Death Qualification of Juries: Does the Process Really Create a Biased Jury?

Bryan Driscoll

> When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish that punishment because we sympathised with traitors, but because we took the view that it was a punishment no longer consistent with our own self-respect.[1]

Everyone has an opinion on capital punishment. Opinions range from those who would vote to abolish capital punishment to those who would not only increase its use but also make it more expeditious.

The focus of this paper is primarily on the use of the death qualified jury. This paper argues, with the help of scientific studies, that the process of death qualification creates a jury that is predisposed to the defendant's guilt.

I. INTRODUCTION

The process of death qualifying a jury begins with excluding jurors. During the voir dire process, jurors will be excused by way of one of two challenges; for cause challenge or peremptory challenge. For cause challenges, which are unlimited in number, may be used to exclude a juror when a specific reason, such as bias or prejudice, exists on the part of the juror.[2] A peremptory challenge, which is limited in number, is used to excuse a juror without having to give a reason.[3]

People with certain beliefs may be excluded using a for cause challenge. A juror whose beliefs about capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" may be excused for cause.[4] This allows the for cause removal of jurors whose beliefs are so strong that they could either never vote for the death penalty or, conversely, if the defendant is found guilty, never vote for any sentence other than death. [5]

These steps are taken to avoid jury nullification. Jury nullification occurs when a juror completely disregards the evidence or the law and simply applies his or her beliefs on capital punishment.[6] Jury nullification often occurs when a juror who is opposed to capital punishment votes not guilty during the guilt phase of the trial, even though the weight of the evidence shows otherwise.[7]

II. HISTORY

In 1968, the Court, in *Witherspoon v. Illinois*,[8] looked at an Illinois statute which stated that, in a murder trial, a juror will be excused for cause upon a finding that "he has conscientious scruples against capital punishment, or that he is opposed to the same."[9] This statute essentially allowed the prosecution to remove, for cause, any juror that was opposed to capital punishment, regardless of whether the juror would be able to put their beliefs aside and still apply the evidence to the law.

> But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.[10]

The Court in *Witherspoon* concluded that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[11] This holding makes clear that any person excused because they would automatically vote against the death penalty regardless of the evidence and anyone who could not be impartial during a determination of guilt because of their views on capital punishment may be excused from the jury for cause.[12] The first prong would eliminate all of those whose beliefs regarding the death penalty would not allow them to vote for death during the penalty phase regardless of the evidence presented. The second prong would eliminate all of those whose beliefs regarding the death penalty would make it difficult for them to vote for the defendant's guilt during the guilt phase of the trial. In 1968, the Court held that these two types of "Witherspoon excludables" are constitutionally valid.[13]

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If 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…
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.[14]

Essentially, what the Court in *Witherspoon* allowed is for all open minded people to be death qualified. So long as ones beliefs for or against the death penalty would not cloud their judgment, they could serve on a capital jury. This created a much more neutral jury.

In 1971, the Court held that it was not a violation of the Constitution to leave the sentencing decision to the jury.[15] "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[16] The Court held here that a single jury could be used for both the guilt phase and penalty phase of a capital trial.[17]

In 1972, proponents of capital punishment were dealt a blow by the Court when it brought an end to capital punishment in the United States.[18] The argument in *Furman* was that capital punishment was a violation of a person's right to be free from cruel and unusual punishment as provided in the Eighth Amendment.[19] *Furman* did not make capital punishment entirely unconstitutional; rather, the holding was that the manner in which all states were applying the death penalty was unconstitutional.[20] Thus, the states that wanted to reestablish capital punishment had to come up with a new way to implement the penalty.[21]

In 1976, the Court took up one of two ways in which states tried to reestablish capital punishment: mandatory death sentences.[22] The state of North Carolina laid out certain offenses that, upon a finding of guilt, required a sentence of death.[23] The Court held this manner of utilizing capital

punishment to be unconstitutional.[24]

Also in 1976, the Court looked at the second way in which states tried to reestablish capital punishment: giving a jury guided discretion in applying the death penalty.[25] Giving a jury complete discretion regarding the application of the death penalty was held unconstitutional.[26] "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as to the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[27] This guided discretion, where the jury decides the sentence but only after considering aggravating and mitigating circumstances is a constitutionally permissible method of applying the death penalty.[28] Thus, after 1976 and *Gregg*, capital punishment is once again a permissible penalty for crimes of murder.

In 1985, the Court decided *Wainwright v. Witt*.[29] The Court in *Witt* took the two prongs from *Witherspoon* and created one standard. "[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."[30] The substantial impairment standard set for in *Witt* is still the standard in effect today.

One year after *Witt* the Court decided *Lockhart v. McCree*.[31] McCree argued that death qualification was unconstitutional because it created a more conviction prone jury.[32] The Court even stated, regarding the studies McCree cited, that "we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' that 'non-death-qualified' juries."[33] Nevertheless, the Court held that death qualification did not violate a defendant's right.[34]

It has been argued that the death qualification process creates a jury that is more conviction prone than a non-death qualified jury because the jury lacks impartiality.[35] The Court has held that a juror is impartial "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."[36] In his case, McCree argued further that his jury lacked impartiality because, after the excludable jurors were removed, those that remained "slanted the jury in favor of conviction."[37] The Court dismissed both of these arguments holding that death qualification does not violate the fair cross section of the community requirement for a jury.[38]

Both *Adams* and *Witt* changed the standard set forth originally in *Witherspoon* by creating the merged prong of substantial impairment.[39] The question now was whether a juror could follow the law if the law and evidence presented called for the death penalty.[40] If not, the juror could be excused for cause.[41] *Lockhart* further expanded this by holding that the "*Witherspoon* excludables" would now be excluded as "unable to follow the law."[42]

Decided in 2002, the Court held that the execution of a mentally handicapped person was unconstitutional.[43] The Court held that there were "evolving standards of decency" and this type of execution was cruel and unusual punishment.[44]

Also decided in 2002, the Court held that the trial judge could not find facts beyond those found by the trial jury.[45] Judges are allowed some discretion in determining the proper sentence but a judge cannot use an aggravating circumstance to sentence the defendant to a more severe punishment than what the jury recommends.[46]

In 2005, the Court held unconstitutional the execution of individuals who committed a capital offense prior to turning eighteen years of age.[47]

III. PROCESS OF DEATH QUALIFYING A JURY

The process of death qualifying a jury requires further inquisition than impanelling a non-death qualified jury. The prospective jurors are questioned at voir dire regarding their specific opinion and outlook on capital punishment. Those who state during voir dire that they could not, because of their abhorrence to the death penalty, enter a judgment of guilty or those who would not even consider the sentence of death upon a finding of guilt, are excused for cause.[48]

Death qualification prohibits impanelling jurors whose opposition to capital punishment is so strong that it affects either their ability to render a judgment of guilty or to impose a sentence of death.[49] During this process it is impossible to avoid questions such as "Will you be able to vote for the death penalty?" If the prospective juror answers in the negative, they will be excused. But, it is the question itself that creates the problem; it implies to the prospective jurors that the defendant is guilty.[50] This process creates the implication that the defendant is guilty and death is the appropriate sentence.[51]

IV. BIASED JURY

Studies show that jurors who are subjected to the questions asked during the death qualification process are more likely to believe that the defendant is guilty and that the judge, prosecutor and defense attorney all believe the defendant is guilty as well. [52]

Because of this bias, juries are also more likely to convict and sentence innocent defendants to death. Since 1973, capital juries in the United States have sentenced more than 130 people to death for crimes that they did not commit.[53]

The Fourteenth Amendment requires that juries be composed of an impartial and fair cross-section of the community.[54] This theory creates the idea that a defendant will be judged by his peers, not by only a small and select group.

> There is no constitutional right to a jury drawn from a group of uneducated and unintelligent persons. Nor is there any right to a jury chosen solely from those at the lower end of the economic and social scale. But there is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people.[55]

This idea of impartiality means that a jury must be representative of the community. "The idea that a jury should be 'impartially drawn from a cross-section of the community' certainly should not mean a selection of only those with a predisposition to impose the severest sentence or with a predisposition to impose the least one that is possible."[56]

Those that are excluded during the death qualification process are generally more concerned with the constitutional rights of the defendant and more likely to question the presumptions of the prosecution.[57] Would mixed juries be a better solution?

> No doubt because diversity promotes controversy, which in turn leads to a closer scrutiny of the evidence, one study found that "the members of mixed juries [composed of *Witherspoon*-excludables as well as death-qualified jurors] remember the evidence better than the members of death-qualified juries." This study found that not only is the

> recall of evidence by a death-qualified jury likely to be below the standard of ordinary juries, but its testing of that evidence will be less rigorous.[58]

Death qualification creates a smaller jury pool.[59] Creating a smaller pool using the death qualification as a guise to excuse potential jurors because of race is unconstitutional.[60] A 1971 Harris poll found that the process of death qualification would produce a jury composed primarily of educated, white men.[61] A study conducted in 1980, shows that *Witherspoon* excludables were composed of 20.7% white and 55.2% black.[62] "Because opposition to capital punishment is significantly more prevalent among blacks than among whites, the evidence suggests that death qualification will disproportionately affect the representation of blacks on capital juries."[63]

The Court realized that the exclusion of a certain class of juror, namely blacks, was something to be avoided, as early back as 1880.[64] The Court held that the exclusion of blacks violated the rights of the excluded jurors[65] and that the exclusion of blacks:

> denies the class of potential jurors the "privilege of participating equally … in the administration of justice," and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting "a brand upon them, affixed by law, an assertion of their inferiority."[66]

In addition, death qualified members of the study were more likely to determine that the defendant was guilty (48.3%) than those who were non-death qualified (37.4%).[67] "Moreover, excluding potential jurors on the basis of their opposition to the death penalty would result in excluding 54.2 percent who thought the defendant was probably not guilty compared to 22.8 percent who thought the defendant was probably guilty."[68] 42% of the death qualified members of the study thought that, if convicted, the defendant should receive the death penalty.[69] Only 8.9% of the *Witherspoon* excludables thought that, if convicted, the defendant should receive the death penalty.[70]

These numbers are startling and the disparity between death qualified and non-death qualified members of society is almost scary. "Exclusion of potential jurors based on the Witherspoon standard would result in excluding only 7.4 percent who favored the death penalty in those cases and 50.5 percent of those who favored life imprisonment."[71] This study shows that there is an obvious source of bias on death qualified juries.[72] A jury such as this is "uncommonly willing to condemn a man to die.[73] The fact that those whose beliefs regarding capital punishment keep them from serving on a capital jury hurts the defendant to such a degree is something that every single person in this country should be aware of. This evidence shows that juries are sentencing people to death because of their belief in retribution or vengeance. Thus, if the man committed the crime, he must die. Leaving aside the argument of whether there should even be a death penalty, the fact that death qualified jurors are so willing to hand out death sentences should be bothersome to all.

> The division is not between rich and poor, highbrow and lowbrow, Christians and atheists: it is between those who have charity and those who have not. . . . The test of one's humanity is whether one is able to accept this fact -- not as lip service, but with the shuddering recognition of a kinship: here but for the grace of God, drop I.[74]

It is possible that death qualified jurors, as a whole, are conviction prone but it is also possible that non-death qualified jurors, as a whole, are acquittal prone.[75] There is no way to tell, precisely, which is more accurate as there is no way to precisely determine how often a defendant should be

convicted.[76] “This point is reminiscent of the quip that the disproportionate number of death sentences in Texas might mean that Texas enjoys a better police homicide division that other states.”[77] Nevertheless, “[b]ecause there is no objective way of deciding which convictions are correct and which are not, the only definition remaining sounds depressingly circular: a conviction-prone jury is more prone to convict than it should be.”[78] This is precisely the point; death qualification creates a conviction prone jury. A conviction prone jury is not representative of the community.

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…”[79] This Sixth Amendment right to impartial jury has been interpreted by the Court to mean a fair cross-section of the community.[80] “Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.”[81]

The Court has even held that the process of death qualification “is carefully designed to serve the State’s concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."[82] Here, the Court is saying that the states interest in seating a jury trumps the defendant’s right to impanel a jury that fits the standard of being a fair cross-section of the community.

McCree, in his case, even argued, without success, that it was not any individual juror that failed to reach the impartiality standard.[83] Rather, it was the system that failed him.[84] “[E]ven though a nonbiased selection procedure might have left him with a jury composed of the very same individuals that actually sat on his panel, the process by which those 12 individuals were chosen violated the Constitution.”[85] McCree was arguing that it was the simple fact that those jurors were *placed* on his jury rather than being randomly selected or selected by some other, less restrictive, means.

Yet, in *Witherspoon*, the Court overturned the defendant’s conviction when the prospective jurors who voiced general opposition to the death penalty were excused.[86] The Court held “that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.”[87] The Court held that Witherspoon was denied a fair sentencing “not because any member of his jury lacked the requisite constitutional impartiality,”[88] but because the process with which his jury was selected “stacked the deck” against him.[89]

The Court, in *McCree* stated that the fair-cross section requirement did not apply to petit juries.[90] The Court stated that this was a “practical impossibility.”[91] But, this was not what McCree was arguing. McCree argued it was the policy, the process, the entire venire that was impartial and disallowed a petit jury to be comprised of a fair cross-section of the community.[92]

“The essence of a ‘fair-cross-section’ claim is the systematic exclusion of ‘a “distinctive” group in the community.’”[93] The Court held that those who would not vote for a punishment of death are not a distinctive group and, thus, are still excludable.[94] The Court further holds that a group that is defined only by its attitude, an attitude that interferes with its ability to carry out duties, does not make it distinctive.[95]

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps

> overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."[96]

The Court still did not take up the issue of defining what a distinctive group actually is. The Court does, however, say that discrimination against certain groups, such as women and minorities, is based on "reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case."[97] So, because someone would be unable to vote for the death penalty and is, therefore, not a member of a distinctive group, discrimination of them is acceptable.

The Court in *Taylor* continues on this point, citing the Federal Jury Selection and Service Act of 1968:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.[98]

The Court continues by stating that the jury being chosen from a "fair cross-section of the community is fundamental to the American system of justice."[99] Yet, the petit jury that results from the venire is anything but a complete and fair cross-section representation of the community.

A jury that is representative of a very conservative, pro-death penalty community, may be entirely composed of proponents of the death penalty. Conversely, however, a liberal, anti-death penalty community, will never produce a jury composed of a fair cross-section of the community. Justice Douglas takes up this very issue in his concurrence in *Witherspoon*:

> In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?
>
> I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the

> accused of a cross-section of the community for decision on both his guilt and his punishment.[100]

Regardless of how a juror is excused, the fact still remains that, at least in theory, no individual will ever sit on a capital jury while being honest about their conviction against capital punishment. But, if there are people in the community who believe this way, who do not agree with capital punishment, does that not violate the fair cross-section requirement?

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.[101]

As the Court properly noted, this process removes a portion of the community. “Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority.”[102] Though the statistics may have changed some[103], the Court’s point is still well made; a death qualified jury does not speak for the entire community, rather, it only speaks for a portion of the community, specially chosen in a way to exclude those that would speak otherwise.

How conviction prone are death qualified juries? Shockingly, 55.1% of death qualified jurors agree that “people accused of crimes should be required to prove their innocence.”[104] Whatever happened to “innocent until proven guilty?” Or, the fact that the burden is on the prosecution to prove the defendant’s guilt beyond a reasonable doubt, not the defendant’s job to prove his innocence?

The same study looked at the old adage, “It is better to let 100 guilty men go free than to convict one innocent man.” To this, the death qualified jurors agreed with 51.4% compared to the non-death qualified jurors who agreed 79.4%.[105] When asked if “[d]efense attorneys have to be watched carefully, since they will use any means to get their clients off,” the death qualified jurors agreed 73.3% compared with the non-death qualified jurors who agreed 54.3%.[106]

These results show that it is, in fact, the death qualified jurors that are more conviction prone than non-death qualified jurors. “[I]n light of this country’s self-proclaimed societal understanding of the government’s burden in proving guilt and the constitutional protections ostensibly provided to defendants, the death qualified are far more prone to convict than they ‘should’ be.”[107]

The death qualification process and the questions posed during voir dire, have a way of persuading prospective jurors into believing that the defendant is guilty and, even further, that death is the most appropriate sentence.[108] In order to properly excuse those prospective jurors that are not death qualified, questions must be asked if a prospective juror would be able to impose a sentence of death, if the defendant were convicted. “The prospective juror presumes guilt in order to answer the question, and the entire panel learns that opponents of the death penalty are not welcome on juries.”[109] This process “which focuses attention on the death penalty before the trial has even begun – has been found to predispose the jurors that survive it to believe that the defendant is guilty.”[110]

The entire process of death qualification

> lend[s] support to the hypothesis that "people who are asked to imagine the occurrence of the penalty phase of the trial should be more likely to expect that that penalty phase will take place. . . . [So] one would . . . predict that people who have been asked to imagine the occurrence of this penalty phase would predict that it was more likely that the defendant will be convicted and more likely that special circumstances will be found in this particular case."[111]

This constant focus on the death penalty does two things: (1) the jury becomes predisposed to the defendant's guilt because there is so much discussion on the penalty phase of the trial before, not only the guilt phase has begun, but also even prior to a jury being seated; and (2) the jury becomes predisposed to the belief that the proper punishment is death.

Already, prior to even seating a jury, the cards are stacked greatly against any defendant in a capital murder case. Furthermore, in Haney's study, those death qualified jurors that experienced the death qualification process recommended a sentence of death by a vote of 57% compared to the group that did not experience the death qualification process who only voted for death at 21.9%.[112]

In addition, "[d]eath-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions."[113] The questions used in death qualifying a jury increase the "subjects' belief in the guilt of the defendant and their estimate that he would be convicted."[114] The fact that people are so easily swayed is a terrifying thought. "Even if this prejudice to the accused does not constitute an independent due process violation, it surely should be taken into account in any inquiry into the effects of death qualification."[115] This "process effect may function additively to worsen the perspective of an already conviction-prone jury whose composition has been distorted by the outcome of this selection process."[116]

VI. RECOMMENDATIONS

The State of Massachusetts tackled this issue of death qualification. According to the Report of the Governor's Council, Governor Romney stressed two main issues: first, "capital punishment should be limited to a narrowly defined subset of first-degree murders, so that only the 'worst of the worst' murders, and murderers, will be eligible for the ultimate punishment" and second, "the death penalty should be administered with a strong emphasis on the use of scientific evidence to help establish the defendant's guilt, which will ensure – as much as humanly possible – that no innocent person will every wrongly be condemned to death."[117] The Council recommended ten proposals:

(1) a narrowly defined list of death-eligible murders;
(2) appropriate controls over prosecutorial discretion in potentially capital cases;
(3) a system to ensure high-quality defense representation in potentially capital cases;
(4) new trial procedures to avoid the problems caused by the use of the same jury for both stages of a bifurcated capital trial;
(5) special jury instructions concerning the use of human evidence to establish the defendant's guilt;
(6) a requirement of scientific evidence to corroborate the defendant's guilt;
(7) a heightened burden of proof to enhance the accuracy of jury decisionmaking;
(8) independent scientific review of the collection, analysis, and presentation of scientific evidence;

(9) broad authority for trial and appellate courts to set aside wrongful death sentences; and
(10) the creation of a death-penalty review commission to review claims of substantive error and study the causes of such error.[118]

This is the best and most thought provoking idea on the reform of capital punishment. The fourth proposal is that which is most on point. "At the end of the guilt-innocence stage of the capital trial, if the defendant is convicted of capital murder, the defendant should have the right to request the selection of a new jury for the sentencing stage."[119] This is a good idea, however, it still leaves open the issue of death qualifying the jury for the guilt phase and, as has been shown, that process creates a jury that is more likely to convict. "I thought the point of bifurcation was to provide the defendant a guilt-innocence decision by a jury that had not been death qualified."[120]

The problem here is that if the first jury finds the defendant guilty, then the second jury basically has to rehear the case in order to get all of the information to make a proper determination of sentence. Or, as Ms. King points out, there could be dual juries.[121] The problem there is that accuracy may be an issue. "I cannot think of anything that might undermine the appearance of accuracy more directly than to have two juries who have seen the exact same evidence come to different conclusions."[122] Though, as has been shown, that is not at all out of the realm of possibility since a death qualified jury is much more likely to convict than a non-death qualified jury.

The entire purpose of the Council seems to have been a good idea in theory but missed slightly in practicality. The idea of two juries sounds decent enough. However, why not take the next step and say that the guilt phase jury (or both the guilt phase and penalty phase, for that matter) be a non-death qualified jury? "The reason to have two juries would be to have a non-death qualified jury make determination as to guilt or innocence."[123] That only seems to be the logical conclusion. "The only reason to have a death-qualified jury would be predicated on the theory that a juror who opposes the death penalty – who would never give the death penalty and thus could not apply the law."[124] This only makes sense as the non-death qualified juror would have nothing to do with the actual decision making process of the sentence; just the guilt. Granted, the juror may feel that the defendant, upon a finding of guilt, would be sentenced to death by the subsequent jury so that juror would then vote not guilty so as to avoid a sentence of death, then we find ourselves right back at the nullification concern.

> The death penalty is such a watershed political issue that it allows for the identification of jurors who are sympathetic to the prosecution point of view, the pro-authoritarian point of view. It removes people who have experiences in their lives that cause them to just say, "hold on a minute, let's compare these two police officers' testimony and see if there are contradictions." These people get exposed and they're removed. So you are most likely to have the most inaccurate false positives … in the most serious cases because everyone who is likely to question the facts has been removed for cause or peremptorily by the prosecution.[125]

Ms. Lyon makes a valid point that those who question are quite easily removed from the jury. So, the Council may have been slightly off with its fourth proposal. Maybe it would have been better to include the idea that the guilt phase jury would be a non-death qualified jury. That may have been a better start.

Professors Kamin and Pokorak make several recommendations as to the adoption of the proposals laid out by the Council.[126] The first proposal is to have no death qualification.[127] Justice Douglas wrote a concurrence in *Witherspoon* in which he recommended no death qualification.

> A fair cross-section of the community may produce a jury almost certain to impose the death penalty if guilt were found; or it may produce a jury almost certain not to impose it. The conscience of the community is subject to many variables, one of which is the attitude toward the death sentence. If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not impose the death sentence. A jury representing the conscience of that community would do one of several things depending on the type of state law governing it: it would avoid the death penalty by recommending mercy or it would avoid it by finding guilt of a lesser offense.
>
> In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?
>
> I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.[128]

"For Douglas, then, the petit jury that is actually impaneled in a capital case ought to represent the fullness of views on capital punishment shared by the citizenry, even if those views would preclude some jurors from imposing the death penalty under any circumstances."[129] This only makes sense that a fair cross-section of the community is placed on the jury. However, the problem arises then, would anyone ever be sentenced to death? If a death sentence did not have to be unanimous, yes.

As Professors Kamin and Pokorak point out, the fact that some jurors would be incapable of rendering a sentence of death would mean that they would be violating their oath as a juror in not fulfilling their legal duty.[130]

The next proposal is for two juries; one death qualified jury and one non-death qualified jury.[131] In this instance, both juries would hear the guilt phase of the trial.[132] However, the non-death qualified jury would be the only jury determining the guilt or innocence of the defendant.[133] Upon a finding of guilt by the non-death qualified jury, then the death qualified jury makes a determination as to sentence.[134] This seems to be practical, leaving aside the economics of impaneling two juries. "The principal advantage of such a system, of course, is that a non-death-qualified jury decides the question of guilt or innocence."[135] However, the issue of nullification still arises here when someone on the non-death qualified jury votes not guilty to ensure that the death penalty not be imposed at sentencing.

The final proposal by Professors Kamin and Pokorak is a singly hybrid jury.[136] This hybrid jury consists of both death qualified and non-death qualified individuals.[137] Under this proposal, all of the prospective jurors could be questioned as currently allowed under *Witt* however, "no juror could be removed for cause from the guilt-phase on the basis of their answers."[138]

In this situation, where a hybrid jury convicts the defendant, the non-death qualified jurors would be excused prior to the penalty phase of the trial and death qualified alternates would take their place.[139] "For the capital defendant, the hybrid jury would permit him to be judged by a jury that has not been death-qualified, thus greatly increasing the chances of his acquittal or of his conviction on a non-capital charge."[140] This is a great step in the right direction as this allows for a jury comprised more closely to a fair cross-section of the community.

"From the state's point of view, the hybrid jury has the advantage of a single voir dire; however such a voir dire will be incrementally more intensive (because more jurors would be needed than are currently used in the typical capital case)."[141] This process, while definitely a positive idea, still creates a problem; there is still a single jury evaluating both the guilt phase and penalty phase of a capital trial, albeit, a hybrid jury comprised of a larger number and a better representation, at least in theory, of the community.[142] Once again, there is still the issue of jury nullification where a non-death qualified juror will vote not guilty in the guilt phase so as to avoid a sentence of death.

VI. CONCLUSION

There are an infinite number of arguments both for and against capital punishment. Morality, religion, vengeance can all be used to argue either for or against capital punishment. But, the one constant is that there will always be proponents and opponents.

It would be nearly impossible to invent a better way of placing members of the public on a capital jury, absent the outlawing of capital punishment. The proposals outlined above by Professors Kamin and Pokorak certainly come close.

But one thing is clear; the current manner of death qualifying a jury creates a jury that is more prone to convict and more likely to recommend a sentence of death. Statistics do not lie.

It would be nice if there were no need for capital punishment. But, a slim majority of people in this nation feel that there is such a need. It is rather unfortunate, especially for defendants in capital murder cases, that the members of that slim majority encompass the entire jury in every capital murder case in every jurisdiction in this nation.

There is no other way to death qualify a jury that would eliminate all juror discrimination and all juror slant. However, it would be rational to at least consider that idea of using a non-death qualified jury for capital cases, the same type of jury used in all other criminal cases. This would at least provide the defendant with a little more breathing room, with some "friends" on the jury. After all, the defendant is innocent until proven guilty. That is something that seems to have been forgotten.

---

[1] 268 Parl. Deb., H. L. (5th ser.) 703 (1965) (Lord Chancellor Gardiner).

[2] *Black's Law Dictionary* 245 (8th ed. 2004).

[3] *Id*.

[4] *Adams v. Texas*, 448 U.S. 38, 45 (1980).

[5] *See Morgan v. Illinois*, 504 U.S. 719 (1992) (The majority opinion discusses the "life qualification" or "reverse-*Witherspoon*" question, holding that voir dire must include these types of questions so as to remove those jurors that, upon a finding of guilt, would only sentence the defendant to death.)

[6] *Black's Law Dictionary* 875 (8th ed. 2004).

[7] Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 Baylor L. Rev. 677, 679 (2002).

[8] 391 U.S. 510 (1968).

[9] Ill. Rev. Stat., c. 38, § 743 (1959).

[10] 391 U.S. at 520-521.

[11] *Id*. at 522.

[12] *Id*.

[13] *Id*.

[14] *Id*. n.21.

[15] *McGautha v. California*, 402 U.S. 183 (1971).

[16] *Id*. at 207-208.

[17] *Id*. at 209-210.

[18] *Furman v. Georgia*, 408 U.S. 238 (1972).

[19] *Id*.

[20] *Id*.

[21] Although, it is true that both Justice Marshall and Justice Brennan felt that capital punishment was always cruel and unusual punishment. For their remaining time on the bench together, they would dissent to every opinion ruling on capital punishment arguing that it violated the cruel and unusual punishment standard.

[22] *Woodson v. North Carolina*, 428 U.S. 280 (1976).

[23] *Id*.

[24] *Id*.

[25] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[26] 408 U.S. 238.

[27] 428 U.S. at 189.

[28] *Id*.

[29] 469 U.S. 412 (1985).

[30] *Id*. at 424 (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

[31] *Lockhart v. McCree*, 476 U.S. 162 (1986).

[32] *Id*. at 169-170.

[33] *Id*. at 173.

[34] *Id*. at 177.

[35] *Id*.

[36] *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

[37] 476 U.S. at 177.

[38] *Id*.

[39] 448 U.S. at 45.

[40] *Id*.

[41] *Id*.

[42] 476 U.S. at 176.

[43] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[44] *Id*. at 321.

[45] *Ring v. Arizona*, 536 U.S. 584, 588 (2002).

[46] *Id*. at 588-589.

[47] *Roper v. Simmons*, 543 U.S. 551 (2005).

[48] 448 U.S. at 45.

[49] Steven C. Serio, *A Process Right Due? Examining Whether a Capital Defendant has a Due Process Right to a Jury Selection Expert*, 53 Am. U.L. Rev. 1143, 1158.

[50] Rozelle, 54 Baylor L. Rev. at 699.

[51] *Id*. at 695.

[52] Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 Law & Hum. Behav. 121 (1984).

[53] Death Penalty Information Center: Innocence and the Death Penalty, at http://www.deathpenaltyinfo.org/innocence-and-death-penalty ("Since 1973, 138 people in 26 states have been released from death row with evidence of their innocence.") (last accessed, April 25, 2010).

[54] *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

[55] *Fay v. New York*, 332 U.S. 261, 299-300 (1947).

[56] 319 U.S. at 524-525 (citation omitted).

[57] 476 U.S. at 199-200 (Marshall, J., dissenting).

[58] *Id*. at 200 (citations omitted).

[59] Rozelle, 54 Baylor L. Rev. at 690. (Rozelle argues that the process of death qualifying a jury creates a smaller jury pool by eliminating family and friends of the defendant, which is good.)

[60] *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). (The Court held that a defendant may challenge a prosecutions "for cause" removal of a potential juror arguing race was the actual reason for removal. The burden is on the defendant to prove the removal was racial and the prosecution must prove a race-neutral reason for the removal. These are known at "*Batson* Challenges.")

[61] Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 Cornell L. Rev. 1176, 1186 (1973). (The study should an under representation of minorities (primarily black), those who did not have at least a high school education and Jews.)

[62] Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. Crim. L. & Criminology 379, 386 (1982). (In addition, 27% of those surveyed fell under the *Witherspoon* excludable category.)

[63] 476 U.S. at 201. (Marshall, J., dissenting).

[64] *Strauder v. West Virginia*, 100 U.S. 303 (1880).

[65] *Id*. at 308-309.

[66] *Peters v. Kiff*, 407 U.S. 493, 498-499 (1972) (citing *Strauder*, 100 U.S. at 308-309).

[67] Jacoby & Paternoster, 73 J. Crim. L. & Criminology at 386.

[68] *Id*.

[69] *Id*. at 387.

[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] 391 U.S. at 521.

[74] Arthur Koestler, *Reflections on Hanging*, 166-167 (1956).

[75] Joan B. Foley, *Death Qualification: Are Capital Defendants Entitled to Acquittal-Prone Juries? An Argument in Support of the Status Quo*, 30 St. Louis U. L.J. 193, 214 (1985).

[76] *Id*.
[77] Rozelle, 54 Baylor L. Rev. at 692-693 (footnote omitted).
[78] *Id*. at 693.
[79] U.S. Const., amend. VI.
[80] 419 U.S. at 526-527.
[81] *Id*.
[82] 476 U.S. at 175-176.
[83] *Id*. at 178.
[84] *Id*.
[85] *Id*. at 193-194 (Marshall, J., dissenting).
[86] 319 U.S. at 521.
[87] *Id*.
[88] 476 U.S. at 194 (Marshall, J., dissenting).
[89] 391 U.S. at 523.
[90] 476 U.S. at 173.
[91] *Id*. at 174.
[92] *Id*. at 178.
[93] *Id*. at 174 (quoting *Duren v. Missouri*, 439 U.S. 357, 363-364 (1979)).
[94] *Id*.
[95] *Id*.
[96] *Taylor v. Louisiana*, 419 U.S. 522, 530-531 (1975) (citations omitted).
[97] 476 U.S. at 175.
[98] 419 U.S. at 529 (citing Federal Jury Selection and Service Act, 28 U.S.C. § 1861 (1968)).
[99] *Id*. at 529-530.
[100] 319 U.S. at 528 (Douglas, J., concurring).
[101] 391 U.S. at 519 (citations omitted).
[102] *Id*. at 520 (citation omitted).
[103] As of 2007, only 39% of the United States population would consider their views against capital punishment so strong that they would not be able to serve on a capital jury. See Death Penalty Information Center Public Opinion Reports, at http://www.deathpenaltyinfo.org/public-opinion-about-death-penalty, (last accessed, April 25, 2010). However, death sentences nationwide have dropped considerably from 326 in 1995 to just 115 in 2007. See Id., at http://www.deathpenaltyinfo.org/death-sentences-year-1977-2008, (last accessed, April 25, 2010). In Florida, death sentences have been handed down with less frequency as well, noting that there were 45 in 1991 and just 16 in 2008. See Id., at http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008, (last accessed, April 25, 2010).
[104] Rick Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 605 (1986).
[105] *Id*.
[106] *Id*.
[107] Rozelle, 54 Baylor L. Rev. at 693.
[108] Welsh S. White, *The Death Penalty in the Eighties: An Examination of the Modern System of Capital Punishment*, 167-168 (1987).
[109] Rozelle, 54 Baylor L. Rev. at 694.
[110] 476 U.S. at 188 (Marshall, J., dissenting) (citation omitted).
[111] *Hovey v. Superior Court of Alameda County*, 616. P.2d 1301, 1352 (Cal. 1980) (citing Craig Haney, *On the*

Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 Law & Hum. Behav. 121 (1984)).

[112] *Id*.

[113] 476 U.S. at 188 (Marshall, J., dissenting) (citation omitted).

[114] Haney, 8 Law & Hum. Behav. at 128.

[115] 476 U.S. at 202 (Marshall, J., dissenting).

[116] Haney, 8 Law & Hum. Behav. at 151.

[117] *Report of the Massachusetts Governor's Council on Capital Punishment*, 80 Ind. U. L.J. 1 (2005).

[118] *Id*. at 3-4.

[119] *Id*. at 16.

[120] Nancy J. King, *The Problem of Death Qualification*, 80 Ind. U. L.J. 60 (2005).

[121] *Id* at 61.

[122] *Id*.

[123] Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 Ind. U. L.J. 52 (2005).

[124] *Id*.

[125] *Id*. at 53.

[126] Sam Kamin and Jeffrey J. Pokorak, *Death Qualification and True Bifurcation: Building on the Massachusetts Governor's Council's Work*, 80 Ind. U. L.J. 131 (2005).

[127] *Id*. at 148.

[128] 391 U.S. at 528.

[129] Kamin and Pokorak, 80 Ind. U. L.J. at 148.

[130] *Id*. at 149.

[131] *Id*.

[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] *Id*. at 150.

[136] *Id*.

[137] *Id*.

[138] *Id*.

[139] *Id*.

[140] *Id*.

[141] *Id*. at 150-151.

[142] *Id*. at 151.