QUALIFYING AND ASSEMBLING EXECUTIONERS

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Abstract

Death qualification, the policy and process by which the American legal system determines whether or not jurors are fit to serve on death penalty cases, functions today as an enshrined practice in criminal law after decades of scrutiny under the lens of both the Supreme Court and academic scholars. By tracing the evolution of the death qualification process as well as its impacts and implications on both jury composition and verdicts, this research considers whether death qualification merits continued utilization and protection. While this practice emanates from a value of balancing the interests of the state with that of the accused, its application does little to bear up such a premise. It is clear that death qualification actively threatens the rights of capital defendants and assembles unrepresentative, conviction-prone juries. These findings demand either a significant transformation or immediate termination of the process of death qualification.

Introduction

Throughout American history, the utilization and deployment of the death penalty has coursed through the veins of the lineage of our jurisprudence. In 1976, the Supreme Court reinstated the use of the death penalty in *Gregg v. Georgia*[1] sparking what would lead to a steady surge in executions through 1999.[2] Since 2000, the total number of executions in the United States has gradually declined, spiking at 98 executions performed in 1999 and receding to 14

[1] "Gregg v. Georgia (1976)," Bill of Rights Institute, accessed November 7, 2020, https://billofrightsinstitute.org/educate/educator-resources/lessons-plans/landmark-supreme-court-cases-elessons/gregg-v-georgia-1962/.

[2] "Death Row U.S.A. Fall 2020," NAACP Legal Defense and Educational Fund, Inc., October 1, 2020, https://www.naacpldf.org/wp-content/uploads/DRUSAFall2020.pdf.

executions in 2020 as of October 1, 2020, bringing the total number of executions enforced in the United States since 1976 to 1,526.[3]

Despite the declining overall trends in executions in the US, one jurisdiction has radically reversed course in 2020; the federal government has scheduled and carried out seven executions this year in July through September, totaling more than it has performed in the past sixty-five years combined.[4] Federal executions, historically rare, were only witnessed three times since Congress reinstituted the federal death penalty in 1988, the most recent transpiring in 2003.[5] After a botched execution in the state of Oklahoma in 2014, President Barack Obama effectively placed a moratorium on the death penalty and enacted a review of federal death penalty procedure by the Department of Justice.[6] In July 2019, Attorney General William Barr announced the DOJ's review had concluded, and the federal government initiated the process of what would become a spree of executions in 2020 for the first time in 17 years,[7] surpassing the number of executions implemented federally in the past six and a half decades of US history.[8]

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[3] "Death Row U.S.A. Fall 2020," NAACP.

[4] "Capital Punishment," Federal Bureau of Prisons, accessed November 7, 2020, https://www.bop.gov/about/history/ federal _executions.jsp.

[5] Hailey Fuchs, "Government Carries Out First Federal Execution in 17 Years," The New York Times, July 14, 2020, https://www.nytimes.com/2020/07/14/us/politics/daniel-lewis-execution- crime.html.

[6] Steven Mufson and Mark Berman, "Obama calls death penalty 'deeply troubling,' but his position hasn't budged," Washington Post, October 23, 2015, https://www.washingtonpost.com/news/post-politics/wp/2015/10/23/obama-calls-death-penalty-deeply-troubling-but-his-position-hasnt-budged/.

[7] Fuchs, 2020.

[8] "Capital Punishment," Federal Bureau of Prisons.

While this trend runs against the past two decades of states' approaches to executions, it also pushes a view becoming progressively more unpopular among the American public.[9] In 2016, fifty percent of Americans favored the death penalty for punishment of murder compared to forty-five percent who preferred life imprisonment without the possibility of parole.[10] Public opinion dramatically shifted in recent years, and in 2019, Gallup found sixty percent of Americans favor life imprisonment without parole in comparison to thirty-five percent who favor the death penalty as the better punishment for murder.[11] In over thirty-four years of asking this question, this marks the first time a majority of Americans find life in prison without parole preferable to the death penalty as punishment for murder.[12] While Americans prefer alternative punishment over the death penalty, in 2019, fifty-six percent of Americans approved of the death penalty as punishment for murder, yet this number has declined gradually from eighty percent in 1994.[13] In 2001, Gallup began questioning and analyzing Americans' views on the moral acceptability of the death penalty, and their findings from a May 2020 poll marked a record-low number of those who find the death penalty morally acceptable.[14] Fifty-four percent of

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[9] Megan Brenan, "Record-Low 54% in U.S. Say Death Penalty Morally Acceptable," Gallup, June 23, 2020, https://news.gallup.com/poll/312929/record-low-say-death-penalty - morally-acceptable.aspx.

[10] "Death Penalty," Gallup, October 24, 2006, https://news.gallup.com/poll/1606/ Death-Penalty.aspx.

[11] Jeffrey Jones, "Americans Now Support Life in Prison Over Death Penalty," Gallup, November 25, 2019, https://news.gallup.com/poll/268514/americans-support- life-prison-death-penalty.aspx.

[12] Jones, "Americans Now Support Life in Prison Over Death Penalty."

[13] "Death Penalty," Gallup.

[14] Brenan, "Record-Low 54% in U.S. Say Death Penalty Morally Acceptable."

Americans view the death penalty as morally acceptable, a decline of six percent since 2019,[15] while a record-high forty percent find the practice morally wrong.[16]

With such division among the American public over the death penalty, the federal government's renewal of executions at such a pace merits serious attention. Of course, the use and dispatch of the death penalty cannot be divorced from the US political climate and context. Perhaps the simple fact that 2020 is an election year is the root cause for this rash of executions. Is the current administration maneuvering this issue for political gain or power? Maybe. While the death penalty may be statistically approaching its own passing in favorability, it is clear that powerful forces and players are still willing to utilize its power, whether for rational, political gain or objective values, despite significant difference of opinion within the public arena on the issue.

Despite being a country that deeply espouses due process, the rights of criminal defendants, and balancing the interests of an individual and the state, the singularity of the American judicial system incontestably falters around the use of the death penalty when examined on the international stage. While many would likely laud the legal traditions of Western culture deeply established in the American system, scarcely any would commend the United States for its company and rank on the world stage concerning executions. According to Amnesty International, a human rights advocacy organization, the year 2019 marked the eleventh consecutive year the US persisted as the exclusive executing country in the Americas.[17] In

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[15] "Death Penalty," Gallup.

[16] Brenan, "Record-Low 54% in U.S. Say Death Penalty Morally Acceptable."

[17] "Amnesty International Global Report: Death Sentences and Executions 2019," Amnesty International, 2019, https://www.amnesty.org/download/Documents/ACT5018472020ENGLISH.PDF.

examining total executions by country in 2019, the US ranked fifth with twenty-two executions over the year preceded only by China (1,000s, the exact number is unknown since "this data is classified as a state secret"),[18] Iran (251+), Saudi Arabia (184), Iraq (100+), and Egypt (32+) (the "+" sign indicating the calculated minimum number of executions).[19] Such standing with countries that generally differ wildly with the US on human rights issues should spark concern and attention from anyone even mildly informed on such affairs. As a country that prides itself on its uniqueness and singularity, it is imperative we analyze how and why the US system ranks so high in this area on the world stage alongside countries with severe human rights abuses. The international company the US holds concerning the death penalty and executions should spark questioning of the system and an evaluation as to whether it lives up to its original ideals and values.

Following *Gregg v. Georgia*, the resurgence of executions ticking up year by year was composed of a shocking array of techniques leading to death including lethal injection, historically the most common method, electrocution, lethal gas, hangings, and firing squad.[20] While this research primarily revolves around the issue of death qualification and how capital juries are constructed, the methods of execution merit significant exploration and weight in any discussion and judgement on the employment of the death penalty. In his book, *Gruesome Spectacles: Botched Executions and America's Death Penalty,* Austin Sarat explores the tragic

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[18] "Death Penalty in 2019: Facts and Figures," Amnesty International, accessed November 7, 2020, https://www.amnesty.org/en/latest/news/2020/04/death-penalty-in-2019-facts-and- figures/.

[19] "Amnesty International Global Report: Death Sentences and Executions 2019."

[20] "Methods of Execution," Death Penalty Information Center, accessed November 7, 2020, https://deathpenaltyinfo.org/executions/methods-of-execution.

errors in executions including hangings becoming slow strangulations or decapitations, electrocutions too minimal that only stunned or too strong that burned the body and sometimes sparked fires, gas chambers leading to harrowing strangulations, and missed veins and complications administering lethal injections.[21] Overall, Sarat found an average botched execution rate of 3.15 percent of executions from 1900 to 2010, and lethal injection, today's method of choice, carries a 7.12 percent error rate.[22] These horrendous errors and long history of botched executions in the United States, despite "evolving" methods, certainly merit continued probing and analysis. A proper understanding of the history and method by which the state conducts the executions of its own citizens is indispensable to a judicious verdict on the moral and legal standing of the death penalty.

While these concerns and issues raise significant challenges to the standing and use of the death penalty, there lies yet another problem that is rooted even deeper in this process. In the United States, death penalty sentences are primarily handed down by juries. These juries are selected and organized by a process defined by looming biases and inevitable disparities in the delivery of justice. This process, known as "death qualification," has wreaked havoc on fundamental constitutional rights, minority communities, and our sense of "justice" in the United States.

Chapter 1: The History of the Death Qualification of Juries

While the death penalty solely in and of itself elicits visceral reactions from many, a darker, discreet element of this practice lurks beneath a surface-level observation. To try a capital

[21] Jon M. Sands and Dale A. Baich, "Gruesome Spectacles: Botched Executions and America's Death Penalty," *Jurimetrics: The Journal of Law, Science & Technology* 55, no. 4 (Summer 2015): 463–75.

[22] Sands and Baich, "Gruesome Spectacles."

case, a court must impanel a group of jurors who are death-qualified. These jurors are required to not be "strictly opposed" to the death penalty nor to hold that the death penalty ought to be applied in all capital murder cases.[23] The case precedent and rules guiding voir dire and defining who is fit to serve on a capital murder case have evolved and emerged from several landmark Supreme Court cases.

One of the earliest cases concerning death qualification, *Witherspoon v. Illinois*, 391 U.S. 510 (1968), decided whether this process aligned with the Sixth Amendment's guarantee of an "impartial jury" and the Fourteenth Amendment's requirement of due process. In this case, the state of Illinois allowed jurors to be challenged for cause if they exhibited "conscientious scruples against capital punishment" or opposed the practice.[24] Under this statute, the prosecution challenged and removed almost half of the jury pool based alone on any hesitations, doubts, and objections toward the death penalty raised by a juror; Witherspoon was subsequently convicted for murder and received a sentence of death.[25] Witherspoon, in his appeal, argued that his jury, in the manner assembled, was produced to convict and would be more likely to side with the prosecution and to find a guilty verdict.[26] Justice Stewart, in writing the majority opinion, rejected Witherspoon's claim and social science evidence that his jury and death-qualified juries overall were more prone to convict; however, he found that this jury did not meet the Sixth Amendment's impartiality requirement in its composition and the ensuing decision on

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[23] Alice Chao et al, "Death-Qualified Juries and the Flowers Trials," Cornell University Law School, accessed November 7, 2020, https://courses2.cit.cornell.edu/sociallaw/FlowersCase/deathqualifiedjuries.html.

[24] *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

[25] *Witherspoon v. Illinois.*

[26] Chao, "Death-Qualified Juries and the Flowers Trials."

punishment was biased toward finding a sentence of death.[27] He ruled, "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."[28] The Court found that a more narrow exclusion rule must be applied in order to produce a "neutral" jury as removing those with "conscientious religious scruples" or general objections deprived the jury of its duty to "express the conscience of the community on the ultimate question of life or death," and instead, "The State produced a jury uncommonly willing to condemn a man to die."[29] This case established the term, "*Witherspoon*-excludables," a label for those whose opposition and views toward the death penalty allowed them to be removed from a jury.[30] *Witherspoon* protected general objectors and those with "conscientious scruples" from immediate removal on capital juries and required only the removal of those who would "automatically" vote against a death penalty sentence and those who could not remain impartial in determining a defendant's guilt.

In 1985, the Supreme Court granted certiorari to another case involving death qualification. *Wainwright v. Witt*, 469 U.S. 412 (1985), further expanded the definition of jurors who could be excluded for their death penalty viewpoints. This case, along with many others since *Witherspoon*, forced the Court to reexamine the *Witherspoon* standard and its application by lower courts over the exclusion of jurors.[31] At issue in this case was whether or not a juror's bias must be proven with "unmistakable clarity" in order to exclude such a juror, a question that

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[27] *Witherspoon v. Illinois.*

[28] *Witherspoon v. Illinois.*

[29] *Witherspoon v. Illinois.*

[30] Chao, "Death-Qualified Juries and the Flowers Trials."

[31] *Wainwright v. Witt*, 469 U.S. 412 (1985).

Justice Rehnquist answered by setting aside the *Witherspoon* standard.[32] The Court ruled that exclusion due to a juror's views on the death penalty should be based upon whether their views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath," the standard set forth in *Adams v. Texas,* 448 U.S. 38 (1980).[33] Effectively, the Court "simplified" its rules and standards for juror exclusion.[34] By replacing the narrow exclusion limited to those employing "automatic" decision-making and broadening exclusion to all whose views would impair them from the performance of their duty and maintaining their oath, the Court vastly increased the pool of excludable jurors. The Court also found that biases did not have to be proven with "unmistakable clarity" but rather, "deference must be paid to the trial judge who sees and hears the juror" to assess whether or not the *Adams* test was met.[35] Additionally, Justice Rehnquist ruled that under 28 U.S.C. § 2254, a trial judge's findings on the merits of an exclusion for cause was a "factual issue" and therefore should be given deference and a "presumption of correctness" by a court reviewing a case involving such an issue as held in *Patton v. Youn*t, 467 U.S. 1025 (1984).[36] Under *Witt,* the Court limited the discretion provided to jurors and clarified the standard for juror exclusion based on the *Adams* test.[37] While *Witt* cleared up confusion among lower courts regarding juror exclusion,

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[32] *Wainwright v. Witt.*

[33] *Wainwright v. Witt.*

[34] Patrick J. Callans, "Sixth Amendment--Assembling a Jury Willing to Impose the Death Penalty: A New Disregard for a Capital Defendant's Rights," *Journal of Criminal Law & Criminology* 76, no. 4 (Winter 1985): 1027–50, https://doi.org/10.2307/1143499.

[35] *Wainwright v. Witt.*

[36] *Wainwright v. Witt.*

[37] Callans, "Sixth Amendment--Assembling a Jury Willing to Impose the Death Penalty."

it largely increased the pool of jurors who could be deemed unfit to serve on capital juries and shielded such decisions under the trial judge's authority.

A year after *Witt*, the Court revisited the issue of jurors' views on the death penalty and death qualification in *Lockhart v. McCree*, 476 U.S. 162 (1986). In this case, where the jury convicted McCree but gave a sentence of life imprisonment without parole, McCree brought a challenge to the use of death qualification before the guilt phase of his bifurcated trial and held that such action violated the representative cross-section of the community and the impartial jury requirements of the Constitution.[38] Justice Rehnquist, writing the majority opinion, found that the exclusion of these "*Witherspoon*-excludables" did not violate the fair cross-section requirement as the process was not a "systematic exclusion of 'a *distinctive group in the community*'" as described in *Duren v. Missouri*, 439 U.S. 357 (1979), and that a group defined by shared viewpoints making them unfit to serve on a jury did not establish a "distinctive group."[39] McCree introduced several studies attempting to show death-qualified juries were more likely to convict and find a defendant guilty, yet the Court found this evidence too "tentative and fragmentary" and rejected it.[40] The Court ruled that McCree's death-qualified jury was not biased in its finding of guilt holding that, "A jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[41] *McCree* stepped away from the *Witherspoon*

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

[39] *Lockhart v. McCree*.

[40] Chao, "Death-Qualified Juries and the Flowers Trials."

[41] *Lockhart v. McCree*.

standard of a least intrusive means to exclude jurors and maintain the state's interests in creating juries that could uphold its statutes and to avoid overbroad, unrepresentative exclusion that would threaten a defendant's rights, and *McCree* held that such exclusion was constitutional even within the guilt phase of a trial.[42] *McCree,* as in cases before it, rejected social science evidence on the effects of death qualification and allowed for the removal of "*Witherspoon*-excludables" prior to the guilt phase of a capital trial.

In 2007, the Court took up another case involving death qualification voir dire and the reviewing by courts of decisions of juror exclusion and removal. In *Uttecht v. Brown,* 551 U.S. 1 (2007), the Court ruled on whether or not an appellate court had correctly deferred to a trial court's finding of a juror's impairment to serve on a capital case.[43] The Court reviewed the voir dire process from the case and "Juror Z's" statements and removal.[44] In the majority opinion, Justice Kennedy strongly affirmed the state's interest in the ability to remove jurors incapable of recommending a sentence of death,[45] and found the trial court "is entitled to deference because it had an opportunity to observe the demeanor of Juror Z."[46] Because the appellate court could not observe and evaluate the juror's behavior, demeanor, and other cues that the trial court had direct access to and observation of, it should give deference to the trial court's ruling.[47] The Court

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[42] Jane Byrne, "Lockhart v. McCree: Conviction Proneness and the Constitutionality of Death-Qualified Juries Note," *Catholic University Law Review* 36, no. 1 (1986): 287–318.

[43] *Uttecht v. Brown,* 551 U. S. 1 (2007).

[44] *Uttecht v. Brown.*

[45] Richard Klein, "Analysis of Death Penalty Decisions from the October 2006 Supreme Court Term Nineteenth Annual Supreme Court Review," *Touro Law Review* 23, no. 4 (2007): 793–814.

[46] *Uttecht v. Brown.*

[47] *Uttecht v. Brown.*

allowed for the potential of review which would overturn a case based on finding no substantial impairment on behalf of a juror and held, "But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion."[48] By weighing a juror's observable demeanor and actions over statements in the trial record by the juror the Court increased the likelihood that reviewing courts would not overturn decisions made by trial courts to exclude jurors.[49] *Uttecht* further solidified decisions of juror exclusion within the bounds of trial courts, increasingly sealing such judgements from review and reconsideration from higher courts.

From *Witherspoon* to *Uttecht*, the standards and tests for death qualification have continued to evolve and new precedents have emerged under varying eras of the Court. These cases are not exhaustive of all of the death qualification related cases the Supreme Court has ruled on and considered, but they do provide a timeline and foundation for understanding the precedent and basis for where the practice stands today. The dark cloud of death qualification continues to grow and encompass more of the American public and viewpoints under its shadow as the Court employs broader exclusion definitions and limits review of juror removals. Certainly, the progression and development of this storm merit attention and cause for concern when nearly half of the population may be removed from juries due to the views they hold, no matter how decided they are.

Another interesting, historical aspect of jury trials and juries is nullification. Jury nullification, a controversial, long-standing practice in American jurisprudence where juries may

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[48] *Uttecht v. Brown.*

[49] Brooke A. Thompson, "Criminal Law - The Supreme Court Expands the Witt Principles to Exclude a Juror Who Would Follow the Law - Uttecht v. Brown," *University of Arkansas at Little Rock Law Review* 30, no. 4 (2007): 845–84.

reject the rule of law by "object[ing] to the application of the law to a particular defendant or object wholesale to the law itself."[50] In English courts before the Magna Carta, the description, "courts of conscience," characterized juries who ruled on cases "according to their own sense of justice."[51] This tradition carried on into the American legal system, most notably in cases where juries nullified the law and refused to convict those who illegally safeguarded runaway enslaved people.[52] More recently, Butler argues that the historic injustices toward people of color at the hands of the American legal system require that, "It is the moral responsibility of black jurors to emancipate some guilty black outlaws."[53] He holds that jury nullification for some nonviolent black defendants is morally, pragmatically, and politically better for black communities.[54] Others have applied Butler's argument for nullification to the case of Latinos as a potentially effective counter to the racism within the immigration process and the detrimental effects of incarceration and deportation.[55] With its varied uses over centuries, many argue that jury nullification "helps keep the law respectable by keeping it in line with the conscience of the community."[56] When a

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[50] "Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents," *Harvard Law Review* 127, no. 7 (2014): 2095.

[51] Andrew J. Parmenter, "Nullifying the Jury: The Judicial Oligarchy Declares War on Jury Nullification Note," *Washburn Law Journal* 46, no. 2 (2006): 380.

[52] "Live Free and Nullify:" 2096.

[53] Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System Essay," *Yale Law Journal* 105, no. 3 (1995): 679.

[54] Butler, "Racially Based Jury Nullification."

[55] Clifford Clapp, "Latino Jury Nullification: Resisting Racially & Ethnically Biased Crimmigration through Civil Disobedience," *Rutgers Race & the Law Review* 17, no. 2 (2016): 167–78.

[56] Clay S. Conrad, "Jury Nullification as a Defense Strategy," *Texas Forum on Civil Liberties & Civil Rights* 2, no. 1 (1995): 41.

law becomes so unpopular and unacceptable within the community, it retains and can use the power of nullification to reject what such a law demands. The link between death qualification and jury nullification comes from the fact that, "Death-qualification of juries began as a means of controlling independent juries."[57] Conrad argues, "Our entire edifice of capital punishment law revolves around guiding, focusing and channeling jury discretion into judicially approved channels"[58] that we risk depriving defendants of their fundamental constitutional rights. Perhaps, there lies a remedy for the scorching of death qualification on jury pools in the doctrine of jury nullification.

It is clear that the process of death qualification has significantly evolved due to many Supreme Court cases guiding its use and limitations. By exploring these cases, it is clear that this process is deeply embedded in the American legal system, and it will likely only change as a result of further legal cases and proceedings. Therefore it is imperative to understand the history of the law and reasoning of the courts in order to maintain an accurate assessment of the process and to understand what approaches could be employed, whether jury nullification, specific legal questions, interpretations of cases, or other means, to best address the policy of death qualification.

Chapter 2: The Impact and Outcomes of Death Qualification

Arguably more disturbing and concerning than the history and purpose of death qualification are the repercussions from the implementation of the practice on juries. Death qualification influences both the demographics and judgements of juries in a vast array of ways that run contrary to the impartial jury and cross-section of the community requirements of the

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[57] Clay S. Conrad, "Jury Nullification," Cato Institute, 2014: 222, https://www.cato.org/ sites/ cato.org/files/pubs/pdf/jury-nullification.pdf.

[58] Conrad, "Jury Nullification," Cato Institute: 230.

Constitution. As death qualification continues to weed out a growing sector of the public, it threatens the very essence of the jury system in the United States, one that relies upon representative, unbiased jurors.

As Cohen argues, any meaningful restriction or qualification built into the jury system erodes the basis of the impartiality of the jury; the broadening exclusionary standards of death qualification corrode the very ideals the jury was intended to represent.[59] It remains to be seen if the American legal system will allow its jurors to serve as checks on the law or be demoted to mere mechanistic enforcers of rules of the state regardless of the state's interests or aberrations. As the system stands, such viewpoint regulation of jurors denies capital defendants a right promised them in the Constitution whereby juries may decide whether or not "a sentence of death is repugnant."[60] Today, the decision is arguably set from the beginning with increasingly smaller chances of true deliberation by juries.

Over the years as death qualification has cemented itself within the courts and death penalty procedure, many studies and extensive research has analyzed the effects and impacts of this process both within the minds of jurors and on the results of jury composition and verdicts. In conducting simulated trials, Cowan found that, under the *Witherspoon* standard, death-qualified jurors were more likely to find a guilty verdict both before and after jury deliberations than their excludable counterparts.[61] Additionally, Cowan's results showed that on mixed juries

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[59] G. Ben Cohen and Robert J. Smith, "The Death of Death-Qualification," *Case Western Reserve Law Review* 59, no. 1 (2008): 87–124.

[60] Cohen and Smith, "The Death of Death-Qualification:" 124.

[61] Claudia L. Cowan, William C. Thompson, and Phoebe C. Ellsworth, "The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation," *Law and Human Behavior* 8, no. 1/2 (1984): 53-79.

(juries including excludable jurors) individual jurors "were generally more critical of the witnesses, less satisfied with their juries, and better able to remember the evidence than subjects from the death-qualified juries, suggesting that diversity may increase the vigor, thoroughness, and accuracy of the jury's deliberations."[62] By stripping a jury of certain viewpoints, the odds decrease in the defendant's favor that they might receive true deliberation and argument over their guilt and sentencing rather than blind acceptance of the state's case.

The process of death qualification itself opens the door to unfounded assumptions by jurors when discussing the death penalty leads to predispositions of guilt on behalf of the defendant.[63] Under death qualification, juries truly "tilt toward death" and are more likely to convict,[64] a frightening fact for any capital defendant and defense attorney. Not only should this evidence plague those involved in such a rigged system, it should unsettle anyone who desires the legal system to retain trust and legitimacy.

The process of death qualification not only removes a large percentage of the public and their viewpoints and experiences from the jury box, it biases even those deemed fit to serve who have predispositions to convict and believe the state's case. Haney's research using simulated voir dire led him to conclude that, "Subjects who were exposed to death qualification were significantly more conviction prone, more likely to believe that other trial participants thought the defendant was guilty, were more likely to sentence him to death, and believed that the law

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[62] Cowan, "The Effects of Death Qualification:" 53.

[63] Richard Dieter, "Blind Justice: Juries Deciding Life and Death with Only Half the Truth," Prison Policy Initiative, 2005, https://www.prisonpolicy.org/scans/deathpenaltyinfo/blindjusticereport.pdf.

[64] "The Report of the Oklahoma Death Penalty Review Commission," The Oklahoma Death Penalty Review Commision, 2017: 114. https://www.courthousenews.com/wp-content/uploads/2017/04/OklaDeathPenalty.pdf.

disapproves of death penalty opposition."[65] This system of qualification biases jurors, who are already open to the death penalty, to assume a defendant is guilty since death is apparently on the table, and it affirms their views on the death penalty as they gain jury seating while those with opposing views are dismissed. This process of death qualification further anchors the likelihood the state's interests will be carried out over the rights and protections reserved to capital defendants.

In addition to the impartiality of the jury, death qualification fails to deliver fair racial representation in the composition of juries. In measuring the strike rate under *Witherspoon* in eleven capital trials in Louisiana with death verdicts between 2009 and 2013, Cover found that 22.5 percent of the jury pool were struck based on their death penalty views and "one- third of black venire members were struck under *Witherspoon*, and nearly sixty percent of those struck on this basis were black."[66] Examining the pool of excluded jurors compared with the entire pool demographics revealed the average of excluded whites was 38.7 percent and 59.8 percent of excluded blacks while the venires were 55.8 percent white and 41.6 percent black overall.[67] On average, twice the percentage of blacks in the total jury pool (35.2 percent) compared to the percentage of whites (17.0 percent) were excluded for their death penalty beliefs.[68] Lynch established that even in communities with strong African American representation the process of

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[65] Craig Haney, "On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process," *Law and Human Behavior* 8, no. 1/2 (1984): 121.

[66] Aliza Plener Cover, "The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency," *Indiana Law Journal* 92, no. 1 (2016): 113.

[67] Cover, "The Eighth Amendment's Lost Jurors."

[68] Cover, "The Eighth Amendment's Lost Jurors."

death qualification leads to underrepresentation of African Americans on juries.[69] Not only does death qualification limit the capacity for representative juries and negate chances for diversity reflecting the community in which a crime may have been committed, Levinson found that, "Death-qualified jurors hold stronger implicit and self-reported biases than do jury-eligible citizens generally."[70] Death qualification both bars blacks from serving on capital juries and ends with jurors who are more biased against minorities than the average eligible juror.

Death qualification has severe implications for convening a representative jury. In examining death qualification's impacts on race and juries, Sullivan concluded, "The demographic consequence of death qualification is the legitimization of a process in which the need for expression of community attitudes on the suitability of capital punishment is compromised by limitations in defining the community through the lens of race and ethnicity."[71] Since death-qualified juries are more white, male, and conservative than other juries, the issue of representation will continue to worsen as minorities grow into majorities and the sector of the population eligible for death penalty juries will continue to diminish.[72] Various studies have outlined additional demographic implications of death qualification including Catholics,

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[69] Mona Lynch and Craig Haney, "Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries," *Law & Policy* 40, no. 2 (April 2018): 148–71, https://doi.org/10.1111/lapo.12099.

[70] Justin D. Levinson, Robert J. Smith, and Danielle M. Young, "Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States," *New York University Law Review* 89, no. 2 (2014): 573.

[71] J. Thomas Sullivan, "The Demographic Dilemma in Death Qualification of Capital Jurors," *Wake Forest Law Review* 49, no. 4 (2014): 1169.

[72] Noelle Nasif, Shyam K. Sriram, and Eric R. A. N. Smith, "Racial Exclusion and Death Penalty Juries: Can Death Penalty Juries Ever Be Representative?" *Kansas Journal of Law & Public Policy* 27, no. 2 (Spring 2018): 147–66.

nonfundamentalists, "people who do not interpret the Bible literally, and those who engage in more devotional religious practices" being highly likely to be removed from capital jury pools.[73] Others have highlighted "higher levels of homophobia, modern racism and modern sexism" among death-qualified jurors,[74] and increased likelihoods to hold views including a just world and legal authoritarianism, possess an internal locus of control, and affirm aggravating factors.[75] Butler and Moran examined the impact of pretrial publicity on potential jurors and found that, "Death-qualified participants were better able to correctly identify the defendant, recognize most of the factual details of the case,… [and be] more likely to feel that the pretrial publicity surrounding the case would have minimal impact on the defendant's right to due process."[76] Butler's research showed that death-qualified jurors and excludable jurors were equally likely to spot and recognize incorrect scientific procedures in testimony; however, death-qualified jurors

[73] Alicia Summers, R. David Hayward, and Monica K. Miller, "Death Qualification as Systematic Exclusion of Jurors With Certain Religious and Other Characteristics," *Journal of Applied Social Psychology* 40, no. 12 (December 2010): 3229, https://doi.org/10.1111/j.1559 - 1816.2010.00698.x.

[74] Brooke Butler, "Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process," *Behavioral Sciences & the Law* 25, no. 6 (2007): 865.

[75] Brooke Butler and 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," *Behavioral Sciences & the Law* 25, no. 1 (2007): 57–68.

[76] Brooke Butler, "The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity," *Journal of Applied Social Psychology* 37, no. 1 (January 2007): 115, https://doi.org/ 10.1111/j.0021-9029.2007.00150.x.

were less likely to employ such knowledge when considering the quality and legitimacy of such evidence.[77]

The mountain of research and studies over the impact of death qualification and the demographics of death-qualified jurors point toward significant tapering of the jury-eligible citizenry toward a selection inherently biased against the interests of capital defendants. It is clear that death qualification substantially impacts both the composition and verdicts of capital juries. Certainly, the system by which capital juries are assembled deserves a re-evaluation in light of its impacts on juries across the United States.

Chapter 3: Reimagining Capital Juries

After reviewing the history, purpose, impact, and outcomes of death qualification, an imperative challenge arises for any who wish to not only improve the American legal system and approach to the gravest judgement in the land, but also to defend and uphold the rights promised and guaranteed to capital defendants under the Constitution. Advocates have advanced varied approaches from abolishing the practice of death qualification to improving voir dire and even informing juries of their right of nullification. It is clear that either transformation or annulment of this process is necessary.

As the death penalty defines one of the most authoritative powers, it therefore requires equally strong protections in place to guard rogue and imprudent wielding of such force by the state. One could argue juries function as one such protection. How could twelve individual jurors, community peers of a defendant, wrongly sentence him in light of the potential for such a harsh penalty, the ultimate penalty? As laid out, in what should be the most protected, careful

[77] Brooke Butler and Gary Moran, "The Role of Death Qualification and Need for Cognition in Venirepersons' Evaluations of Expert Scientific Testimony in Capital Trials," *Behavioral Sciences & the Law* 25, no. 4 (2007): 561–72.

trial and jury selection, death penalty juries can be the most biased, unrepresentative juries of them all. So, the question remains, what can be done against such odds?

One possible remedy to the effects of death qualification may lie in the increased awareness and utilization of jury nullification. As discussed previously, nullification functions as an essential check to state power and interests. Some suggest adding to jury instructions and allowing judges to inform juries, with caution, of their right to refuse to follow the instructions of the law in the extraordinary case it offends their sense of justice.[78] Such an instruction may aid in advancing true deliberation among jurors over a verdict rather than confusion or bad assumptions.[79] Arguing that this recommendation is unlikely to materialize, Rubenstien encourages courts not to inform juries of or discourage them against nullification; instead, he suggests they be told their duty of fact finding and applying the law to the facts but not be instructed to disregard their sense of morality in the process where the law runs against it.[80] This process would likely prove easier to enact as it functions as deletion rather than addition to the process as in the former offer. McKnight offers a similar suggestion, "Judges should instruct petite juries that if the prosecutor has proven his case beyond a reasonable doubt, the jury *may* convict the defendant—as opposed to an instruction that in such cases the jury *must* or *should*

[78] David C. Brody, "Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right," *American Criminal Law Review* 33, no. 1 (1995): 89–122.

[79] John Clark, "The Social Psychology of Jury Nullification Contributed Article," *Law and Psychology Review* 24 (2000): 39–58.

[80] Arie M. Rubenstein, "Verdicts of Conscience: Nullification and the Modern Jury Trial," *Columbia Law Review* 106, no. 4 (2006): 959-993.

convict."[81] A small wording adjustment to jury instructions could prove influential in jurors' deliberations and understanding of their duty.

Other recommendations include utilizing one jury for the guilt phase and, if necessary, impaneling a new jury that is death-qualified for the sentencing phase.[82] However, such a process would likely bias the new jury against a defendant because of the established conviction and new jurors would not retain any residual doubts from the guilt phase or knowledge of the evidence presented.[83] Salgado advocates a slightly different approach where a jury undergoes death qualification voir dire but excludable jurors are not removed until after the guilt phase if a sentencing phase proves necessary; a maximum number of alternates would be retained throughout the jury and before the sentencing phase excludable jurors would then be removed from the jury.[84]

Another suggestion for improvement to the death qualification system is to change the questions asked during voir dire used to death qualify jurors. Rozelle contends that under the *Witt* standard only one question asking whether jurors have "such strong feelings about the death penalty one way or the other that they would not be able to obey their instructions and oath" is

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[81] Aaron McKnight, "Jury Nullification as a Tool to Balance the Demands of Law and Justice," *Brigham Young University Law Review* 2013, no. 4 (2013): 1103.

[82] David Lindorff, "The Death Penalty's Other Victims," Death Penalty Information Center, accessed November 7, 2020, https://deathpenaltyinfo.org/stories/the-death-penaltys-other-victims.

[83] Lindorff, "The Death Penalty's Other Victims."

[84] Richard Salgado, "Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green," *Brigham Young University Law Review* 2005, no. 2 (2005): 519–54.

necessary.[85] She argues that this question alone can satisfy the requirements under *Witt* in order to determine whether or not a juror is fit to serve on a capital case and that any additional examination of a juror's views infringes on the rights of capital defendants.[86] Changing the process of death qualification voir dire could increase the percentage of the community deemed fit to serve and still fall under the rules of the *Witt* standard.

Stepping away from an improvement approach, others argue that the best and only way to guard against the detrimental impacts of death qualification is abolishment of the process altogether. Haney notes, "The problems created by exposure to the process itself cannot be entirely remedied by anything less than prohibiting the procedure."[87] Some offer that excluding the process of death qualification from the trial process altogether may be the only way to ensure the rights of capital defendants enshrined within the Constitution are protected and ensured. Ultimately, whether by transformation or annulment, it is abundantly clear that the process of death qualification is in dire need of change, not only for the process itself, but especially for those facing the severest of punishments under the American legal system. For a system built on the pursuit of justice and equality under the law, it is essential we strive to maintain these values at all levels of the system, no matter how heinous the crime one is charged with or how clear the evidence is stacked up against them. True justice for all must prevail.

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[85] Susan D. Rozelle, "The Utility of WITT: Understanding the Language of Death Qualification," *Baylor Law Review* 54, no. 3 (2002): 696.

[86] Rozelle, "The Utility of WITT."

[87] Craig Haney, "Juries and the Death Penalty: Readdressing the Witherspoon Question," *Crime and Delinquency* 26, no. 4 (1980): 526.

Conclusion

While the use of the death penalty in America is itself a hotly contested issue, one of the most concerning issues within its use is the process of death qualification. This process creates juries that are unrepresentative of their communities and more prone to convict defendants. Death-qualified juries are the embodiments of a select group of the public rather than the "conscience of the community" as held in *Witherspoon*. Death qualification creates a system inherently biased against those charged at the highest level permissible.

Either the transformation of this practice or termination of its employment under the American legal system is imperative to retaining the system's legitimacy and the ideals established in the Constitution. Death qualification raises flags that must be addressed in order to retain the original intent and purpose of juries in the United States. It remains to be determined what method or solution will best serve the balance between the state's and defendants' interest.

Ultimately, can juries be believed to come to the best conclusion and form of justice possible? Or should the system predetermine their choice and force them to make the decision in order to rid itself of the blame? Is it truly worth restraining the "conscience of the community" in order to maintain a law of death? The death knell of death qualification hinges on the answer.

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Worldview Appendix

I felt inclined to research this topic and area of the criminal justice system because I believe how we treat "the least of these" as Christ outlines in Matthew 25:40, "Truly I tell you, whatever you did not do for one of the least of these, you did not do for me," referring to the hungry, thirsty, naked, sick, and imprisoned, defines who we are as a society. Jesus clearly identifies Himself not with the rich ruler of the day, much less the religious leader; rather, He casts his lot with that of the naked, the prisoner, the sick, the one in need, shattering every preconception a reasonable person might hold about the king of the universe. While on earth, Jesus sought out the fringes of society, whether forgotten, despised, or both. He ate with tax collectors, healed lepers, and freed the demon-possessed. The life and ministry of Jesus screams the message that no one is beyond God's reach, no matter their transgressions or societal rank. This tenet of the faith must permeate our views and actions as Christians as we seek to follow Jesus' example here on earth.

The application of this doctrine most certainly can and should be enshrined in how we treat those society marginalizes and disregards. To me, there is no clearer place to start than the criminal justice system. How we treat the accused, the systems we utilize in the pursuit of "justice" for all, the manner by which we decide the fate of those charged, all should be informed by a healthy view of our common humanity, shared dignity, and equal worth. By learning more about the issues that plague the system, dismantle the rights of the accused, and encourage convictions by juries, it is strikingly obvious that this system desperately needs rectification if our goal is a system informed by the Gospel and its doctrines. Even if the goal is a secular system, one can argue that values of equal worth and dignity and a vested interest in the rights and status of the accused and marginalized also prove beneficial in pursuit of such a system.

Exploring the process, history, and impacts of death qualification revealed an area of law and of the judicial system that appears severely adrift of the value of justice, the presumption of innocence, and a Christian approach to care and regard for the oppressed and marginalized.

As Christians, we should be vigilant to the dangers and threats to the most vulnerable in our society just as Jesus was. When society's rules and systems hurt the marginalized and disregarded, we must not fail to step up and speak out. Bringing peace and healing to any place of hurt or need ought to be our calling card as Christians. This is our charge—to bring hope and healing to a world desperately in need of Jesus. May our eyes not be so fixed on a future eternity that we fail to see a broken, hurting world in front of our very eyes.