that the substantive test is an irrevocable predisposition. The Court stated, "[t]he juror's confirmation that he was 'not absolutely certain whether [he] could realistically consider' the death penalty was a reasonable basis for the trial judge to conclude that the juror was unable to give that penalty fair consideration."[150] The first part of that statement reflects the deference due to the trial judge. The second part reflects the test: *unable* to give a penalty fair consideration.[151] That is the same thing as an irrevocable predisposition and a reaffirmation of *Witherspoon* language. The Court referenced *Witt* divorced from *Witherspoon* when discussing the deference due to the trial judge, thereby suggesting that *Witt* now stands for the deference due to the trial judge.[152] The substantive rule is the *Witherspoon–Witt* irrevocable predisposition test.[153]

From this review, the test for when a venireperson is disqualified is this: their capital views cause them to be irrevocably predisposed to one penalty or the other.[154] The "substantially impaired" language

144. *See id.* at 18, 20.
145. *See generally* 577 U.S. 73 (2015).
146. *Id.* at 75.
147. *See id.* at 74.
148. *See id.*
149. *Id.* at 78.
150. *Id.* at 79.
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*

from *Witt* does not mean "substantially predisposed."[155] Rather, it means "irrevocably predisposed."[156] Further, "impartial" does not mean "having no predisposition;" rather, it means having a predisposition that can be overcome.[157] A venireperson can be predisposed—even strongly—toward one penalty or the other and he or she is still qualified if that predisposition can be reversed by the evidence.[158] From this, "partial" means an irreversible predisposition.[159] If the venireperson is disqualified under that test, then the trial court should grant a challenge for cause for the government (because it would frustrate its legitimate interest in exercising its executive powers) or for the defendant (because it would violate the Sixth and Fourteenth Amendments right to an impartial jury).[160]

E. An Irrevocable Predisposition—For Those Convicted of Capital Murder

Under this line of cases, an irrevocable predisposition is disqualifying at a particular procedural moment. The precise test is whether the venireperson, knowing that a defendant has been convicted of a capital offense, is irrevocably committed to voting for one penalty.[161] As the Court stated in Morgan, the disqualification is "the belief that death should be imposed *ipso facto* upon conviction of a capital offense."[162] The constitutional concern is that at the end of the guilt phase of the trial, if there was a conviction on the capital offense, these venirepersons would not be able to fulfill their roles in the penalty phase of trial.[163] They would not consider evidence in aggravation or mitigation, and would always (or never) vote for one penalty.[164] To validly identify disqualified venirepersons, voir dire needs to include this condition—for a defendant convicted of capital murder—as part of the questioning.

There are subsequent points of disqualification. One is whether the venireperson will automatically vote for one penalty for a

155. Wainwright v. Witt, 469 U.S. 412, 434 (1985).
156. *White*, 577 U.S. at 79.
157. *Id.* at 79–80.
158. *See id.*
159. *See id.*
160. *See id.*
161. *See id.* at 724, 726, 733–34, 735 n.9, 739.
162. Morgan v. Illinois, 504 U.S. 719, 728, 735 (1992).
163. *See id.* at 728–29.
164. *See id.* at 729.

defendant who has been convicted of a capital offense in the first phase *and* for whom an aggravating factor has been proven beyond a reasonable doubt in the second phase.[165] The argument is that *Morgan* makes clear that potential venirepersons must be able to consider mitigation evidence, and if a venireperson would automatically vote for death after a defendant has been convicted of a capital offense along with an aggravating factor, then the venireperson would not be able to further consider mitigating evidence as part of the state's sentencing scheme.[166] Presumably, some venirepersons who may have been able to vote for life in some limited circumstances might now automatically vote for death once this additional aggravating evidence was added to the mix. While *Morgan* does not say so explicitly, the natural extension of *Morgan* is that these venirepersons would be disqualified.[167]

There are other, related second-phase disqualifiers: venirepersons who might not automatically vote for death could still

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165. *See* John H. Blume et al., *Probing "Life Qualification" through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1223–24 (2001).

166. *See Morgan*, 504 U.S. at 737–38; Blume et al., *supra* note 165, at 1223–24.

167. *See* United States v. Johnson, 366 F. Supp. 2d 822, 837–40 (N.D. Iowa 2005). Some researchers have measured at this point. Haney and colleagues measured qualification at the first-degree murder point plus an additional special circumstance but did not define those terms. *See* Craig Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 623 (1994). They conducted a phone survey of 498 Californians statewide and asked a qualification question based on the *Witherspoon* language and another based on the *Witt* language, but did not report the exact language used. *See id.* at 623–24, 624–25 n.6. They reported that 2.6% of the subjects were ADP and 5.8% were ALS under the *Witherspoon* language, and 8.6% were ADP and 8.4% were ALS under the *Witt* language. *See id.* at 624.

Abstract questions related to case-categories (aggravating or mitigating) to see whether venirepersons would always or never vote for death in those categories are generally allowed, while questions related to specific facts in the case and how the venireperson would vote if he or she heard those facts are not. *See* United States v. McVeigh, 153 F.3d 1166, 1207–08 (10th Cir. 1998); *see also Johnson*, 366 F. Supp. 2d at 840, 844–45; United States v. Fell, 372 F. Supp. 2d 766, 770–71 (D. Vt. 2005). Some studies have measured qualification at this point, with case-specific facts. *See* Lisa L. Bell Holleran et al., *Juror Decision-Making in Death Penalty Sentencing when Presented with Defendant's History of Child Abuse or Neglect*, 34 BEHAV. SCIS. & L. 742 (2016); Lisa Bell Holleran & Tyler J. Vaughan, *Examining Jurors' Ability to Meet the Constitutional Requirement of Narrowing in Capital Sentencing*, 38 BEHAV. SCI. & L. 317 (2020); Crystal M. Beckham et al., *Jurors' Locus of Control and Defendants' Attractiveness in Death Penalty Sentencing*, 147 J. SOC. PSYCH. 285 (2007); Tyler J. Vaughan et al., *Applying Moral Foundations Theory to the Explanation of Capital Jurors' Sentencing Decisions*, 36 JUST. Q. 1176 (2019).

be impaired on certain mitigating factors;[168] venirepersons who might not automatically vote for death in all capital murder cases where an aggravating factor was proven, but would if *certain* aggravating factors were proven;[169] and venirepersons in states where the government carries second-phase burdens of persuasion who would shift those burdens over to the defense.[170] These subsequent points of disqualification that are derivative of the *Morgan* reasoning are important and lawyers should also investigate venireperson disqualification at these points.[171] For parsimony, the focus of the rest of this Article will be the initial objection: disqualification based on conviction of capital murder.

II. A QUICK NOTE ON VALIDITY AND RELIABILITY

With an understanding of the legal test for disqualification, lawyers need to ask questions that validly and reliably measure that disqualification. Validity "refers to measuring what we think we are measuring."[172] This means that questions need to measure the qualification status using the *Witherspoon–Witt* "irrevocably predisposed" or "automatic" test at the point of conviction of capital murder. The questions also need to be reliable, such that "applying the same procedure in the same way will always produce the same measure."[173] This means that the questions need to be "consistent in the sense that a subject will give the same response when asked again,"[174] or in the context of a panel of venirepersons, each venireperson with the same underlying belief system will answer the question in the same way.

Valid and reliable questions minimize common method variance, which is "variance that is attributable to the measurement method rather than to the construct of interest."[175] Within the body of research on capital case qualification, "a problem in estimating how many people in the general population believe in capital punishment

168. *See* Blume et al., *supra* note 165, at 1217–19.
169. *See id.* at 1224.
170. *See id.* at 1224–25, 1228.
171. *See* Morgan, 504 U.S. at 738–39.
172. *See* GARY KING ET AL., DESIGNING SOCIAL INQUIRY 25 (1994).
173. *Id.*
174. ALAN AGRESTI & BARBARA FINLAY, STATISTICAL METHODS FOR THE SOCIAL SCIENCES 11 (4th ed. 2009).
175. Philip M. Podsakoff et al., *Common Method Biases in Behavioral Research: A Critical Review of the Literature and Recommended Remedies*, 88 J. APPLIED PSYCH. 879 (2003).

is that responses will vary according to the way that the question is posed."[176] There are two main problems. The first is that many questions related to capital case qualification are susceptible to a form of response bias called social desirability bias.[177] This bias can lead venirepersons to answer in a way that does not reflect their true value, leading to high rates of false negatives.[178] Second, when asking questions related to capital case qualification, lawyers may not define "capital murder."[179] Because of this, we cannot have a high degree of confidence that what the lawyer thought she was measuring was the same as what the venireperson thought was being measured.[180] This problem can lead to high rates of false positives and false negatives.[181]

One last general comment. In research problems, subjects should not be the ones labeling themselves with the outcome variable of interest. Podsakoff and colleagues note that if a subject does label themselves, the subject is providing data for the predictor variables *and* the outcome variables:

> Some methods effects result from the fact that the respondent providing the measure of the predictor and criterion variable is the same person. This type of self-report bias may be said to result from any artifactual covariance between the predictor and criterion variable produced by the fact that the respondent providing the measure of these variables is the same.[182]

At trial, this would happen if the lawyer asked the venireperson, "Are you substantially impaired?" Rather, the lawyers should question the venireperson about circumstances where they would or would not impose the death penalty and then argue to the judge that the venireperson should be labeled as unqualified based on the venireperson's answers to those questions.[183] The judge should then formally apply the label.[184]

176. Stuart J. McKelvie, *Measuring Attitude Toward Capital Punishment and Right-Wing Authoritarianism: Psychometric Properties of Two Short Instruments*, *in* NEW DEVELOPMENTS IN PSYCHOLOGICAL TESTING 5, 6 (Robert A. DeGregorio ed., 2007).

177. *See infra* Part III.

178. *See infra* Part III.

179. *See infra* Part IV.

180. *See infra* Part IV.

181. *See infra* Section IV.B.

182. Podsakoff et al., *supra* note 175, at 881.

183. *See id.* at 883.

184. *See id.*

III. IDENTIFICATION PROBLEMS RELATED TO SOCIAL DESIRABILITY BIAS

Social desirability bias is a type of response bias where the "tendency of subjects to respond to test items in such a way as to present themselves in socially acceptable terms in order to gain the approval of others."[185] Professor Susan Fiske describes it thusly:

> Participants enter the research setting with motives not only to belong, understand, and control. They also have fundamental motives to protect the self and the images of the self that they present. In the social setting of the research context, participants want to come across well. They worry about *social desirability*, that is, complying with the norms for responses that reflect positively on self . . . Consequently, participants resist responding in ways that make them vulnerable to looking incompetent, unkind, dishonest, unfair, biased, and so on.[186]

This bias is pronounced when anonymity is compromised, when related to topics of high social sensitivity, and when the subjects anticipate that their responses will result in judgmental consequences.[187] Those factors are present during voir dire in a courtroom in a capital case, where the venireperson is face-to-face with the examiners, discussing a very charged issue (the death penalty), and where they may be rejected by people of high social standing and escorted out of the courtroom if they do not answer "correctly."

A. Problems Using the *Witt* Language

The language used by the *Witt* Court, if asked directly to the subject, is an example of a question that is susceptible to social desirability bias. If a researcher or lawyer uses that language or something like it ("Would you be substantially impaired such that you would not follow my instructions or the law? Would you be unable to be fair and impartial?"), the socially desirable response is, "Of course not. I am a fair and impartial person who can follow instructions." The other option is, "I am not a fair and impartial person, and I can't follow instructions"—and many people, when asked to label themselves, will not label themselves that way. The Supreme Court in *Morgan* noted

185. Maryon F. King & Gordon C. Bruner, *Social Desirability Bias: A Neglected Aspect of Validity Testing*, 17 PSYCH. & MKTG. 79, 81 (2000).

186. SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY 62 (4th ed. 2018) (emphasis in original).

187. *See* King *supra* note 185, at 94.

that venirepersons cannot be relied upon to give valid and reliable responses to these kinds of questions:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.[188]

Note the language that the *Morgan* Court said is suspect: "fair and impartial."[189] That is basically the *Witt* language.[190] That formulation of the legal test, if asked directly to a venireperson or research subject, calls for a socially desirable response, and because of that, researchers note that "the *Witt* standard is extremely subjective and unsatisfactory for controlled research."[191] We do not know if the question measures what we want it to measure or if the question will consistently measure all subjects with the same belief systems in the same way.[192] If two true-ADP subjects are given the same question, one may respond one way, and the other may respond another way.

To demonstrate the invalidity and unreliability of using the *Witt* language in the questions posed to venirepersons, we can look to studies that have given both the *Witt* language and neutral language to the subjects. If both questions are valid and reliable in measuring disqualification, we should see the same results when asked of the same people; however, we do not see the same results.[193] For example, Professors Ronald Dillehay and Marla Sandys conducted structured interviews of 148 people from a county in Kentucky who had previously served as jurors in a felony, noncapital case.[194] The subjects were asked whether they would always give death to someone

188. Morgan v. Illinois, 504 U.S. 719, 735 (1992).

189. *See id.* at 720.

190. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985).

191. Robert J. Robinson, *What Does "Unwilling" to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors*, 17 LAW & HUM. BEHAV. 471, 473 (1993).

192. *See generally id.* (noting the lack of conclusiveness on what the question actually measures).

193. The *Witherspoon* language, if posed directly to the subjects, is also susceptible to social desirability issues, discussed *infra*.

194. Ronald C. Dillehay & Marla R. Sandys, *Life Under* Wainwright v. Witt*: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147, 154 (1996).

convicted of first-degree, intentional murder.[195] Of the 147 subjects, forty-four (30%) responded, "yes," marking them as disqualified.[196] The subjects were also asked a question based on a modified version of the *Witt* language: "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?"[197] If the subjects asked the interviewers what that standard meant, the interviewer would say that meant that they could no longer be impartial, follow the instructions, or be fair to the defendant or the state.[198] Only 10.2% self-identified under this standard.[199] Looking next at the 89.8% who said that their death views would not seriously affect them, the researchers identified 28.2% as ADP.[200] This indicates a high rate of false negatives using the *Witt* language.[201]

Dillehay and Sandys suggest that that error could be due to social desirability bias: "[T]o admit that it would be impossible to be a juror because of one's attitudes may be felt to be failing the test of good citizenship."[202] In a later article, Sandys and colleagues commented on this study, saying:

> [O]nly two of the 44 jurors who indicated that they would always vote for death if they were convinced of the defendant's guilt, also indicated that their attitude toward the death penalty was so severe as to prevent or substantially impair their ability to perform the duties of a juror. Clearly, for the vast majority of these former jurors, always voting for death for a person who they were convinced was guilty was not something that they perceived as preventing or substantially impairing their ability to perform the duties of a juror. Thus, as a general standard, *Witt* fails woefully to determine who could and who could not perform the duties of a juror.[203]

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195. *See id.* at 155. The subjects were not asked if they would always give the life sentence.

196. *See id.* at 160.

197. *Id.* at 155. The researchers substituted "seriously affect" for "substantially impaired."

198. *See id.*

199. *Id.* at 156. This figure could include subjects who were ADP or ALS. The distribution between the two was not reported.

200. *Id.* at 159.

201. *See id.* The researchers reported that 3% of the 89.8% were ALS, 159, but it is not clear when the researchers asked the subjects about ALS status or what the distribution of ALS was in the total sample, as compared to ADP, which was reported as 30%.

202. *Id.* at 161.

203. Marla Sandys et al., *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 393, 409 (J. Acker et al. eds., 3d ed. 2014).

These jurors are likely responding in good faith, but unaware that they have views about the death penalty that prevent them from being fair. To them, this may be a simple logical problem like one plus one equals two: if you take a life, you forfeit your life.[204] The subject does not feel biased when doing other simple math problems, and so does not feel biased here either. Again, the venirepersons should not be asked to label themselves.[205]

For ADP subjects, the *Witt* language appears to induce social desirability bias and leads to high false negative rates. However, research suggests that ALS subjects may not have the same rates of false negatives when given an item that uses *Witt* language. Michael Neises and Ronald Dillehay surveyed 135 registered voters in Fayette County, Kentucky.[206] They did not report the language of their questions, but they appear to have asked the subjects an ADP question (if they would always vote to impose the death penalty for guilty capital murderers), to which 24.1% reported they would.[207] The researchers asked an ALS question (if they were "unwilling to impose the death penalty"), to which 12.7% reported they were.[208] They also asked a *Witt* question (if their "attitudes toward the death penalty were so strong that they would seriously affect their ability to perform their duties as a juror").[209]

Consistent with the Dillehay and Sandys findings, of those who reported as ADP under *Witherspoon* language, only 19% of them also reported under the *Witt* language.[210] This demonstrates a high rate of false negatives using the *Witt* language for ADP subjects.[211] However, of those who identified as ALS, 78% self-identified under the *Witt* language.[212] This demonstrates a much lower rate of false negatives than with the ADPs. Subjects who are ALS may recognize that they

204. *See* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 120 (2010).

205. Here, we are comparing *Witt* and neutral items to see how an ADP subject might recognize that they are an automatic death voter but not label themselves as substantially impaired. In the section dealing with definitional problems, *infra*, we will do similar analysis, but looking within a *Witherspoon* item to see how an ADP subject might not recognize that they are an automatic death penalty voter.

206. Michael L. Neises & Ronald C. Dillehay, *Death Qualification and Conviction Proneness:* Witt *and* Witherspoon *Compared*, 5 BEHAV. SCI. & L. 479, 483 (1987).

207. *Id.* at 485.

208. *Id*.

209. *Id.* at 483.

210. *See id.* at 493.

211. *See id.*

212. *See id.*

are taking a formal social position by refusing to vote for death in any circumstance, understand that they cannot be fair to the prosecution if they sit, so self-identify under *Witt* language. Subjects who are ADP, in contrast, are not taking a formal social position. They are taking what to them seems like a logical position (one plus one equals two),[213] feel that they can be fair and impartial when applying that logic, so do not self-identify under *Witt* language.

In a series of studies, Brooke Butler and colleagues reported similar effects but unlike the previous two studies, they did not report the distribution of ALS and ADP within those subjects who were excluded using the *Witt* language. In these studies, Butler and colleagues used this question for ALS ("The death penalty is never an appropriate punishment for the crime of first-degree murder"),[214] this question for ADP ("The only appropriate punishment for the crime of first-degree murder is the death penalty"),[215] and this question with *Witt*-language ("Felt so strongly about the death penalty (either for or against it) that their views would prevent or substantially impair the performance of their duties as a juror").[216] In addition, Professor Aaron Kivisto and Scott Swan reported similar effects. They did not report the item language they used to measure ADP, but indicated that they asked, "would always vote to impose the death penalty in every case if they were sure beyond a reasonable doubt that the defendant was guilty of first degree murder." [217] To measure ALS, they used a question that included some of the *Witt* language as well language that measured guilt-phase disqualification: "unwilling to vote to impose the death penalty in any case and/or would not be fair and impartial in deciding the question of guilt or innocence."[218] The distributions for

213. *See* Sundby, *supra* note 204, at 120.

214. Brooke Butler, *Moving beyond* Ford, Atkins, *and* Roper*: Jurors' Attitudes Toward the Execution of the Elderly and the Physically Disabled*, 16 Psych., Crime & L. 631, 637 (2010).

215. Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venipersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 179 (2002).

216. Butler, *supra* note 214, at 637.

217. Aaron J. Kivisto & Scott A. Swan, *Attitudes Toward the Insanity Defense in Capital Cases: (Im)partiality from* Witherspoon *to* Witt, 11 J. Forensic Psych. Prac. 311, 323 (2011).

218. *See id.* This item is compound or double-barreled. Compound items "convey two or more ideas so that an endorsement of these items might refer to either or both ideas," DEVELLIS, *supra* note 17, at 116. For an ALS subject, this feature probably does not affect the interpretation of the responses to this item as they relate to the penalty decision. It is unlikely that an ALS subject would think, "My anti-death penalty views are so strong that I would nullify on the guilt question, but then be open

all of these studies are presented in Table 1 with full citations in appendix 1.[219] If the *Witt* language was accurate and reliable, that figure should match the ALS plus the ADP numbers that were identified using the first two questions, and the figures do not match.[220]

Table 1. Comparison of responses to neutral and Witt *questions*

Author	Year	Sample type	ALS (%)	ADP (%)	*Witt* question (%)	(ALS + ADP) - *Witt*
Butler, Moran[221]	2002	Survey of 450 called for jury service in Miami, FL	13	17	20	10
Butler, Wasserman[222]	2006	Survey of 300 called for jury duty in Sarasota, FL	8	11	12	7
Butler, Moran[223]	2007	Survey of 212 called for jury duty in Bradenton, FL	8	23	25	10
Butler, Moran[224]	2007a	Survey of 200 called for jury duty in Bradenton, FL	7	18	20	5

to voting for death in the penalty phase." The compound feature of this item would make it difficult to interpret how many ALS subjects would be willing to vote for guilt but not willing to vote for death.

219. *See infra* Table 1.

220. It is difficult to have confidence that the distributions based on the *Witt* language that are reported in Table 1 accurately measure the true disqualification status in those samples. Those distributions likely undercount ADP subjects.

221. Butler & Moran, *supra* note 215, at 177, 180.

222. Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. APPLIED SOC. PSYCH. 1744, 1749, 1751 (2006).

223. Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57, 64–65 (2007).

224. Brooke Butler & Gary Moran, *The Role of Death Qualification and Need for Cognition in Venierpersons' Evaluations of Expert Scientific Testimony in Capital Trials*, 25 BEHAV. SCI. & L. 561, 564, 566 (2007).

Butler[225]	2007 b	Survey of 200 drawn from shopping malls, businesses, and driver's license bureaus in three counties in Florida	10	16	21	5
Butler[226]	2007c	Survey of 200 drawn from shopping malls, businesses, and driver's license bureaus in Sarasota, FL	10	21	23	8
Butler[227]	2010	Survey of 250 drawn from local businesses, driver's license bureaus, restaurants, and shopping malls in Desoto, Manatee, and Sarasota Counties, FL	8	14	17	5
Kivisto, Swan[228]	2011	Survey of 312 undergraduat e students	22	27	22	27

The *Witt* language appears to be undercounting, and the Neises and Dillehay study suggests that those false negatives are more likely to be ADP than ALS. This Article's review of the existing research supports the proposition that questions that use the *Witt* language have problems with social desirability bias and likely have a high rate of

225. Brooke Butler, *The Role of Death Qualification in Capital Trials Involving Juvenile Defendants*, 37 J. APPLIED SOC. PSYCH. 549, 553, 555–56 (2007).

226. Brooke Butler, *The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCH. 115, 117, 119 (2007).

227. Butler, *supra* note 214, at 636, 639–40.

228. Kivisto & Swann, *supra* note 217, at 317, 323.

false negatives, particularly among true-ADP subjects. Further, this review supports Robinson's and Dillehay and Sandys' assertion that questions based on the *Witt* language may be invalid and unreliable.[229] Questions on disqualification should not pose the *Witt* language directly to venirepersons.[230]

B. Problems Using the *Witherspoon* Language

After criticizing *Witt*-language items, one researcher remarked, "[t]he only satisfactory tool from the perspective of standardization and replication appears to remain the *Witherspoon* questions."[231] However, items that do not include the *Witt* language ("prevent or substantially impair" or "fair and impartial") but instead include the irreversible predisposition test (using "automatic" or "without regard to the evidence," for example) in questions asked directly to the venireperson can also be problematic.

For example, Professors Edith Greene and Brian Cahill surveyed 259 undergraduate students.[232] To measure ADP, they asked, "[i]f a defendant was found guilty of murder for which the law allowed a death sentence, I would sentence the defendant to death even if the case facts did not show that the defendant deserved a death sentence."[233] That item calls for a socially desirable response. Most people—even if they were ADP and think that in every capital murder case, the simple facts of capital murder show that the defendant should be executed—would not say that they would vote for death in a case even if the facts said not to. That would be admitting to being a sociopath. And the results they reported for this item reflect that bias: only one subject out of 259 (0.4%) answered yes to that item.[234]

To measure ALS, they used this item: "I have such strong doubts about the death penalty that I would be unable to find the defendant guilty and vote for a death sentence where the law allowed it, even if the facts of the case showed that the defendant was guilty and deserved

229. *See infra* Appendix 2 for additional studies related to *Witt* and *Witherspoon* items.

230. *See* Butler & Moran, *supra* note 224, at 562.

231. Robinson, *supra* note 191, at 473.

232. Edith Greene & Brian S. Cahill, *Effects of Neuroimaging Evidence on Mock Juror Decision Making*, 30 BEHAV. SCI. & L. 280, 286 (2012).

233. *Id.* at 288.

234. *Id.* at 289; *accord* Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113, 116 (2008) (using same question, surveyed 994 people from Nebraska, reported just 0.01% were ADP).

a death sentence."[235] Now, forty-three (17%) answered yes and so were ALS.[236] While ADP subjects would not label themselves as sociopaths (willing to execute someone even if the facts showed the person should not be executed), ALS subjects *were* willing to say that they would never vote to execute someone under any circumstance.[237] Taking that position is more socially acceptable and does not mark you as a sociopath. The difference in response rates is consistent with that.[238]

Even using the word "automatic" can be a problem. People who agree with that are also saying that they are closed-minded and not open to the evidence. Professor James Luginbuhl and Kathi Middendorf surveyed two cohorts, 325 people and 317 people called for jury duty in Wake County, North Carolina.[239] They asked the two cohorts questions based on the *Witherspoon* language (for first-degree murder, "would never consider the death penalty under any circumstances" and "would always impose the death penalty for first degree murder").[240] With the second cohort, they asked more questions. The first dealt with guilt-phase disqualification and include socially desirable language: "I would follow the judge's instructions and decide the question of guilt or innocence in a fair and impartial manner based on the evidence and the law" or "I would NOT be fair and impartial in deciding the question of guilt or innocence, knowing that if the person was convicted he might get the death penalty."[241]

They then asked penalty-phase questions, stating, "[i]n order to decide if you are qualified to be a juror in this case, the judge will ask

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235. *See* Greene & Cahill, *supra* note 232, at 288. This item is compound but that is unlikely to affect the measurement of ALS. *See* discussion *supra* note 218, at 323.

236. *See* Green & Cahill, *supra* note 232, at 289; *accord* Miller & R. Hayward, *supra* note 234, at 115–16 (using same question, surveyed 994 people from Nebraska, reported 15% were ALS); *see also* Natalie Gordon & Edie Greene, *Nature, Nurture, and Capital Punishment: How Evidence of a Genetic-Environment Interaction, Future Dangerousness, and Deliberation Affect Sentencing Decisions*, 36 BEHAV. SCI & L. 65, 73 (2018) (using same questions, surveyed 600 students and community members, did not report how many were ADP or ALS, just that there were 115 disqualified).

237. *See* Miller & Hayward, *supra* note 236, at 115–16.

238. *See generally id.* (stating only eleven out of 973 voted to apply the death penalty in all murder cases).

239. James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 267, 272 (1988).

240. *Id.* at 268. The results are reported in Table 4, *infra*.

241. *Id* at 272.

you if you will . . . consider both penalties, or if you would AUTOMATICALLY vote for the death penalty or against the death penalty in every case, no matter what the evidence."[242] Next, they gave the subjects these options. "I would NOT follow the judge's instructions, but would automatically vote for (or against) the death penalty in every case, no matter what the evidence is," or, "I would follow the judge's instructions, and would consider the evidence when I made my decision between the death penalty and life imprisonment."[243] These questions include socially desirable language related to following the judge's instructions, along with the "automatic" language.[244]

The results are consistent with other studies that we have reviewed. Of the 10% who identified as ADP under the *Witherspoon*-based language, only 13% of them self-identified under these other questions.[245] With the socially desirable language, the rate of false negatives for ADP subjects was very high.[246] However, of the 9% that identified as ALS under the *Witherspoon* language, 63% self-identified under these other questions.[247] The false negative rate for ALS subjects was again much lower.[248] The takeaway is that any socially desirable language can lead to invalid and unreliable results, even when that language is being used to operationalize the irreversible predisposition test.[249]

In sum, the social desirability problem is significant with questions based on the *Witt* language and exists even with questions that operationalize the *Witherspoon* language. And while using questions that call for socially desirable responses fails to identify both ADP and ALS venireperson, the failure rate is much higher with ADP venirepersons. Using these questions could potentially leave several hidden killers in the jury pool.

242. *Id.*
243. *Id.* at 273.
244. *See id.*
245. *Id.* at 274.
246. *See id.*
247. *Id.*
248. *See id.*
249. *See id.*

IV. IDENTIFICATION PROBLEMS CAUSED BY NOT DEFINING CAPITAL MURDER

Most lawyers do not define capital murder when they ask venirepersons about their death views. Likewise, almost no researchers have defined capital murder when asking subjects these questions.[250] Lawyers and researchers may say that the questions are related to "murder," "capital murder," or "first-degree murder," but most laypeople—indeed, many lawyers—do not know what those offenses are. Without defining capital murder, we do not know what type of homicide the venireperson had in mind when he or she answered the lawyer's questions. In research, without defining the type of homicide in the measurement, we do not know what type of homicide the subject had in mind when the subject answered the researcher's questions:

> [I]f venire members in capital cases knew what was in store for them, they might respond differently to voir dire questions on their ability to follow the law . . . [J]urors are not in a position to answer a question during voir dire on following the law when they do not know what the law may direct.[251]

A subject whose true disposition is to vote for death under all circumstances, when asked for her qualification status related to "murder" or "capital murder" or "first-degree murder," might say that she would vote for life in some circumstances.[252] But the subject may picture those circumstances as homicides that are not capital murder, and lawyers and researchers are not interested in whether a venireperson or subject is irreversibly predisposed in those situations. Lawyers and researchers are interested in whether a venireperson or

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250. Levinson et al. and Dillehay and Sandys used "intentional," but "intentional" murder alone generally is not capital. The intentional murder must also be deliberated and premediated. Two studies defined capital murder as "willful and premeditated," but as discussed *supra*, used a methodology that may have compromised that definition. Vaughan et al., *supra* note 167, at 1186; *accord* Holleran & Vaughan, *supra* note 167. Some researchers used "first-degree murder," but that does not help with the definition. That phrase varies among the jurisdictions that use it, and some states without the death penalty also use "first-degree murder." The phrase is used to grade the punishment of various types of murder, not to define the elements of murder.

251. *See* Dillehay & Sandys, *supra* note 194, at 149.

252. Adding the phrase "first-degree murder" does not help because "first-degree murder," if that phrase is used by a jurisdiction, varies by jurisdiction, where "first-degree" is used to grade the punishment of various types of murder. *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW: CASES AND MATERIALS 253–54 (8th ed. 2019). States without the death penalty also use "first-degree murder." *See, e.g.*, ALASKA STAT. ANN. § 11.41.100 (West 2021).

subject is irreversibly predisposed for someone convicted of capital murder.[253]

A. Properly Defining Capital Murder

Laypeople may think "murder" means the same thing as homicide, which is the killing of a person by another person. However, murder is a subset of homicide. Indeed, many forms of homicide are not "murder," and some are not even criminal, like accidental deaths not involving negligence (in many jurisdictions, even accidental deaths involving simple negligence are not criminal). Other nonmurder homicides are involuntary manslaughter, which includes accidental deaths caused by recklessness or gross negligence, and voluntary manslaughter, which includes homicides committed after adequate provocation, in the heat of passion, or under extreme mental or emotional disturbance.[254]

Once we exclude all of these other homicides and just focus on the category of "murder," we see that there are various types of murder: willful, deliberate, and premeditated murder; specific intent, purposeful, or knowing murder; felony murder; abandoned and malignant heart, depraved mind, or extreme indifference murder; and intending grievous bodily harm and death results murder.[255] But most of these are not *capital* murder—capital murder is a subset of murder, which is itself a subset of homicide.[256] Of all of these various forms of homicide, in most jurisdictions, only two qualify for the death penalty: willful, deliberate, and premeditated murder, and felony murder. Recognizing that what is capital murder varies among jurisdictions, the rest of this discussion will focus on premeditated murder.[257]

Having narrowed the set of homicides down to the small subset of capital murders, lawyers need to define *that* kind of murder for the

253. *See* Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, 34 CHAMPION 18, 18 (2018) (noting that the purpose is to remove pro-death jurors).

254. *See, e.g.*, GA. CODE ANN. § 16-5-3 (West 2021); GA. CODE ANN. § 16-5-2 (West 2021).

255. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 473–518 (8th ed. 2018).

256. *Compare Murder*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The killing of a human being with malice aforethought.") *and Homicide*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The killing of one person by another."), *with* KAN STAT. ANN. § 21-5401 (West 2021).

257. *See, e.g.*, TEX. PENAL CODE ANN. § 19.03 (West 2021); MISS. CODE ANN. § 97-3-19 (West 2021); ARK. CODE ANN. § 5-10-101 (West 2021).

venireperson. Willful, deliberate, and premeditated murder means the killer considered killing another person, thought about the consequences, all while having a calm mind—and then killed that other person.[258] For voir dire to validly measure death qualification, *that* crime needs to be defined.[259] If a venireperson receives a definition of *that* type of homicide, she may realize that for someone convicted of a willful, deliberate, premeditated murder, she would *always* vote for death.

In addition to defining what the crime is, lawyers need to define what the crime is not. For example, the killing was not accidental, or unintentional, or one done impulsively under the heat of passion or because the person was provoked. And the venireperson needs to be told that no defenses applied.[260] The venireperson needs to be told that the premeditated killing was not done in self-defense or defense of others, or while under duress, or while the defendant was so high or drunk that he could not form the required mental state, or while insane, and that the jury convicted the right person. If the jury heard any evidence of any of those defenses, the jury rejected it and said, beyond a reasonable doubt, this defendant committed premeditated murder.

Without that clarification, a venireperson whose true disposition is to vote for death for all premeditated murderers, when asked for her qualification status related to premeditated murder, might say that she would vote for life in some circumstances. But the venireperson may picture those circumstances as, when the defendant acted in self-defense, or was adequately provoked, or was insane—or some other circumstance where the defendant would not have been convicted or eligible for the death penalty. We care about a venireperson's views for a defendant who has been convicted of a capital offense. Without a thorough definition of what the crime is and is not, we do not know if the questions accurately measure the venireperson's true qualification status, we do not know if the same person asked months later would give the same answer, and we do not know if two venirepersons who have the same beliefs would answer the question the same way.

258. *See* DRESSLER, *supra* note 255, at 481–85.
259. *See* Dillehay & Sandys, *supra* note 194, at 149.
260. *See* Rubenstein, *supra* note 253, at 20–21.

B. False Positives and False Negatives

Failing to define "murder" can lead to false positives and false negatives, and these errors can create a resulting jury pool that significantly favors the prosecution. Professors Marla Sandys and Adam Trahan conducted a study to identify the error related to identifying an ADP venireperson that is associated with the use of a standard qualification question.[261] They interviewed 113 people who had already served on a capital case in Kentucky.[262] They asked, "[i]f you were sure, beyond a reasonable doubt, the defendant was guilty of a crime for which s/he could receive the death penalty, would you be able to consider a sentence of less than death?"[263] The results were that 21% said they could not, indicating that they were ADP.[264] To identify false positives (such that the question identified jurors as ADP when they were not) and false negatives (such that the question did not identify ADP jurors when they were), Sandys and Trahan evaluated the responses given by the subjects during lengthy interviews.[265] Based on those narratives, they classified the subjects as ADP or not-ADP.[266] For those jurors who they were confident that they could classify, 19.2% of those who were classified as not-ADP from the initial question were indeed ADP, indicating a high false negative rate.[267] For those jurors who they were confident that they could classify, they felt that 72.7% of those who identified as ADP were indeed ADP, while 27.3% could vote for life in some circumstances.[268] Those jurors were incorrectly classified as ADP and so were false positives.[269]

Sandys and Trahan further described two types of ADP venirepersons. The first is the "traditional ADP."[270] These venirepersons will unequivocally say that they would never consider voting for a sentence less than death and are aware and capable of articulating that belief.[271] These venirepersons are easy to identify

261. *See* Sandys & Trahan, *supra* note 6, at 387.
262. *See id.* The item did not further define "crime for which s/he could receive the death penalty." *Id.* at 388.
263. *See id.*
264. *See id.*
265. *See id.*
266. *See id.* at 387.
267. *Id.* at 389.
268. *Id.*
269. *See id.*
270. *See id.* at 389–90.
271. *Id.* at 390.

using the standard question and unlikely to be misidentified.[272] The second is the "latent ADP," meaning those who state that they could vote for life, but their narratives suggest otherwise.[273] Latent ADP jurors "maintain the self-perception that they would consider a sentence of less than death upon conviction" when they actually cannot.[274] One latent ADP, when asked, "[i]n making your punishment decision, did you find one specific feature that made you feel you knew what the punishment should be?" responded, "[t]he actual crime itself, you know what I mean, the actual crime, the murder. It was premeditated and it wasn't an act of self-defense or in temporary, I mean, temporary insanity."[275] Another said he might consider life if the crime had been committed in the heat of passion (not a capital offense); however, because it was premeditated (a capital offense), the defendant would deserve death.[276]

Sandys and Trahan note, "their conception of cases where a sentence of less than death would be appropriate is not one of death-eligible offenses. A capital offense is not one where the crime was committed in self-defense, in the heat of passion, or while the defendant was suffering from temporary insanity."[277] William Bowers and Wanda Foglia also describe this type of venireperson:

> [Their] position may more often be a matter of personal conviction grounded in the particulars of the specific kind of crime, and free of any conscientious objection to the alternative, a life sentence. Without having a clear understanding of what constitutes mitigation or even what the term means, and without any prior experience in making such a decision, ADPs may be unlikely to believe or say that they would not [be able to vote for life].[278]

Failing to properly define capital murder makes it difficult to identify latent ADPs, and Sandys and Trahan recommend extensive voir dire

272. *See id.* at 393.

273. *See id.* at 391–92.

274. *Id.* at 391. This analysis is similar to that associated with social desirability bias. There, an ADP subject might recognize that they will always vote for death in capital murder but will not label themselves as unfair and impartial using a *Witt*-language question. Here, using *Witherspoon* language, a traditional ADP will likely identify as automatic. A latent ADP, however, might not.

275. *Id.*

276. *Id.*

277. *Id.* at 393.

278. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 63 n.61 (2003).

of venirepersons to identify them: "[T]heir actual status as ADPs is revealed only through the process of careful examination."[279]

We can see the idea of traditional and latent ADPs reflected in a study conducted by Alexis Durham and colleagues that predates the Sandys and Trahan study. Durham and colleagues mailed surveys to residents of Tampa, Florida, that listed seventeen different homicide scenarios and asked the subjects to choose the punishment, one of which was the death penalty.[280] They used two versions of the scenarios: generally, one scenario had an additional aggravating or mitigating factor and one scenario did not.[281] Looking at the version of the scenarios that most clearly defines a particular offense or that does not include the aggravators or mitigators (and so more closely approximating the point of conviction of capital murder), we see that percentage of those who voted for the death penalty varied by type of offense.[282]

279. Sandys & Trahan, *supra* note 262, at 391.

280. *See* Alexis M. Durham et al., *Public Support for the Death Penalty: Beyond Gallup*, 13 JUST. Q. 705, 712 (1996).

281. *See id.*

282. *Id.* at 732–35.

Table 2. Homicide scenarios and percentage choosing the death penalty[283]

Type of homicide	Chose death penalty (%)	Study scenario
Willful, deliberate, premeditated	73.3 83.6	9 v.1 15 v.2
Felony murder (intentional killing)	70.8 66.9 89.9 87.8 81.4 71.4 66.3	1 v.1 5 v.2 7 v.1 8 v.2 11 v.1 12 v.2 13 v.2
Felony murder (unintentional killing)	50.6 55.0	4 v.2 10 v.2
Extreme recklessness (abandoned and malignant heart, depraved mind, implied malice)	73.2	17 v.2
Voluntary manslaughter (provocation, heat of passion, extreme mental or emotional disturbance)	41.8 39.2 29.4 24.4	2 v.1 3 v.2 14 v.1 16 v.1
Involuntary manslaughter	28.7	6 v.2

The traditional ADPs are likely those who voted for death even for voluntary manslaughter and involuntary manslaughter. For them, if you take a life—no matter the circumstances—you forfeit your life. Next, note that 73.3–83.6% of the subjects would vote for death for premeditated murder, but the rates are much lower for voluntary and involuntary manslaughter.[284] Some of those subjects who would vote for premeditated murder but not manslaughter may have been latent ADP. They may have been irrevocably predisposed to vote for death for premeditated murder (and so voted for death in that scenario) but would not be detected when the crime is not defined in the question. When they are asked if they would always vote for death in a "murder" case or whether they could vote for life in some circumstances, they may be thinking about voluntary or involuntary manslaughter. They may think, "I could vote for life under those circumstances;" and then mark "in some circumstances." Yet, they are still irrevocably predisposed where it matters: for a defendant convicted of capital murder. These are the hidden killers. Without properly defining the

283. *Id.* at 720 tbl.5, app. A at 732–33, app. B at 734–35.
284. *Id.*

capital crime in the question posed to those subjects, we would not know if we were accurately measuring their qualification status.[285]

Where Sandys and Trahan looked for the error with identifying ADPs, Michele Cox and Sarah Tanford looked for the error with identifying ALSs.[286] They surveyed 210 undergraduates using this question: for first-degree murder, "Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?"[287] The researchers then gave the subjects sixteen homicide scenarios, and of those classified as unqualified according to their response to the question, 65% were false positives in that they indicated that they could consider imposing the death penalty in at least one of those scenarios.[288] The results were consistent with the researchers' theory that the general nature of the qualification question is not adequate for classifying venirepersons.[289] Life-leaning venirepersons tend to inaccurately identify as ALS.[290] These are the imagined saints. At an abstract level, they think they would never vote for death, but when given concrete facts about particular murders, they can.

Professor Robert Robinson replicated Cox and Tanford, but used five vignettes and asked the subjects whether they would impose the death penalty rather than would they consider imposing the death penalty.[291] He surveyed 602 undergraduate students and asked them, "[i]s your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?"[292] Within the sample, 109 (18%) said they were ALS.[293]

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285. Also note that large percentages of subjects voted for death in offenses that are not generally capital (voluntary manslaughter, involuntary manslaughter, and extreme recklessness murder), which indicates that laypeople likely do not know what capital murder is and what it is not. They need the instrument to define "capital murder" for them.

286. *See generally* Michele Cox & Sarah Tanford, *An Alternative Method of Capital Jury Selection*, 13 LAW & HUM. BEHAV. 167 (1989).

287. *Id.* at 174, 175 (failing to further define first-degree murder).

288. *Id.* at 173, 176 (failing to check for false negatives).

289. *See id* at 171.

290. *See id.* at 177.

291. *See* Robinson, *supra* note 191, at 473–74.

292. *See id.* at 474 (failing to report the item language but noting the adoption of the item used by Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 81 LAW & HUM. BEHAV. 53, 62 (1984)).

293. *Id.* at 474–75.

However, when presented with the five homicide vignettes, 60.6% of these said they would impose death in at least one of the cases, which indicates that they were false positives and inaccurately identified as ALS.[294] He also looked for false negatives and only 1.1% of those who identified as includable did not impose death in at least one of the vignettes.[295]

For ALS subjects, detecting false positives requires two steps: a clear definition of capital murder, and additional, abstract information about potentially grave murders.[296] Detecting true ALS requires an exploration within the set of capital murders to see if there are *any* capital murders that that venireperson could sentence to death.[297] The second step could be accomplished by adding in one or more of the abstract statutory aggravators.

False negatives do not appear to be a problem with ALS subjects. This could be because, as Bowers and Foglia note, "[t]he [ALSs'] opposition to the death penalty may often be an unconditional matter of moral conscience, one that is self conscious and easy to detect."[298] True ALS venirepersons know that they will never vote for death under any circumstances and do not necessarily need a thorough definition of a crime. No matter how grave it is, they will not vote for death.[299] This is in contrast to true ADPs, who think they can vote for life because they envision less egregious circumstances, but those are situations where death cannot be imposed and so they need to be told that those are not the situations the court is interested in. While detecting true ALS requires two steps (definition of capital murder, then exploration of egregious circumstances), detecting ADP venirepersons only requires one step (the definition of capital murder).[300] These venirepersons will give the entire set of capital murderers the death penalty.[301]

294. *Id.* at 475.
295. *Id.* at 475.
296. *See* Sandys & Trahan, *supra* note 6, at 393.
297. *See* Robinson, *supra* note 191, at 475.
298. Bowers & Foglia, *supra* note 278, at 63 n.61.
299. This is similar to ALS self-identification even with the socially desirable *Witt*-language.
300. *See* Bowers & Foglia, *supra* note 278, at 63 n.61.
301. *See id.* at 58.

C. The Impact on the Jury Pool

At trial, the false positive and false negative errors could have significant consequences. We can conduct a thought experiment if we assume the studies above are accurate. First, out of 100 venirepersons, we can assume that twenty will self-identify as ADP (Trahan and Sandys found 21%).[302] Starting with false negatives, among ADPs, Sandys and Trahan found high rates of false negatives (19.2% of those who were included under the test were ADP), and that false negative rate is consistent with the discussion of the Durham and colleagues findings.[303] If 20% of the eighty who remained in the pool are false negatives for ADP (meaning, they are true-ADP), that leaves sixteen true-ADP venirepersons in the jury pool.

For ALS venirepersons, we can assume twenty will self-identify as ALS (Cox and Tanford found 18%). Robinson found that of those who did not self-identify, 1.1% were false negatives (Cox and Tanford did not look for these).[304] If 1% of the eighty that remain are false negatives, that leaves one ALS venireperson in the jury pool. Because true-ADP venirepersons tend to not accurately identify themselves, but true-ALS venirepersons almost always do, sixteen ADP venirepersons would be improperly kept in the pool, but only one ALS venireperson would. Finishing our thought experiment by constructing odds ratios, the odds are sixteen times higher that a true-ADP juror will improperly remain in the jury pool than a true-ALS juror. The pool ends up unfairly stacked against the defendant.

Turning to false positives, Sandys and Trahan found high rates of false positives for ADP (27.3% of those who were disqualified under the test were not ADP).[305] Using the same math, if twenty venirepersons self-identify as ADP and 30% of those are false positives, then six would be improperly excluded from the pool. Among ALSs, Cox and Tanford found 65% were false positives, and Robinson found 60.6% were false positives.[306] Again, assume that out of 100 venireperson, twenty self-identify as ALS. If 60% of these are false positives, then twelve potential life voters would be improperly excluded from the pool. Again, this loads the pool against the defendant. Twelve life-leaning venirepersons were improperly

302. *See* Sandys & Trahan, *supra* note 6, at 388.
303. *Id.*
304. Robinson, *supra* note 191, at 475.
305. *See* Sandys & Trahan, *supra* note 6, at 389.
306. *See* Cox & Tanford, *supra* note 286, at 176; Robinson, *supra* note 191, at 475.

excused while only six death-leaning venirepersons were, for an odds ratio of two to one.

Failing to properly define capital murder could leave large numbers of ADP venirepersons in the pool (the hidden killers) while possibly leaving only one ALS venireperson in the pool. And failing to properly define capital murder could exclude large numbers of qualified life-leaning venirepersons (the imagined saints) while also excluding a smaller number of death-leaning venirepersons. That process is highly inaccurate and unacceptable.

V. RETURNING TO THE SCOPE OF THE PROBLEM

As discussed, using questions that call for a socially desirable response can lead to high rates of false negatives among ADP venirepersons.[307] This means many ADP venirepersons will remain in the pool and may ultimately be selected for service. Further, failing to define capital murder can lead to high rates of false negatives and false positives among death-leaning venirepersons, and importantly, high rates of false positives among life-leaning venirepersons.[308] This means many life-leaning venirepersons who are qualified will be improperly excused.[309] Accurately identifying ADP and ALS venirepersons is critical particularly when research suggests that up to half of the members of the jury pool are ADP or ALS and should be disqualified. While we still do not know the distribution in the general population of ADP and ALS voters, we can get a broad sense by looking at the distributions reported in studies that have not used the problematic *Witt* language. I report these studies in Table 3.[310]

307. *See supra* Section III.B.
308. *See supra* Section IV.C.
309. *See supra* Section IV.C.
310. *See infra* Table 3.

*Table 3. Percentages of ALS and ADP for non-*Witt *language items*

Author	Year	Sample type	Question	ALS (%)	ADP (%)
Acker et al.[311]	1999	Survey of 180 eligible for jury duty in county in New York	Asked what sentence was usually most appropriate (death, LWOP, or life) for someone convicted of first-degree murder; if they indicated LWOP or life, asked if they would always vote for that choice or whether they could consider other punishments	34	
			Same; if they indicated death, asked if they would always vote for that choice or whether they could consider other punishments		16
Butler, Moran[312]	2002	Survey of 450 called for jury service in Miami, FL	The death penalty is never an appropriate punishment for the crime of first-degree murder	13	
			The only appropriate punishment for		17

311. James Acker et al., *The Empire State Strikes Back: Examining Death- and Life-Qualification of Jurors and Sentencing Alternatives Under New York's Capital-Punishment Law*, 10 CRIM. JUST. POL'Y REV. 49, 57, 59, 60, 68 (1999).

312. Butler & Moran, *supra* note 215, at 180.

			the crime of first-degree murder is the death penalty		
Butler, Wasserman[313]	2006	Survey of 300 called for jury duty in Sarasota, FL	The death penalty is never an appropriate punishment for the crime of first-degree murder	8	
			The only appropriate punishment for the crime of first-degree murder is the death penalty		11
Butler, Moran[314]	2007	Survey of 212 called for jury duty in Bradenton, FL	The death penalty is never an appropriate punishment for the crime of first-degree murder	8	
			The only appropriate punishment for the crime of first-degree murder is the death penalty		23
Butler[315]	2007a	Survey of 200 called for jury duty in Bradenton, FL	The death penalty is never an appropriate punishment for the crime of first-degree murder	7	
			The only appropriate		18

313. Butler & Wasserman, *supra* note 222, at 1751.

314. Butler & Moran, *supra* note 223, at 61–65.

315. Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendant's Right to Due Process*, 25 BEHAV. SCI. & L. 857, 859–60, 862 (2007).

			punishment for the crime of first-degree murder is the death penalty		
Butler[316]	2007b	Survey of 200 drawn from shopping malls, businesses, and driver's license bureaus in three counties in Florida	The death penalty is never an appropriate punishment for the crime of first-degree murder	10	
			The only appropriate punishment for the crime of first-degree murder is the death penalty		16
Butler[317]	2007c	Survey of 200 drawn from shopping malls, businesses, and driver's license bureaus in Sarasota, FL	The death penalty is never an appropriate punishment for the crime of first-degree murder	10	
			The only appropriate punishment for the crime of first-degree murder is the death penalty		21
Butler[318]	2010	Survey of 250 drawn from local businesses, driver's license bureaus, restaurants, and shopping malls in Desoto, Manatee, and	The death penalty is never an appropriate punishment for the crime of first-degree murder	8	
			The only appropriate punishment for		14

316. Butler, *supra* note 225, at 553–56.
317. Butler, *supra* note 226, at 555.
318. Butler, *supra* note 214, at 639.

		Sarasota Counties, FL	the crime of first-degree murder is the death penalty		
Cox, Tanford[319]	1989	Survey of 210 undergraduate students	[For first-degree murder,] Is your attitude toward the death penalty such that as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?	9.5	
Dillehay, Sandys[320]	1996	Structured interviews of 147 from a county in Kentucky who had previously served as a capital juror	Exact question not provided, but indicated that they asked, whether they would always give death to someone convicted of "first-degree, intentional murder"		30
Fitzgerald, Ellsworth[321]	1984	Survey of 811 eligible jurors in Alameda County, CA	[For first-degree murder,] "[i]s your attitude toward the death penalty such that as a juror you would never be willing to	21	

319. Cox & Tanford, *supra* note 286, at 174–75.

320. Dillehay & Sandys, *supra* note 194, at 155.

321. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 40–41, 49 (1984).

			impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases?"		
Garvey[322]	2000	Structured interviews of 185 people who had served on capital cases in South Carolina between 1988 and 1997	"For convicted murderers, do you now feel that the death penalty is an unacceptable punishment?"	2	
			"For convicted murderers, do you now feel that the death penalty is the only acceptable punishment?"		14
Greene, Cahill[323]	2012	Survey of 259 undergraduate students	"I have such strong doubts about the death penalty that I would be unable to find the defendant guilty and vote for a death sentence where the law allowed it [an earlier item said convicted of murder], even if the facts of the case showed that the defendant was guilty and deserved a death sentence."	17	

322. Garvey, *supra* note 6, at 69.
323. Greene & Cahill, *supra* note 232, at 287–88.

Kivisto, Swan[324]	2011	Survey of 312 undergraduate students	Exact question not provided, but indicated that they asked, "Unwilling to impose the death penalty" in any case [later item likely included for defendant guilty of first-degree murder]	20	
			Exact question not provided, but indicated that they asked, Would always vote to impose the death penalty in every case if they were sure beyond a reasonable doubt that the defendant was guilty of first-degree murder		27
Levinson et al.[325]	2014	Survey of 445 jury-eligible citizens in six death penalty states	[For intentional murder,] would you automatically vote for a life sentence without the possibility of parole	11	
			[For intentional murder,] would you automatically vote for the death penalty		12

324. Kivisto & Swan, *supra* note 217, at 318.

325. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 553, 554, 554 n.203 (2014).

Luginbuhl, Middendorf[326]	1988	Survey of 325 and 317 called for jury duty in Wake County, NC	Would never consider the death penalty under any circumstances [for first-degree murder]	10, 10	
			Would always impose the death penalty for first degree murder		10, 10
Myers et al.[327]	2013	Survey of 180 undergraduate students	Exact question not provided, but reported "individuals who indicated an unwillingness to impose the death penalty under any circumstances"	23	
Miller, Hayward[328]	2008	Survey of 994 people from Nebraska	I have such strong doubts about the death penalty that I would be unable to find the defendant guilty and vote for a death sentence where the law allowed it [an earlier item said convicted of murder], even if the facts of the case showed that the defendant was guilty and deserved a death sentence.	15	

326. Luginbuhl & Middendorf, *supra* note 239, at 269, 274.

327. Bryan Myers et al., *Victim Impact Statements and Crime Heinousness: A Test of the Saturation Hypothesis*, 19 PSYCH., CRIME & L. 129, 133 (2013).

328. Miller & Hayward, *supra* note 234, at 116.

Neises, Dillehay[329]	1987	Survey of 135 registered voters in Fayette County, KY	Exact question not provided, but indicated that they asked, unwilling to vote to impose the death penalty for guilty capital murderers	12.7	
			Exact question not provided, but indicated that they asked, would always vote to impose the death penalty for guilty capital murderers		24.1
Stevenson et al.[330]	2010	Survey of 402 called for jury service in Cook County, IL.	Would always vote for the death penalty if the defendant were found guilty of a murder for which the law allowed the jury to impose a death sentence		5

329. Neises & Dillehay, *supra* note 206, at 485.

330. Margaret C. Stevenson et al., *Jurors' Discussions of a Defendant's History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations*, 16 PSYCH., PUB. POL'Y & L. 1, 10–11, 11 n.1 (2010).

West et al.[331]	2017	National survey of 457 people using Mechanical Turk	Asked, "What is your attitude toward the death penalty?" with response option, "have such strong doubts about the death penalty that they would be unable to find the defendant guilty and vote for a death sentence where the law allowed it"	16	
Worthen et al.[332]	2014	Survey of 775 undergraduate students	Are you in favor of the death penalty for persons convicted of murder? Never under any circumstances.	15	
			Are you in favor of the death penalty for persons convicted of murder? Always under any circumstances.		17

331. Matthew P. West et al., *The Legal and Methodological Implications of Death Qualification Operationalization*, 13 APPLIED PSYCH. CRIM. JUST. 18, 22–24 (2017).

332. Meredith G. F. Worthen et al., *Expanding the Spectrum of Attitudes Toward the Death Penalty: How Nondichotomous Response Options Affect Our Understandings of Death Penalty Attitudes*, 39 CRIM. JUST. REV. 160, 160 165–68 (2014).

Within those samples, somewhere between 5-30% of subjects were ADP and between 2-23% were ALS.[333] One study used a heavily Democratic sample and it reported that 34% were ALS. Importantly, none of these studies fully defined capital murder (only two partially defined it as "intentional") and some included socially desirable language in the question items, so these studies may have significant rates of false positives with the ALS subjects and high rates of false positives and false negatives with the ADP subjects.[334] The true-ALS distribution was likely lower than that reported, and the true-ADP distribution may have been higher.[335] (These studies did not use sampling techniques that allow for an inference that the general population has the distribution reported within that sample).[336]

VI. NEEDED IMPROVEMENTS

When a judge looks out over the jury pool, upwards of half of the people sitting in the chairs may be unqualified to sit on a capital jury. That should alarm trial judges, prosecutors, and defense counsel. Those venirepersons would frustrate the government's legitimate interests, violate the defendant's constitutional rights, and lead to unreliable verdicts. Properly identifying and removing those venirepersons is critical, and the lawyers in the courtroom should expect that many venirepersons need to be excused. So what should judges, prosecutors, and defense counsel do to identify these unqualified venirepersons?

A. Ask Questions That Address the Test

As developed in Section II, the constitutional test is whether the venireperson's views on the death penalty make them irrevocably predisposed to vote for a particular sentence for a defendant convicted

333. *Supra* Table 3; *see infra* Appendix 2. One study reported 2% for ADP, but asked, "What is your attitude toward the death penalty?" with an option for "would always vote for the death penalty." West et al., *supra* note 331, at 22, 24. However, the researchers did not appear to let the subjects know that the question was in relation to a murder, which calls into question the validity of the results. *See id.* at 22.

334. *See infra* Part IV.B.

335. Almost all of these studies used Likert scales, which can have validity and reliability issues that lead to undercounts of ADP voters and overcounts of ALS voters. *See infra* note 364 and accompanying text.

336. Only one of those studies used a sample that could allow for an inference to the general population (West et al.), and that study used a question to measure ADP subjects that appears to have serious validity and reliability problems.

of capital murder.[337] The test is not, what are their views on the death penalty.[338] Knowing whether someone is for or against the death penalty does not tell a lawyer whether that person is ADP or ALS.[339] Someone can support the death penalty and not always impose it, and someone can be opposed to the death penalty in the abstract and still be willing to apply it in specific situations.[340] Indeed, many people who are opposed to the death penalty on a moral or public policy level are still able to vote for it when the evidence of a gruesome murder comes in at trial.[341] Recent Gallup polling suggests that about 43% of the American public opposes the death penalty as a policy matter, but as has been developed in this Article, the rate of ALS voters is likely much lower than that. [342]

Support of or opposition to the death penalty may be a predictor variable for the predisposition to vote for the death penalty in a particular case, where that predisposition is the outcome variable, but those are two different constructs, as "[g]eneral questions about punishment tend to elicit very punitive responses characterizing the public's general fear of crime and dissatisfaction with the criminal justice system, rather than carefully thought-out punishment preferences appropriate for specific situations."[343] And while support or opposition may be related to the predisposition to vote for a particular sentence in a particular case, the relationship is not perfect:

> During the death penalty voir dire, jurors are often asked general and abstract questions about their death penalty attitudes (e.g., "Do you oppose, for any reason, the imposition of the death penalty?"). Those jurors who state they are unwilling to consider the imposition of the death penalty might reconsider their position if they were alternatively questioned in a more concrete, specific manner. Research on political issues has revealed that people respond to concrete and abstract versions of given attitude objects differently, sometimes even to the opposite extremes of an evaluative dimension.[344]

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337. *See infra* Part II.

338. *See infra* Part II.

339. *See* Bowers & Foglia, *supra* note 278, at 61 n.57.

340. *See id.*

341. *See id.*

342. *See* Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP (Nov. 19, 2020), https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx [https://perma.cc/9J76-DV37].

343. Joseph E. Jacoby & Francis T. Cullen, *The Structure of Punishment Norms: Applying the Rossi-Berk Model*, 89 J. CRIME & CRIMINOLOGY 245, 251 (1999).

344. Cox & Tanford, *supra* note 286, at 171.

To measure predispositions for particular cases, lawyers need to ask questions that will reveal those predispositions: "[M]any of the jurors who actually serve on these cases are not questioned in open court about each of the qualification standards."[345] And they need to ask precise questions that validly and reliably measure that predisposition: "[r]ather than asking abstractly about capital punishment as a sanction, [one should ask] them to indicate what they believe to be the appropriate punishment for the offenders."[346] Asking questions related to why a person supports or opposes the death penalty may provide clues about the venireperson's predisposition, but lawyers still need to ask directly about the predisposition. That is what matters.

B. Avoid Social Desirability Bias

At trial, the conditions that induce socially desirable responses are at their peak.[347] While venirepersons may not be identified by name, they sit in person in front of the trial participants.[348] The topic is highly sensitive. If they answer "incorrectly," they are rejected by trial participants, who are people of high social standing.[349] To address these conditions, lawyers should tell the venirepersons that there are no right or wrong answers, that they will not be judged on their answers, and that they will be treated with dignity and respect no matter what answer they give.

Venirepersons should not be asked the standard in an abstract way such that they are labeling themselves: lawyers should not use language like "substantially impaired," "can you follow the judge's instructions," "fair and impartial," "automatic," or "will not consider the evidence." Two sets of researchers (Garvey, and Vaughan and colleagues), when trying to identify ADP subjects, asked subjects if death was the "appropriate" punishment, and that may be the best way

345. Marla Sandys et al., *supra* note 203, at 418; *see also* Blume et al., *supra* note 165, at 1255.

346. Alexis M. Durham et al., *supra* note 280, at 710.

347. *See* Podsakoff, *supra* note 175, at 887 (finding that "social desirability biases result from the tendency of some people to respond in a socially acceptable manner, even if their true feelings are different from their responses").

348. *See generally*, *Justice 101*, OFFICES OF THE UNITED STATES ATTORNEYS, https://www.justice.gov/usao/justice-101/trial [https://perma.cc/TEJ8-VMFK] (last visited Feb. 28, 2022).

349. *See* Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 134 (1987).

to phrase the disqualification standard: "[f]or you, for that defendant, is death the only appropriate punishment?"[350]

Professor John Blume and colleagues offer several other suggestions for addressing this bias.[351] These include conducting individual rather than group questioning to reduce the social pressure that produces the bias,[352] not having the judge (the person with the highest social standing) ask questions but instead having properly trained attorneys do it,[353] and using questionnaires to gather information because of the increased anonymity and reduced social pressure associated with that method.[354] Two of these suggestions require additional comments.

Judges must be very careful when asking venirepersons questions because judges have the greatest social standing of anyone in the room.[355] Indeed, research has shown that potential jurors are twice as likely to alter their responses when the judge asks the questions versus when the attorneys ask, and that is likely because of the increased social stature held by the judge.[356] In addition to this, venirepersons may think they have a legal obligation to reply in a certain way to comply with the judge's orders:

> Members of a venire are summoned by the court to serve on the jury; to give personal reasons for not doing so may seem not to follow the court's orders or not to assent to what is requested of them. In fact, in the courtroom this feeling seems at times to be reinforced by attorneys and by the court.[357]

In particular, if an attorney has identified an ALS or ADP venireperson, the judge should not try to rehabilitate that venireperson or walk them back from their responses by asking questions that call for a socially desirable answer.[358] These would be questions like, "Could you set aside what you just said and follow my instructions?" We know from the discussion above that ADP venirepersons will

350. *See* Garvey, *supra* note 6, at 27–29, 69 tbl.14; Vaughan et al, *supra* note 167, at 1186.

351. *See* Blume et al., *supra* note 165, at 1248.

352. *See id.* at 1248–49.

353. *See id.* at 1248, 1253, 1261 (suggesting that "the willingness of a court to permit probing voir dire means nothing if [the attorney] does not know how to conduct it").

354. *See id.* at 1254 (finding that "[j]urors are willing to admit unfavorable opinions in written responses to questionnaires that they would hesitate to reveal out loud in the courtroom").

355. *See* Jones, *supra* note 349, at 134.

356. *See id.* at 143.

357. Dillehay & Sandys, *supra* note 194, at 161.

358. *See* Blume et al., *supra* note 165, at 1238–39.

likely say, "Yes, I can," while ALS venirepersons (and even some life-leaning but qualified venirepersons) will likely say, "No, I cannot" and this imbalance would further aggravate the jury pool stacking that is described above.[359] These responses mask the venireperson's true qualification status and could lead to constitutional violations or the frustration of the government's legitimate interests.

The Supreme Court has recognized as much. In *Morgan*, the trial court asked "general fairness and 'follow the law' questions," and the state argued that those questions were sufficient to satisfy the constitutionally required inquiry.[360] The Court rejected that argument:

> Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath. But such jurors-whether they be unalterably in favor of, or opposed to, the death penalty in every case-by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding.[361]

The Court recognized that the venireperson would give the socially desirable response, which would mask their true belief systems:

> As to general questions of fairness and impartiality, such jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed . . . It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so.[362]

Questions that call for socially desirable responses should not be used to identify unqualified venirepersons, and they should not be used to rehabilitate a venireperson who has been properly identified as unqualified.

Next, using questionnaires to ask the disqualification question can be problematic. Even if the question prompt does not contain words that invite social desirability bias, the arrangement or demand characteristics of the response items could induce a biased response:

> [I]n addition to the fact that social desirability may be viewed as a tendency for respondents to behave in a culturally acceptable and appropriate manner, it may also be viewed as a property of the items in a questionnaire. As such,

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359. *See also* Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, 25 CHAMPION 35, 36 (2001); Dillehay & Sandys, *supra* note 194, at 162.

360. *See* Morgan v. Illinois, 504 U.S. 719, 734 (1992).

361. *Id.* at 734–35.

362. *Id.* at 735.

> items or constructs on a questionnaire that possess more (as opposed to less) social desirability may be observed to relate more (or less) to each other as much because of their social desirability as they do because of the underlying constructs that they are intended to measure.[363]

Likert scales (for example, strongly disagree, disagree, agree, strongly agree) can induce socially desirable responses.[364] In the responses, if the poles of the Likert scale look extreme, the subject might reject those for a response that appears more socially moderate.[365] This is similar to the central tendency bias, which "inclines participants to avoid the endpoints of a response scale and to prefer responses closer to the midpoint."[366]

Butler and colleagues have used a reasonably well-constructed Likert scale with these items:

> (1) The death penalty is never an appropriate punishment for the crime of first-degree murder.
>
> (2) In principle, I am opposed to the death penalty, but I would consider it under certain circumstances.
>
> (3) In principle, I favor the death penalty, but I would not consider it under all circumstances.
>
> (4) The only appropriate punishment for the crime of first-degree murder is the death penalty.[367]

Still, when reviewing the items, the central items suggest open-mindedness and fairness while the items on the poles do not.

As in the other areas looked at above, we should expect that the false negative rate will be higher for true-ADP subjects (who want to protect a self-identify and project an image of being a good, open-minded citizen and so may choose a central item) than for true-ALS subjects (who know in all circumstances that they will not vote for death and would likely not mark a central item that is inconsistent with that firmly-held value system).[368] Lawyers may not be able to get around this problem using paper questionnaires (researchers might by

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363. Philip M. Podsakoff et al., *supra* note 175, at 883.

364. *See* Rodrigo Schames Kreitchmann et al., *Controlling for Response Biases in Self-Report Scales: Forced-Choice vs. Psychometric Modeling of Likert Items*, 10 FRONTIERS PSYCH. 1, 2, 10 (2019).

365. *See id.* at 2.

366. *See* Igor Douven, *A Bayesian Perspective on Likert Scales and Central Tendency*, 25 PSYCHONOMIC BULL. & REV. 1203, 1203 (2018).

367. *See* Brooke Butler & Gary Moran, *supra* note 224, at 565 (2007).

368. *See* Dillehay & Sandys, *supra* note 194, at 156–58, 160–61.

using sequential questioning in computer software) and so should consider not using Likert scale items when determining whether to ask this question.[369] If lawyers do, they should recognize that those who identify as ADP likely are ADP, but many who choose item three may still be ADP, and many who choose item one will not be true ALS.[370] Lawyers would need to follow up the questionnaire with oral voir dire of those venirepersons.[371]

C. Define Capital Murder

Venirepersons need to be told what capital murder is and is not.[372] It is a willful, deliberate, premeditated murder where the killer considered killing another person, thought about the consequences, all while having a calm mind, and then killed that other person. The killing was not accidental, or unintentional, or one done impulsively under the heat of passion or because the person was provoked.[373] The premeditated killing was not done in self-defense or defense of others, while under duress, while the defendant was so high or drunk that he could not form the required mental state, or while insane, and the jury convicted the right person.[374] If the jury heard any evidence of any of those defenses, the jury rejected it and said, beyond a reasonable doubt, this defendant committed premeditated murder.[375]

D. Follow Up and Use Open-Ended Questions

Fully defining capital murder should greatly reduce false negatives with ALS venirepersons with just this one step.[376] However, to reduce false positive for ALS among life-leaning venirepersons, lawyers need to do another step. They need to provide examples of egregious capital crimes in that jurisdiction.[377] Lawyers can pose the statutory aggravating factors to the venireperson, and even multiple

369. *See id.* at 160.

370. *See id.* at 157, 160. Further, if the items in the questionnaire are not preceded by a thorough definition of capital murder, life-leaning venirepersons may identify as ALS (and so choose option 4) because they do not recognize that they could vote for death in egregious circumstances (and so have a true value of 3).

371. *See id.* at 162.

372. *See* DRESSLER, *supra* note 255, at 478–79, 482.

373. *See id.* at 480.

374. *See id.* at 480, 484.

375. *See id.*

376. *See infra* Section IV.B.

377. *See* Cox & Tanford, *supra* note 286, at 177.

aggravating factors, to ensure that there are no circumstances under which the life-leaning venireperson can vote for death.[378] If there are any circumstances, even if those are only murders with multiple aggravating circumstances, then the venireperson is qualified and cannot be excused without violating the defendant's constitutional rights as outlined in *Witherspoon*.[379] Three sets of researchers (Sandys and Trahan, Cox and Tanford, and Robinson) all continued to explore the juror's or subject's beliefs and found that this exploration helped to identify the venireperson's true value.[380]

While lawyers are in this information-gathering stage, they should also ask open-ended questions like, "What do you think about this? Why do you think that? Tell me about that?"[381] Even with a properly constructed and defined disqualification question, there is a risk of false negatives and false positives.[382] With follow-on and open-ended questions, the lawyers will be able to discover whether the venireperson was confused by the disqualification question and so needs further clarification.[383] The lawyers might discover that the venireperson may have thought they were not ALS or ADP, but when they started to think about it (prompted by the questions), now realize that they are.[384] The lawyer may learn that the venireperson is not receptive to certain statutory mitigation or are ADP on this particular aggravating factor.[385]

CONCLUSION

Potential jurors who will always (or never) vote to impose the death penalty in a capital case are being included on juries, and this is because the lawyers in capital cases are not properly conducting voir dire.[386] Using questions that call for a socially desirable answer and asking questions without fully defining capital murder leads to high rates of false positives and false negatives, and ultimately fails to

378. *See* Robinson, *supra* note 191, at 471.

379. *See id.* at 471–72.

380. *See* Cox & Tanford, *supra* note 286, at 167; Robinson, *supra* note 191, at 471; Sandys & Trahan, *supra* note 6, at 385.

381. *See* JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION 72–73 (4th ed. 2018); *see also* RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY 300–01, 312 (2003).

382. *See* FREDERICK, *supra* note 381, at 72–73.

383. *See id.*

384. *See* WAITES, *supra* note 381, at 301.

385. *See id.*

386. *See* Rubenstein, *supra* note 253, at 18.

identify unqualified venirepersons, which is a constitutionally indispensable part of the process of inflicting the penalty of death.[387] Further, these mistakes leave a jury pool that is stacked against the defendant.[388] The death penalty statutes may be constitutional in the abstract, but the implementation of those systems is not because the systems are not accurately identifying unqualified venirepersons, and we should question whether those who are currently on death row were sentenced by jurors who were unqualified and selected from a jury pool that was stacked against the defendant.[389]

Some defense attorneys are already being trained on a method that works to accurately identify ADP venirepersons by avoiding social desirability bias and defining capital murder.[390] These defense attorneys are trained to tell venirepersons that there are no right or wrong answers to the questions that they will be asked and that different views are entitled to respect.[391] The attorneys then fully define what capital murder is and is not,[392] and then they ask a question based on *Morgan* that is designed to identify ADP venirepersons: "[f]or that defendant, do you believe that the death penalty is the only appropriate penalty?"[393] If the venireperson says, "no," the attorney then asks more questions to identify the venireperson's predisposition.[394] If a venireperson appears to be ALS, the defense attorney questions the venireperson about aggravated forms of capital murder to ensure that this venireperson is not falsely identified as an ALS when the venireperson could vote for death in some circumstances.[395]

But identifying unqualified venirepersons is not just the defense counsel's problem. As Dillehay and Sandys note: "Identification of the ADP juror is a serious challenge in court. Under the banner of a strong commitment to justice, all principal actors in the courtroom have an investment in eliminating ADP jurors, but in the adversary system the burden falls on the defense."[396] All of the lawyers—the judge, the

387. *See id.*
388. *See id.*
389. *See id.*
390. *See National Capital Voir Dire Training Program*, NAT'L COLL. OF CAPITAL VOIR DIRE, https://www.nccvd.org/ [https://perma.cc/FKN8-4AAL] (last visited Feb. 28, 2022).
391. *See* Rubenstein, *supra* note 253, at 20.
392. *See id.* at 18, 20–21.
393. *See id.* at 18, 21.
394. *See* Rubenstein, *supra* note 253, at 18, 21.
395. *See id.* at 18, 21, 23.
396. *See* Dillehay & Sandys, *supra* note 194, at 162.

prosecutor, and the defense counsel—must safeguard the defendant's constitutional rights by removing ADP venirepersons from the jury pool, and the judge and the prosecutor must remove ALS venirepersons from the pool.[397] That we would establish reliability as the bedrock and then ignore reliability in the seating of jurors is unconscionable.

397. *See id.*

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Appendix 2: Additional Studies That Include *Witt* and *Witherspoon* Responses

Another study is consistent with the research that shows that the *Witt* language is susceptible to social desirability bias, but is more difficult to interpret.[398] Vaughan and colleagues drew a sample of students from a large Texas university along with a nationwide sample using Mechanical Turk.[399] They asked the subjects these questions based on the *Witherspoon* language: "The death penalty is never an appropriate punishment for the crime of first-degree murder," and "The only appropriate punishment for the crime of first-degree murder is the death penalty."[400] Those who identified themselves under these questions were then asked a qualification question based on the *Witt* language: "[W]hether they felt so strongly about the death penalty (either for or against) that their views would prevent or substantially impair their duties as a juror . . . ."[401] The researchers then labeled these

398. *See generally* Vaughan et al., *supra* note 167.

399. *See id.* at 1182–83; *accord* Holleran & Vaughan, *supra* note 167 (using same methodology, vignettes, questions, and samples).

400. *See* Vaughan et al., *supra* note 167, at 1186.

401. *See id.*

subjects—those who self-identified under *both* items—as disqualified and reported that 6% of the student sample and 10% of the online sample were ALS, and less than 2% of both samples were ADP.[402] While the researchers do not say so directly, it appears that the *Witherspoon* set (the results from the first question) was larger than the *Witt* set, and so the *Witt*-language question did not identify all of the disqualified subjects.[403]

The study methodology makes those figures difficult to interpret, though. In the research instrument, the subjects first read a murder vignette.[404] The vignettes included a child abuse case where none of the facts indicate premeditation; a shooting into a group of people that could have been premediated or could have been abandoned and malignant heart murder; a felony murder with an unintentional killing; and another felony murder.[405] The subjects were then asked the death qualification questions concerning first-degree murder where that crime was defined "an unlawful killing that is both willful and premeditated."[406] However, none of the vignettes clearly fit that definition and some subjects may have believed that the vignette that they read related to that definition, and that they were being asked whether they would always or never vote for a certain penalty for that vignette.[407] Someone who would always vote for death in a premeditated murder case might have felt that death was not the only appropriate punishment for *that* vignette, rather than premeditated murder, and would end up as a false negative.[408]

Two studies report findings that are inconsistent with *Witt*-language items having lower identification rates than *Witherspoon*-language items, but they are also difficult to interpret.[409] West and colleagues surveyed 457 community members using Mechanical

402. *See id.* at 1186–87.
403. *See id.* at 1186–87.
404. *See id.* at 1182–83.
405. *See id.* at 1185, 1204–05.
406. *See id.* at 1186.
407. *See id.* at 1185, 1204–05.
408. Because the subjects read the vignette first, I treated this study as a fact-specific study and did not include in table 2. The authors also make this comment: "In practice, it is unlikely that jurors who believe the only appropriate punishment for murder is execution would be excluded from jury service, as the qualification process typically seeks affirmative answers to the question 'are you willing to impose the death penalty?' and stops at that point." *See id.* at 1186. That is incorrect. *See* Morgan v. Illinois, 504 U.S. 719, 728–29 (1992).
409. West et al., *supra* note 331, at 24–26; Haney et al., *supra* note 167, at 624.

Turk.[410] They asked, "What is your attitude toward the death penalty?" and then participants were instructed to indicate, among other options, if they would always vote for the death penalty.[411] However, it does not appear that the subjects were told that this was concerning someone convicted of capital murder. The researchers reported that 2% of the subjects were ADP, which is not surprising because the question was not asked concerning a capital murder offense—very few people would say that they would always vote for the death penalty for, say, jaywalking or even felonies short of murder.[412] Another response item to this question was whether the subject had such strong doubts about the death penalty that they would be unable to find the defendant guilty and vote for a death sentence where the law allowed it.[413] This item is compound and difficult to interpret. Unlike the earlier discussion of a compound item, here, an ALS subject who might be able to vote for guilt but not for death, would not mark this item, and so not be counted.[414] The authors reported that 16% were ALS under that item.[415]

The authors also asked a question using *Witt* language: "Given your position regarding the death penalty, which of the following statements best describes how you would conduct yourself as a juror in a capital murder case?"[416] Participants were instructed to check one of the following statements: "I have such strong sentiments about the death penalty that they would seriously affect me as a juror and would prevent or substantially impair my performance in accordance with my instructions and oath" or "My sentiments about the death penalty are not so strong that they would seriously affect me as a juror and would prevent or substantially impair my performance in accordance with my instructions and oath."[417] In this question, the subjects *were* told that this was in relation to a capital murder case.[418] In response to this question, 17% of the subjects said they were substantially impaired, which is essentially the same as what the researchers

410. West et al., *supra* note 331, at 22.
411. *See id.* at 22–23.
412. *See id.* at 22–23, 24.
413. *See id.* at 22–23.
414. *Cf.* Greene & Cahill, *supra* note 232, at 288 (using a compound question but allowing the subject the ability to indicate that they would give a guilty verdict without imposing the death penalty).
415. *See* West et al., *supra* note 331, at 24.
416. *Id.* at 23.
417. *See id.* at 23.
418. *See id.*

identified using the *Witherspoon* ADP and ALS questions.[419] However, ADP subjects were likely significantly undercounted, and the ALS subjects were likely undercounted by the respective *Witherspoon* questions.

In the second study, Haney and colleagues measured qualification at a later stage (first-degree murder plus an additional special circumstance).[420] They conducted a phone survey of 498 Californians statewide and asked a qualification question based on the *Witherspoon* language and another based on the *Witt* language, but did not report the item language so it is hard to interpret their results. [421] They reported that 2.6% of the subjects were ADP under the *Witherspoon* language, but this is an unusual finding when compared to the 6.2% that held pro-death views that were so strong that they would impair their guilt phase determinations.[422] We should expect that the ADP number would be higher than the guilty-phase impaired, not lower.[423] The guilty-phase impaired are very likely penalty-phase impaired, and some who are not guilt-phase are likely penalty-phase.[424] Using the *Witt* language, they reported 8.6% were ADP, which is higher than the rate found using *Witherspoon* language.[425] But they said that figure came from an item that used *Witt* and *Morgan* language, but *Morgan* is *Witherspoon* language.[426] They also reported 5.8% were ALS using *Witherspoon* language (this time, a number higher than the guilt-phase impaired, which was 4.4%), and 8.4% were ALS using *Witt* language.[427] Without the actual language used, and because this was measured at a later stage in the penalty phase, it is difficult to interpret these figures.

In addition to the distributions resulting from *Witt*-language items that are reported in Table 1, two studies reported distributions for *Witt*-language questions without distinguishing between ALS and ADP subjects.[428] Butler and Moran sampled 200 people called to jury duty in Bradenton, FL, and reported 20% were disqualified under *Witt* language.[429] Next, Butler sampled 200 venirepersons who had been

419. *See id.* at 24.
420. *See* Haney et al., *supra* note 167, at 623 (1994).
421. *See id.* at 623–24, 624–25 n.6 (1994).
422. *See id.* at 619, 624 tbl.1.
423. *See id.* at 624.
424. *See id.*
425. *See id.* at 624 tbl.1.
426. *See id.*
427. *See id.*
428. *See* Butler & Moran, *supra* note 367, at 564–68.
429. *See id.* at 564–65.

called for duty in Sarasota, FL, and reported that 25% were disqualified under the *Witt* language.[430]

One study reported just ALS. Stevenson and colleagues surveyed 402 people who had been called for jury duty in Cook County, IL.[431] Researchers measured ALS with both *Witherspoon*-language ("never vote to impose the death penalty in any case," where it is unclear if the subjects were told that was related to capital murder) and *Witt*-language ("have such strong reservations that they would prevent or substantially interfere with my voting for a death sentence," where earlier items suggested that this was related to someone convicted of murder for which the law allowed the death penalty).[432] It appears that they only reported the results from the *Witt*-language item, such that that nine of the 402 (2%) were disqualified as ALS using the *Witt* language.[433]

Last, Lynch and Haney surveyed 996 residents of Solano County, CA.[434] They asked, "In a case where a defendant was convicted of murder for which the death penalty was a possible punishment, do you OPPOSE [SUPPORT] the death penalty so much that you feel your attitude might interfere with or impair your ability to act fairly in the PENALTY phase[?]," as well as, "Do you OPPOSE [SUPPORT] the death penalty so much that you would NEVER [ALWAYS] actually vote to impose THE DEATH PENALTY in ANY case in which the defendant has been convicted of first degree murder and is eligible to receive the death penalty, no matter what the evidence showed?"[435] If the subjects answered yes to either of these or to another question dealing with fairness at the guilt phase, then the subjects were coded as excludable.[436] They reported that 16% were death-penalty-supporter excludables and 23% were life-sentence-supporter excludables, but we do not know which item was used to exclude them.[437]

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430. *See* Brooke Butler, *The Role of Death Qualification in Venirepersons' Susceptibility to Victim Impact Statements*, 14 PSYCH. CRIME & L. 133, 136, 138 (2008).

431. *See* Stevenson et al., *supra* note 330, at 10.

432. *See id.*

433. *See* Stevenson et al., *supra* note 330, at 10–11, 11 n.1.

434. *See* Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 153 (2018).

435. *See id.* at 154.

436. *See id.*

437. *See id.* at 156.

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