

HE'S SOMETHING LESS THAN HUMAN

The Impact of Pretrial Publicity on Capital Defendants' Right to Due Process



by
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THE NATURE OF CAPITAL PRETRIAL PUBLICITY

Most capital cases tend to be surrounded by a great deal of pretrial publicity. Because the death penalty is intended for only the most heinous offenses and both the American media and its consumers thrive on sensationalistic headlines dominated by themes of power and retribution, capital trials are typically front-page news.

Prior research has repeatedly noted that the media coverage encircling capital defendants is tremendously unbalanced. Social scientists have found that such pretrial publicity tends to focus on enraging the community by inflating crime statistics, blurring fact and fiction, and dehumanizing violent offenders by using "metaphors of filth" (i.e., depictions of defendants as "dirty" and "slimy" in order to make the delineation between "criminals" and "noncriminals"), as

opposed to presenting an accurate picture of crime news (Butler, 2007b; Duncan, 1999; Haney, 2005). In addition, the media tends to perpetuate images of "stereotypical" murderers, designed to demonize the defendant and impact the public (e.g., labeling defendants with terrifying nicknames; describing a crime scene in language fit for a horror movie).

Since the vast majority of media outlets receive their information from law enforcement organizations (i.e., police departments; sheriffs' offices; state attorney's offices), it is hardly surprising that numerous studies have found almost all capital pretrial publicity to be pro-prosecution and, consequently, slanted in favor of conviction and the death sentence (Besirevic & Fulero, 1999; Dexter, Cutler & Moran, 1992; Haney, 2005; Imrich, Mullin & Linz, 1995; Moran & Cutler, 1991; Otto, Penrod & Dexter, 1994). In fact, Imrich, et al. (1995) conducted a content analysis of crime stories in 14 metropolitan U.S. newspapers over a span of eight weeks. The authors concluded that 27% of defendants were described in a prejudicial manner through negative characterizations and opinions about the defendant's guilt. The negative

information most frequently publicized involved defendants' prior arrests, confessions and prior convictions.

It also has been suggested that the information printed in newspaper articles that is commonly found in capital case reporting is similar, if not identical, to the aggravating factors presented during the penalty phase of a capital trial (i.e., arguments for a death sentence which tend to focus on the characteristics of the crime). In fact, very rarely does mitigation, arguments for a life sentence which tend to focus on the social-contextual characteristics of the defendant, make headlines (Butler, 2007b; Haney, 2005).

In fact, one model that explains how negative pretrial publicity can impact the interpretation of trial evidence is that of predecisional distortion. Predecisional distortion has been defined as, "biased interpretation and evaluation of new information to support whichever alternative is currently leading during a decision process (Carlson & Russo, p. 91; Hope, Memon & McGeorge, 2004)." Specifically, jurors filter what is presented to them during the trial in light of their preexisting decisional frame-

work. Since capital pretrial publicity is overwhelmingly anti-defendant, jurors should be more prone to accept the evidence that confirms their preexisting negative expectations. Studies exploring capital pretrial publicity have certainly confirmed this notion (Butler, 2007b).

Although it is well-established that capital defendants are tried in the media long before they actually face a jury, other psycholegal theorists have taken this a bit further. Specifically, it has been posited that capital pretrial publicity is reminiscent of the American public executions that were abolished in the early 20th century (Butler, in press). For example, newspapers that methodically publicize the state's side of the case are currently sold on street corners, whereas the government used to display its power by executing the condemned in a ritualistic way amidst jeering crowds. Today, defendants are often dragged to trial through an irate Internet community of "bloggers," whereas s/he used to be paraded through jeering crowds on the long walk to the gallows.

Research has demonstrated that most laypersons get their knowledge about the legal system through the factual and fictionalized media (Haney, 2005). This also applies to the specific details about actual cases (Butler, 2007b; Vidmar, 2002). Logically, exposure to pretrial publicity impacts the way jurors view the defendant and, consequently, make decisions in actual capital cases (Dexter, et. al, 1992; Haney, 2005; Moran & Cutler, 1991; Otto, et. al., 1994). Psycholegal scholars have repeatedly concluded that jurors who read and watch capital pretrial media coverage have strong anti-defendant biases before they walk into the courtroom. Consequently, such jurors are significantly more likely to believe that the defendant is guilty and should be sentenced to death (Haney, 2005).

SUPREME COURT STANDARDS PERTAINING TO PRETRIAL PUBLICITY AND THE REALITIES OF VOIR DIRE

At present, the U.S. Supreme Court uses a "totality of the circumstances" test to determine whether pretrial publicity

is so prejudicial that it compromises defendants' Sixth Amendment rights. Specifically, the Court examines such things as the atmosphere of the trial, voir dire transcripts and jurors' statements' regarding impartiality (Studebaker & Penrod, 2005). While it is not required that prospective jurors be "ignorant of the facts and issues" surrounding a case, it becomes problematic when venirepersons are biased against a defendant before the trial even begins. *Irwin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961).

Although it is hoped that capital voir dire would screen out those potential jurors with preexisting case-specific knowledge or opinions that would render them unable to be objective, in practicality, this is not what tends to occur. First, court dockets are perpetually overbooked and judges tend not to allot a tremendous amount of time to voir dire. Although capital trial attorneys are granted more time for voir dire than non-capital trial attorneys, it is virtually impossible for both sides to thoroughly question all of the venirepersons on the panel. Second, research has repeatedly demonstrated that capital jurors who are the most biased tend to be the least aware of their own prejudices (Haney, 2005). Such jurors can also be the least likely to admit their prejudices (Haney, 2005). This reluctance is compounded when voir dire is performed in large-group—as opposed to sequestered or individual—fashion. Third, in *Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), the U.S. Supreme Court held that the trial court need not question venirepersons about the specific content of their exposure to pretrial publicity. Rather, the defendant is only entitled to know whether the juror can remain impartial. *Id.* Fourth, social scientists know that a pledge to remain impartial is extraordinarily ineffective. Research has demonstrated that jurors who, upon being given a judicial admonition, doubted whether or not they would be able to remain impartial were just as likely to convict the defendant as jurors with no such

doubts (Kerr, Kramer, Carroll & Alfini, 1991). Social scientists have concluded that even though jurors may take an oath of impartiality, they tend to rely on their preexisting knowledge, attitudes and beliefs when engaging in decision-making processes in the jury deliberation room (Kerr et al, 1993). Fifth, jurors feel pressured to conform to the requirements of the law and, consequently, tend to publically distance themselves from what they know about the case via a "minimization effect" (Bronson, 1993).

INDIVIDUAL DIFFERENCES AND SUSCEPTIBILITY TO PRETRIAL PUBLICITY

Clearly, not all jurors are equally affected by pretrial publicity. For example, prior research has demonstrated that people who are analytical or well educated tend to be more affected by factual information, whereas those who are less educated or analytical tend to be persuaded by emotional appeals (Cacioppo, Petty, Feinstein & Jarvis, 1996; Hovland, Lumsdaine & Sheffield, 1949). Since pretrial publicity can be considered either factual (e.g., information about the defendant's prior record) or emotional (e.g., information about the way the victim's family has been affected by the crime), it logically follows that different people would be affected by different types of pretrial publicity. However, research exploring this topic has been mixed (Kerr et al., 1993; Wilson & Bornstein, 1998). Individual differences play a role in the way jurors process other types of trial information. Therefore, it logically follows that the intersection of dispositional variables and exposure to capital pretrial publicity would impact attitudes toward jury decisions about various aspects of a capital case. However, the research exploring this phenomenon is remarkably scarce.

In addition, almost all of the research on pretrial publicity has involved participants to laboratory simulations (sometimes positive; sometimes negative) pretrial publicity for brief periods of time. While laboratory simulations

pretrial publicity certainly provides a controlled setting that field research is not able to replicate, it has substantial drawbacks (Studebaker, Robbennolt, Penrod, Pathak-Sharma, Groscup & Devenport, 2002). First, and as previously mentioned, veritable pretrial publicity is almost always overwhelmingly negative. Second, pretrial publicity is encompassing, inflammatory, ritualistic, emotional, and perhaps most importantly, personal. The aforementioned factors impact memory for case-specific details; such conditions cannot possibly be recreated in a laboratory.

At present, there is a promising trend in pretrial publicity research favoring the use of both real trials and participants drawn from the judicial circuits in which the trials will take place. It has been strongly suggested that assessing participants' reactions to the pretrial publicity surrounding an actual capital case enhances the external validity, legal implications, and applications of such research (Butler, 2007b; Steblay, Besirevic, Fulero & Jimenez-Lorente, 1999).

Previous research has also found that certain individual-difference variables appear to impact the way jurors evaluate different factors in capital cases. For example, one of the most salient personality characteristics that has repeatedly proven to affect decision-making in capital trials is level of support for the death penalty. Specifically, as the level of support for the death penalty increases, people appear to be more vulnerable to capital pretrial publicity (Butler, 2007b; 2009). In other words, a person's level of support for the death penalty interacts with their case-specific knowledge to produce prejudgments of the defendant's guilt.

On a similar note, death-qualification status (i.e., a prospective juror's eligibility for capital jury service based on their willingness to impose either a death or life sentence as an appropriate form of punishment, *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852 (1985)), has also been proven to significantly affect susceptibility to pretrial publicity (Butler, 2007b). Specifically, death-qualified jurors are more suscep-

tible to capital pretrial publicity than their excludable counterparts (Butler, 2007b; 2009). One possible explanation for this relationship is that news reports often publicize details of the crime which tend to mirror certain aggravating circumstances in the states that retain the death penalty because mitigation is rarely newsworthy. In a sense, prospective jurors are "aggravated" before they ever make it into the jury box. Previous research has repeatedly concluded that the death-qualification status of a jury impacts evaluations of aggravating and mitigating circumstances (Butler & Moran, 2002; 2007a; 2009).

An additional personality variable demonstrated to impact verdicts in capital cases is jurors' attitudes toward the death penalty. Social scientists have concluded that the issue of capital punishment is extraordinarily complex. In like fashion, people's opinions toward the death penalty are similarly multifaceted and need to be measured in a way that taps into the aforementioned underlying ambivalence (Haney, 2005). Previous research has demonstrated that people who espouse positive attitudes toward the death penalty are more willing to impose the death sentence. In like fashion, a study of the correlation between attitudes toward the death penalty and vulnerability to capital pretrial media exposure has demonstrated that respondents with more positive attitudes toward the death penalty are more likely to be susceptible to pretrial publicity (Butler, 2007c; 2009).

Another dispositional variable that is related to capital juror decision-making is belief in a just world (Butler, 2008c; Furnam, 2003; Martin & Cohn, 2004; Moran & Comfort, 1982; Weir & Wrightsman, 1990). Lerner's (1980) just world theory suggests that some people want to believe that the world is a fair place and that people generally get what they deserve. When an unjust event occurs, people with a high belief in a just world can restore this aforementioned belief by either attributing blame to the victim or alleviating the victim's suffering. The author suggests that capital defendants who are on trial

for victimizing others and claim to be victims themselves may be at a "double disadvantage" when being judged by jurors with a high belief in a just world (Butler, 2008(c)). Previous research has found that jurors with a high belief in a just world are more likely to be susceptible to pretrial publicity (Butler, 2009).

Another salient personality variable that has been proven to affect capital juror decision-making is that of locus of control. Locus of control is a concept characterized by the belief that the events in a person's life are due to things that are either within their control (an internal locus of control) or outside of their control (an external locus of control) (Nowicki & Duke, 1983). Locus of control has been found to consistently predict juror decision-making in capital cases. For example, previous research suggests that venirepersons with an internal locus of control are significantly more receptive to aggravating, rather than mitigating, factors (Butler & Moran, 2007a; 2009). In addition, earlier findings also suggest that jurors with an internal locus of control are more susceptible to the media exposure that tends to surround capital trials (Butler, 2009).

The need for cognition is an additional variable that has been demonstrated to affect the way jurors render verdict and sentencing decisions in capital trials (Cacioppo, Petty & Kao, 1984; Kassin, Reddy & Tulloch, 1990; Leippe, et al., 2004; Sargent, 2004; Shestowsky & Horowitz, 2004). The need for cognition is defined as "the tendency to engage in and enjoy effortful cognitive activity (Cacioppo et al., 1984)." In essence, people with a high need for cognition enjoy engaging in activities that require effortful thought. Participants with a low need for cognition do not. Although participants with a low need for cognition are no less capable of engaging in such contemplation, they tend not to do so unless they are extrinsically motivated. Consequently, it has been suggested that people with a high need for cognition may be more likely to systematically process complex concepts,

whereas people with a low need for cognition may be more likely to rely on superficial heuristics to make decisions in situations that require deep thought.

Earlier findings have also suggested that the need for cognition affects the way certain jurors effectively evaluate scientific evidence presented during trials (Butler & Moran, 2007b; Kovera, Gresham, Borgida, Gray & Regan, 1997; Kovera, Russano & McAuliff, 2002). For example, it has been found that jurors with a low need for cognition were more likely to be pro-guilt and pro-death in a capital case that involved ambiguous, flawed expert scientific testimony. Butler and Moran (2007b). In addition, Leippe et al. (1994) discovered that, when compared to jurors with a moderate need for cognition, jurors with both a low and high need for cognition had higher rates of conviction in a case involving eyewitness expert testimony. Capital pretrial publicity frequently involves making the effortful distinction between fact and fiction; previous findings have concluded that jurors who have a low need for cognition are more likely to be vulnerable to capital pretrial media exposure (Butler, 2009).

A final individual-difference variable that has been strongly correlated with the way jurors evaluate capital trials is that of legal authoritarianism (Kravitz, Cutler & Brock, 1993; Narby; Cutler & Moran, 1993). Legal authoritarians are more likely to feel that the rights of the government outweigh the rights of the individual with respect to legal issues and are significantly more likely to be conviction-oriented and death-prone than their civil-libertarian counterparts (Butler, 2007a; 2007c; Butler & Moran, 2007a; Martin & Cohn, 2004; Narby et al., 1993). Legal authoritarians, when compared to civil libertarians, are more likely to be susceptible to capital pretrial publicity (Butler, 2009).

COGNITIVE ISSUES

Interestingly, research has found that jurors' self-reported familiarity with a capital case is only weakly related to recollection of case-specific details (Butler,

2009). In other words, jurors who say they are very familiar with the case might know very little about it and vice versa. Other studies have indicated the presence of source monitoring errors, errors that occur when representations of imagined events are vivid, but representations of actual events are poorly detailed, resulting in the confusion of the source of information (Mitchell & Johnston, 2000). Specifically, jurors have been known to confuse the details of current cases with other completely unrelated, highly-publicized trials tried in the same judicial circuit. It appears as if certain participants are joining the defendants and, perhaps, their respective fates. Clearly, this "guilt by association," or, perhaps more appropriately, "death by association," has substantial implications for capital defendants' right to due process.

LEGAL IMPLICATIONS

The results of capital pretrial publicity research underscore the importance of change-of-venue motions by demonstrating the tremendous effect that individual-difference variables, combined with exposure to pretrial publicity, has on capital trials (Butler, 2007b). In essence, capital juries are more likely to be comprised of people who know more about the case and assume the defendant is guilty before the trial even begins.

LEGAL APPLICATIONS

The findings of the research on capital pretrial media exposure appear to have substantial legal applications: very rarely do the negative characterizations (i.e., "metaphors of filth") used by jurors to frequently describe capital defendants find their way into group voir dire. This level of emotion, particularly in the presence of the judge, attorneys, capital defendants and other venirepersons, rarely, if ever, tends to be expressed in open court. Of course, the venireperson's contempt for the defendant is still present—however, this sentiment is simply not articulated. The present research illustrates another reason why capital defense attorneys should, at the

very least, make a motion for sequestered, or individual, voir dire. In addition, the findings of the current study suggest that capital defense counsel should request that the venirepersons complete confidential, pretrial surveys before the commencement of jury selection. In addition to saving time, the survey process allows the court to more accurately measure the true beliefs and attitudes of prospective jurors, thereby protecting the defendant's Sixth Amendment rights (Butler, 2007b; 2008a; 2008b; 2008c; in press; Butler & Wasserman, 2006). Also, although the process of death qualifying juries has been deemed constitutional, defense attorneys can use scientific jury selection principles to deselect those jurors who might have some of the undesirable dispositional traits described in this article. Finally, it is imperative for defense attorneys to front-load their mitigation in an attempt to counteract the aggravation that jurors have been exposed to long before trial (Butler, 2009). ■



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