DUREN, POPE FRANCIS, AND THE DEATH PENALTY: HOW CATHOLICS CAN RENDER THE CAPITAL JURY SELECTION PROCESS UNCONSTITUTIONAL

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Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good. Today, however, there is an increasing awareness that the dignity of the person is not lost even after the commission of very serious crimes. In addition, a new understanding has emerged of the significance of penal sanctions imposed by the state. Lastly, more effective systems of detention have been developed, which ensure the due protection of citizens but, at the same time, do not definitively deprive the guilty of the possibility of redemption. Consequently, the Church teaches, in light of the Gospel, that the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person, and she works for its abolition worldwide.

New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty, February 8, 2018.[1]

Introduction

The execution of Jesus Christ is a bedrock foundation of the Christian faith. As it is written, Jesus was flogged, betrayed, and abandoned by his disciples. He was forced to carry a massive wooden cross as He marched towards His death.[2] Centurion officers of the Roman army drove nails through His flesh, crucifying Him to the cross.[3] Nailed to the cross, gasping for breath, Jesus cried out, "[i]t is finished," and exhaled his final breath.[4] The Roman government, albeit begrudgingly, authorized this ruthless form of public mockery and execution.[5]

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1. Press Release, Holy See Press Office, New Revision of Number 2267 of the Catechism of the Catholic Church on the death penalty – Rescriptum "ex Audentia SS.mi," (Aug. 2, 2018), https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2018/08/02/180802a.html.

2. *Matthew* 26:47–27:32. For a detailed description on the Roman practice of crucifixion in the first century, see Joseph W. Bergeron, The Crucifixion of Jesus: A medical Doctor Examines the Death and Resurrection of Christ (2018), 91-112.

3. *Mark* 15:24.

4. *John* 19:30.

5. *Luke* 23:13–25.

Given this unwarranted, state-sanctioned execution of Jesus, as well as the Sixth Commandment's prohibition on killing,[6] one might presume opposition to capital punishment is a universal Christian viewpoint. This assumption would be incorrect. In fact, in 2015, Christians in the United States supported the death penalty at a higher rate than those who identified as religiously unaffiliated.[7] Catholics (53%) supported the death penalty at a lower rate than Protestants (63%), but still at a slightly higher rate than the religiously unaffiliated (48%).[8]

Historically, the Catholic Church has approved of capital punishment, or at least tolerated the practice in extreme circumstances.[9] However, on October 11, 2017, Pope Francis declared that, "[n]o matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person."[10] On May 11, 2018, a revision to the Catechism of the Catholic Church[11] adopted Pope Francis's teaching on the death penalty, stating that, "[t]he Church teaches, in light of the Gospel, that the death penalty is inadmissible . . . and she works for its abolition worldwide."[12]

The Catholic Church's stance on the death penalty has the potential to significantly impact capital punishment in the United States. In particular, the Church's unequivocal stance against capital punishment may create new opportunities to challenge the current jury-selection process in death penalty cases. Criminal defendants are guaranteed "the right to . . . [a] public trial, by an impartial jury,"[13] comprised of a fair cross-section of the community.[14] The fair cross-section requirement prohibits the government from systematically excluding distinct groups in the community from the jury-selection process unless doing so

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6. *Exodus* 20:13.

7. *Less Support for Death Penalty, Especially Among Democrats*, PEW RESEARCH CENTER (Apr. 16, 2015), http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/.

8. *Id*. Pew conducted another survey regarding support of the death penalty in April 2018. *See* Baxter Oliphant, *Public Support for the Death Penalty Ticks up*, PEW RESEARCH CENTER (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/. The 2018 survey provided data for "White Evangelical Protestants" and "White Mainline Protestants" but did not provide data for Protestants in general. Support for the death penalty among Catholics in general remained the same but declined from 63% to 57% among white Catholics. Support among religiously unaffiliated remained the same.

9. *See* New Revision of Number 2267, *supra* note 1 ("Recourse to the death penalty on the part of legitimate authority, following a fair trial, was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good.").

10. Pope Francis, Address of His Holiness Pope Francis to Participants in the Meeting Promoted By the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017).

11. "The Catechism contains the essential and fundamental content of the Catholic faith in a complete and summary way. It presents what Catholics throughout the world believe in common. It presents these truths in a way that facilitates their understanding." *Frequently Asked Questions About the Catechism of the Catholic Church*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, http://www.usccb.org/beliefs-and-teachings/what-we-believe/catechism/catechism-of-the-catholic-church/frequently-asked-questions-about-the-catechism-of-the-catholic-church.cfm (last visited Apr. 28, 2019).

12. New Revision of Number 2267, *supra* note 1.

13. U.S. CONST. amend. VI.

14. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

manifestly and primarily advances a significant state interest.[15] Any defendant can raise a fair cross-section challenge, regardless of whether they are a member of the group allegedly underrepresented.[16]

By way of background, a capital jury is tasked with two primary responsibilities. First, the capital jury determines culpability (i.e., whether the defendant is guilty of the crime or crimes he or she has been accused of committing).[17] If the defendant is found guilty of a capital offense, the capital jury must then determine whether to recommend the death penalty.[18] To make this determination, most death penalty laws require jurors to consider aggravating and mitigating factors.[19] If the aggravating factors outweigh the mitigating factors, jurors must recommend the death penalty, regardless of an individual's personal disposition towards capital punishment.[20]

Because the capital jury may have to determine whether to recommend the death penalty, potential capital jurors must be "death-qualified" to serve on the capital jury.[21] Prior to trial, potential jurors may be questioned by the prosecutor, the defense attorney, and even the judge in a process called *voir dire*.[22] During this questioning, if it is determined that a prospective juror's "opposition to the death penalty is so strong" that the prospective juror could never vote to impose capital punishment, this individual is excused for cause and cannot serve on the capital jury.[23] This results in capital juries that do not accurately represent a fair cross-section of the community.

Death qualification and the fair cross-section requirement may seem to be at odds with one another. How can the capital jury be a fair cross-section of the community when death qualification excludes members of the community with strong convictions on an important societal issue? This issue was brought to the United States Supreme Court in *Lockhart v. McCree*.[24] In *Lockhart*, the Court held that death qualification did not violate a defendant's Sixth Amendment right to an impartial jury, in part because "groups defined solely in terms of shared attitudes" against the death penalty "are not distinctive groups for fair cross-section purposes."[25]

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15. Duren v. Missouri, 439 U.S. 357, 364, 367 (1979).

16. *See Taylor*, 419 U.S. at 526 (holding that the defendant, a male, had standing to raise a fair cross-section challenge when women were systematically excluded from the jury pool).

17. *E.g.*, Gregg v. Georgia, 428 U.S. 153, 163 (1976).

18. *Id.* at 165–66.

19. *E.g.*, 18 U.S.C. § 3592 (2006).

20. *See, e.g.*, ALA. CODE § 13A-5-46(e) (2019).

21. *See*, *e.g.*, Lockhart v. Mcree, 476 U.S. 162, 167 (1986).

22. *See* Uttecht v. Brown, 551 U.S. 1, 10–11 (2007).

23. *E.g.*, Wainwright v. Witt, 469 U.S. 412, 430 (1985). To be sure, an individual who would vote in favor of the death penalty in all cases also cannot serve on the capital jury. Holland v. Illinois, 493 U.S. 474, 483–84 (1990).

24. 476 U.S. 162 (1986).

25. *Id.* at 174.

The revision to the Catechism provides a new avenue for challenging the constitutionality of the death penalty through the fair cross-section requirement of the Sixth Amendment. Now, any Catholic who follows their religion's teaching regarding capital punishment will be prohibited from serving on a capital jury. Unlike those excluded from the jury in *Lockhart*, Catholics are not defined "solely in terms of shared attitudes"[26] against the death penalty.

In this Note, I will discuss how Catholics can render the current jury-selection process in capital cases unconstitutional under the fair-cross section requirement.[27] Part I provides an overview of modern death qualification and fair cross-section jurisprudence. Part II then discusses how to raise a fair cross-section challenge using a burden-shifting framework established in *Duren v. Missouri*.[28] Part III concludes by applying the burden-shifting framework to Catholics.

I. MODERN DEATH QUALIFICATION AND FAIR CROSS-SECTION JURISPRUDENCE

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to trial by an impartial jury.[29] Implicit in this right is the requirement that the pool from which jurors are selected be comprised of a fair cross-section of the community.[30] Four Supreme Court cases over the last fifty years have been fundamental to the development of death qualification, the fair cross-section requirement, and the intersection of these two issues: *Witherspoon v. Illinois*,[31] *Taylor v. Louisiana*,[32] *Duren v. Missouri*,[33] and *Lockhart v. McCree*.[34] These four cases, along with others, are discussed below.

A. Witherspoon v. Illinois

Witherspoon v. Illinois established a landmark limitation on excluding potential jurors in death penalty cases for their personal opposition towards capital punishment.[35] In 1960, William Witherspoon was on trial for murder in Cook County, Illinois.[36] During *voir dire*, the state "eliminated nearly half the venire of prospective jurors by challeng[ing] . . . any venireman who expressed qualms about capital

26. *Id.*

27. The focus on Catholics in this Note is in no way meant to suggest that other distinct groups, religious or otherwise, could not raise similar fair cross-section challenges. However, Catholics are a particularly good case study for a fair-cross section challenge because Catholicism now has an unequivocal teaching against the imposition of the death penalty.

28. 439 U.S. 357, 364, 367 (1979).

29. U.S. CONST. amend. VI.

30. *See* Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

31. 391 U.S. 510 (1968).

32. 419 U.S. at 522.

33. 439 U.S. at 357.

34. 476 U.S. 162 (1986).

35. 391 U.S. at 510.

36. *Id.* at 512.

punishment."[37] In other words, any potential juror who expressed any reservations about the death penalty was excluded from Witherspoon's jury. The jury, comprised solely of individuals who had not expressed any opposition towards capital punishment, found Witherspoon guilty and recommended that he be sentenced to death.[38] The United States Supreme Court overturned Witherspoon's death sentence, holding 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. No defendant can constitutionally be put to death at the hands of a tribunal so selected.[39]

Witherspoon made clear that those who express mere general oppositions to the death penalty cannot be excluded from the capital jury. The Court, in dicta, also articulated who *could* be excluded from the capital jury: those "who . . . would automatically vote against the imposition of capital punishment without regard to any evidence."[40] These individuals would become known as the "*Witherspoon*-excludables."[41] In subsequent cases, the Court clarified who qualified as a *Witherspoon*-excludable, i.e., who could be excluded from the capital jury because of their opposition to the death penalty.[42] Now, any potential juror whose views about the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" may be excluded from the capital jury.[43] Thus, *Witherspoon* both established who could not be excluded from the capital jury and laid the framework for who could be excluded.

B. Taylor v. Louisiana *and* Duren v. Missouri

Taylor v. Louisiana established how the systematic exclusion of a group of people from the jury selection pool could violate the Sixth Amendment.[44] At the time

37. *Id.* at 513.
38. *Id.*
39. *Id.* at 522–23.
40. *Id.* at 522, n.21.
41. Lockhart v. McCree, 476 U.S. 162, 167 (1986).
42. *See, e.g.*, *id.* at 167, n.1.
43. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Important developments in the death penalty laws in the United States between *Witherspoon* and *Adams* may explain this apparent changed standard. In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court ruled that the implementation of the death penalty at the time violated the Eighth Amendment's proscription against cruel and unusual punishments, in part because "[j]uries . . . [had] practically untrammeled discretion to let an accused live or to insist that he die." *Id.* at 248 (Douglas, J. concurring). In response to *Furman*, many states quickly adopted new capital punishment laws where at sentencing juries are "asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty." *Wainwright*, 469 U.S. at 422.
44. 419 U.S. 522 (1975).

of Billy J. Taylor's trial, both the Louisiana State Constitution[45] and the Louisiana Criminal Code[46] prohibited women from participating in jury service unless they had previously filed a written declaration with the court requesting to be eligible for jury service.[47] Women comprised fifty-three percent of the population eligible for jury service in Taylor's judicial district, yet women accounted for no more than ten percent of the jury pool.[48] Over the course of eleven months, only twelve out of 1,800 persons selected to fill petit jury venires were women, and no women were selected to Taylor's 175 person venire.[49]

Taylor argued that the Louisiana laws exempting women from jury service violated his constitutional right to a jury panel representative of the community. The Supreme Court agreed with Taylor, holding: (1) that requiring juries be chosen from a fair-cross section of the community is "fundamental to the jury trial guarantee of the Sixth Amendment," and (2) that this "requirement is violated by the systematic exclusion of women [from jury panels]."[50]

Four years after *Taylor*, the Supreme Court in *Duren v. Missouri* established a burden-shifting framework for analyzing a fair cross-section challenge.[51] First, the defendant must "establish a prima facie violation" by showing that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[52]

Once a defendant has established a prima facie fair cross-section violation using the *Duren* factors, the burden shifts to the state. To rebut the defendant's prima facie case, the state must demonstrate that the jury-selection process "manifestly and primarily" advances "a significant state interest."[53] *Taylor* and *Duren* collectively provide the framework for making a fair-cross section challenge.

C. Lockhart v. McCree

Lockhart v. McCree set forth which individuals could be excluded from the capital jury without violating the fair-cross section requirement.[54] In 1978, Ardia

45. LA. CONST. art. VII, § 41 (repealed 1975).
46. LA. CODE CRIM. PROC., art. 402 (repealed 1975).
47. 419 U.S. at 523.
48. *Id.* at 524. The jury pool, also referred to as the jury venire, the juror wheel, or the qualified juror wheel, is a list of names of individuals who may be called for jury service. For detail about how jury pools are created, see *infra* Part II.B.
49. *Id.*
50. *Id.* at 526, 530–31.
51. 439 U.S. 357 (1979).
52. *Id.* at 364.
53. *Id.* at 367.
54. 476 U.S. 162 (1986).

McCree was charged with capital felony murder.[55] During jury selection, the trial judge removed eight "prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty."[56] The jury found McCree guilty and recommended that he be sentenced to life imprisonment.[57] McCree filed a federal habeas corpus petition, arguing that the removal of the *Witherspoon*-excludables violated his constitutional right "to have his guilt determined by an impartial jury selected from a representative cross section of the community."[58]

The District Court for the Eastern District of Arkansas examined numerous social science studies concerning the potential effects of death qualification and concluded that death qualified juries "were more prone to convict [defendants] than . . . non-death-qualified juries."[59] The court then concluded that death qualification "violated both the fair-cross-section and impartiality requirements of the Sixth and Fourteenth Amendments . . . ."[60] The United States Court of Appeals for the Eighth Circuit agreed that removing the *Witherspoon*-excludables violated McCree's right to a jury selected from a fair cross section of the community because it results in juries more likely to convict.[61] It then applied the *Duren* test and found that *Witherspoon*-excludables were: (1) a distinctive group, (2) underrepresented in capital juries in Arkansas, and (3) systematically excluded during *voir dire*.[62]

Despite its assumption that death qualification produces more conviction-prone juries, the Supreme Court reversed and held that death qualification does not violate the fair cross-section requirement.[63] The Court rejected the Eighth Circuit's conclusion that *Witherspoon*-excludables constituted a distinctive group under *Duren*.[64] The Court provided three principle reasons for this conclusion: (1) death qualification serves the state's legitimate interest of obtaining a jury that can impartially apply the law to the facts in a given case at both the guilt and sentencing phase of a capital trial; (2) other groups that have been held "distinctive" (e.g., women and African Americans) were excluded because of their immutable characteristics and not their beliefs; and (3) death qualification does not prevent *Witherspoon*-excludables from serving as jurors in non-capital cases, and thus does not result in a substantial deprivation of their basic rights of citizenship.[65]

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55. *Id*. at 166 (1986).
56. *Id*.
57. *Id*.
58. *Id*. at 167.
59. Grigsby v. Mabry, 569 F. Supp. 1273, 1323 (E.D. Ark. 1983), *rev'd sub nom*. Lockhart v. McCree, 476 U.S. 162 (1986).
60. *Lockhart*, 476 U.S. at 167–68 (citing *Grigsby*, 569 F. Supp. at 1324).
61. Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985), *rev'd sub nom. Lockhart*, 476 U.S. at 162.
62. *Id*. at 231–32.
63. *Lockhart*, 476 U.S. at 173.
64. *Id*. at 174.
65. *Id*. at 175–76.

II. THE MODERN *DUREN* TEST

As noted in Part I.B, defendants can challenge the constitutionality of a jury pool using the *Duren* factors. Under *Duren*, a defendant must first show: (1) a "distinctive group" in the community (2) is underrepresented in jury pools and (3) this underrepresentation is due to systematic exclusion in the jury-selection process.[66] If all three of these factors are proven, the burden shifts to the state to show "that a significant state interest [is] manifestly and primarily advanced" by excluding that group from the jury-selection process.[67] Each factor of *Duren* will be discussed below.

A. *Distinctive Group in the Community*

To raise a fair cross-section challenge, a defendant must first show that the group allegedly being underrepresented is a "distinctive group" in the community.[68] The Supreme Court in *Duren* found that women easily constitute a distinctive group.[69] However, the Court did not provide any further guidance to determine when a group qualifies as distinctive. Since *Duren*, several circuits have developed substantially similar criteria to one another for determining whether a group is distinctive.[70] For example, the Eleventh Circuit looks at:

> (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition); (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.[71]

These factors need not be "applied mechanically," and "groups acknowledged to be cognizably distinctive may not satisfy all three elements of the test."[72] Rather, the factors should be considered in light of the purpose of the fair cross section requirement: to provide an impartial jury.[73] Courts have consistently found that groups characterized by immutable traits such as race or sex are distinctive for fair cross-section purposes.[74] Conversely, groups have been deemed not distinctive

66. Duren v. Missouri, 439 U.S. 357, 364 (1979).

67. *Id*. at 367–68.

68. *Id*. at 364.

69. *Id*.

70. *See*, *e.g*., United States v. Raskiewicz, 169 F.3d 459, 463 (7th Cir. 1999); United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992); United States v. Canfield, 879 F.2d 446, 447 (8th Cir. 1989); Ford v. Seabold, 841 F.2d 677, 681–82 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 986–87 (1st Cir. 1985) (en banc); Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983); United States v. Test, 550 F.2d 577, 591 (10th Cir. 1976).

71. *Zant*, 720 F.2d at 1216.

72. *Raskiewicz*, 169 F.3d at 463.

73. *Id*.

74. *See*, *e.g*., Castaneda v. Partida, 430 U.S. 482, 495 (1977) (Hispanics); Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (women); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (African Americans); United States v.

when characterized by things such as occupation,[75] age demographic,[76] socioeconomic status,[77] education level,[78] and criminal history.[79] A group's collective attitude, without more, is not sufficient to qualify a group as distinctive.[80]

B. *Underrepresentation*

The second *Duren* factor requires the defendant to demonstrate that "the representation of [the purported group] in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community."[81] It is insufficient to demonstrate that the jury impaneled in a defendant's particular case underrepresented a distinct group.[82] Rather, the defendant must show that a distinct group is underrepresented in the jury-selection process.[83] Thus, "[w]hen analyzing jury composition challenges, [courts] must look to" the list or pool of names from which individuals are selected for jury service. [84] An example of how a jury pool is formed is as follows:

> Jurors are . . . randomly selected from the voter registration lists from the counties in the division. Those names are placed on a "Master Juror Wheel." Each of the individuals on the "Master Juror Wheel" receives a juror qualification questionnaire . . . [Those] who return the questionnaires and are not disqualified, excused or exempted, are placed on the "Qualified Juror Wheel." The jury venires are then selected randomly from the "Qualified Juror Wheel."[85]

Gault, 141 F.3d 1399, 1402 (10th Cir. 1998) (Native Americans); United States v. Cannady, 54 F.3d 544, 547 (9th Cir. 1995) (Asians); United States v. Nix, 264 F. Supp. 3d 429, 436 (W.D.N.Y. 2017) (African Americans); United States v. Taylor, 663 F. Supp. 2d 1157, 1163 (D.N.M. 2009) (men); United States v. Pleier, 849 F. Supp. 1321, 1324 (D. Alaska 1994) (Alaskan Natives).

75. Anaya v. Hansen, 781 F.2d 1, 5–6 (1st Cir. 1986) ("blue collar workers"); Kotler v. Woods, 620 F. Supp. 2d 366, 398 (E.D.N.Y. 2009) (nurses).

76. *See, e.g.*, Jonson v. McCaughtry, 92 F.3d 585, 592–93 (7th Cir. 1996) (persons aged eighteen to twenty-five years old); Barber v. Ponte, 772 F.2d 982, 994 (1st Cir. 1985) ("young adults"); State v. Stanko, 741 S.E.2d 708, 723 (S.C. 2013) (persons over sixty-five-years-old).

77. *See, e.g.*, United States v. Gonzalez-Velez, 466 F.3d 27, 39 (1st Cir. 2006).

78. *Anaya*, 781 F.2d at 8; Ford v. Seabold, 841 F.2d 677, 682–83 (6th Cir. 1988) (college students); United States v. Burgess, 836 F. Supp. 336, 340 (D.S.C. 1993).

79. United States v. Greene, 995 F.2d 793, 796 (8th Cir. 1993) (persons facing felony charges); Henry v. Horn, 218 F. Supp. 2d 671, 695 (E.D. Pa. 2002) (individuals previously convicted of misdemeanors or juvenile offenses).

80. *E.g.*, Lockhart v. McCree, 476 U.S. 162, 174 (1985) (*Witherspoon*-excludables); United States v. Salamone, 800 F.2d 1216, 1219–1220 n.5 (3d Cir. 1986) (National Rifle Association members).

81. Duren v. Missouri, 439 U.S. 357, 364 (1979).

82. *See* Holland v. Illinois, 493 U.S. 474, 478 (1990). *See also Lockhart*, 476 U.S. at 173–74 ("We have never invoked the fair-cross section principle to . . . require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."); Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("Defendants, are not entitled to a jury of any particular composition.").

83. *See Duren*, 439 U.S. at 364.

84. United States v. Gault, 141 F.3d 1399, 1402 (10th Cir. 1998). *See also* United States v. Rioux, 930 F. Supp. 1558, 1575 (D. Conn. 1995) ("The relevant jury pool in this case is the qualified wheel over the life of the wheel.").

85. *Gault*, 141 F.3d at 1402 (internal footnotes omitted). Different jurisdictions use different names for the list of persons eligible for jury service. For uniformity, this Note will refer to the list of eligible juries as the jury pool.

Individuals on a Master Juror Wheel will not be included in a jury pool if they do not return their juror questionnaire, or if their responses on the juror questionnaire indicate they are either disqualified, exempt, or excused.[86] If a distinctive group is underrepresented in the jury pool to a statistically significant degree, the second *Duren* factor will be met.

Courts use two primary statistical measurements to determine whether a distinctive group in the community is underrepresented in a jury pool: (1) absolute disparity and (2) comparative disparity.[87] Other statistical measurements, such as "standard deviation" and "risk-disparity" are used less frequently,[88] and accordingly will not be analyzed. Jurisdictions may also choose to apply different measurements on a case-by-case basis.[89]

1. Absolute Disparity

Absolute disparity is the difference between the percentage of members of a distinct group in the community at large and the percentage of that group in the jury pool.[90] For example, if Catholics comprised twenty-five percent of the overall eligible juror population, but only ten percent of the jury pool, the absolute disparity of Catholics in the jury pool would be fifteen percent. Absolute disparity is the method applied by a majority of jurisdictions.[91] Most jurisdictions applying this

86. An individual may be *disqualified* from jury service if he or she: (a) is not a citizen of the United States, not eighteen years of age or older, or has not resided in the Judicial District for less than one year; (b) is unable to read, write, understand, or speak English proficiently; (c) is unable to serve by reason of mental or physical infirmity; or (d) has a pending felony charge against him or her, or has been convicted of a felony. 28 U.S.C. § 1865 (2000). An individual may be *exempt* from jury service if he or she is: (a) active in the armed forces; (b) a member of the fire or police department; or (c) a public officer in the executive, legislative, or judicial branch of the state, local, or federal government. *Id*. at § 1863(b)(6). An individual may be *excused* if that individual: (a) is over seventy-years-old; (b) has served on a grand or petit jury within the previous two years; or (c) is a volunteer safety personnel who serves without compensation as a firefighter or member of a rescue squad or ambulance crew or public agency. *See, e.g*., UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, PLAN FOR RANDOM SELECTION OF JURORS 7, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_press/ILNDJuryPlan.pdf.

87. *Gault*, 141 F.3d at 1402 ("[C]ourts generally rely on two methods [for measuring underrepresentation]: absolute disparity and comparative disparity."). *See also* Stephen E. Reil, *Who Gets Counted? Jury List Representativeness for Hispanics in Areas With Growing Hispanic Populations Under Duren v. Missouri*, 2007 BYU L. REV. 201, 224 (2007).

88. *Cf*. Berghuis v. Smith, 559 U.S. 314, 329 (2007) (noting that "[n]o court . . . has accepted [a standard deviation analysis] alone as determinative in Sixth Amendment challenges to jury selection systems.") (alterations in original) (quoting United States v. Rioux, 97 F.3d 648, 655 (2d Cir. 1996)). For an in-depth review of statistical measurements other than absolute disparity and comparative disparity, see Mark McGillis, *Jury Venires: Eliminating the Discrimination Factor by Using a Statistical Approach*, 3 HOW. SCROLL SOC. JUST. L. REV. 17, 32 (1995).

89. *See* People v. Smith, 615 N.W.2d 1, 3 (Mich. 2000), *aff'd sub nom*. Berghuis v. Smith, 559 U.S. 314 (2010).

90. *Id*. at 323.

91. Delgado v. Dennehy, 503 F. Supp. 2d 411, 425–26 (D. Mass. 2007) (citing cases). *See also* United States v. Hernandez-Estrada, 749 F.3d 1154, 1162 (9th Cir. 2014) (en banc) ("The absolute disparity test has been used by many courts because it is easy to administer.").

measurement have found an absolute disparity above ten percent infers underrepresentation,[92] but this not a universal rule.[93] Conversely, an absolute disparity below ten percent almost always means this factor will not be satisfied.[94]

The absolute disparity test has been frequently criticized, especially when the allegedly underrepresented group comprises a small percentage of the judicial district's overall population.[95] For example, suppose that African Americans constitute nine percent of a judicial district's population. Now suppose that the juror selection system in that judicial district removed all African Americans from the jury pool. In this situation, using the absolute disparity test, African Americans would not be underrepresented, even though they comprised zero percent of the jury pool. Accordingly, in situations "where the distinctive group alleged to be underrepresented is small . . . the comparative disparity test is the more appropriate measure of underrepresentation."[96]

2. Comparative Disparity

Comparative disparity compares the disproportionality between the jury pool and the community at large by dividing absolute disparity by the percent of the distinct group within the entire community.[97] For example, suppose eight percent of the population in a judicial district is Catholic, and two percent of individuals on the jury pool are Catholic. Because the absolute disparity is simply the percent of the group in the community minus the percent of the group in the jury pool, the absolute disparity would be six percent, insufficient to show underrepresentation in most jurisdictions. However, the comparative disparity would be seventy-five

92. *See, e.g.*, Duren v. Missouri, 439 U.S. 357, 365–66 (1979); Taylor v. Louisiana, 419 U.S. 522, 531 (1975); Randolph v. People, 380 F.3d 1133, 1140 (9th Cir. 2004); United States v. Ashley, 54 F.3d 311, 313–314 (7th Cir. 1995); Ramseur v. Beyer, 983 F.2d 1215, 1232 (3d Cir. 1992).

93. *Compare* Garcia-Dorantes v. Warren, 801 F.3d 584, 600 (6th Cir. 2015) (absolute disparity of 3.45% sufficient to satisfy the second prong of *Duren*) *with* Primeaux v. Dooley, 747 N.W.2d 137, 141 (S.D. 2008) (noting that South Dakota requires an absolute disparity above fifteen percent).

94. *See, e.g.*, United States v. Carmichael, 560 F.3d 1270, 1280 (11th Cir. 2009) ("Under black letter Eleventh Circuit precedent, '[i]f the absolute disparity . . . is ten percent or less, the second element is not satisfied' . . . .") (quoting United States v. Grisham, 63 F.3d 1074, 1078–79 (11th Cir. 1995)); United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006); United States v. Ashley, 54 F.3d 311, 313–14 (7th Cir. 1995); United States v. Biaggi, 909 F.2d 662, 678 (2d Cir. 1990); United States v. Pepe, 747 F.2d 632, 649 (11th Cir. 1984); United States v. Hawkins, 661 F.2d 436, 442 (5th Cir. 1981); *Dennehy*, 503 F. Supp. 2d at 426; State v. Huffaker, 493 N.W.2d 832, 834 (Iowa 1992).

95. *See Hernandez-Estrada*, 749 F.3d at 1161 ("[I]f a minority group makes up less than 7.7% of the population in the jurisdiction in question, that group could *never* be underrepresented . . . even if none of its members wound up on the qualified jury wheel.") (emphasis in original). *See also* United States v. Jackman, 46 F.3d 1240, 1247 (2d Cir. 1995) ("[T]he absolute numbers approach is of questionable validity when applied to an underrepresented group that is a small percentage of the total population . . . .").

96. Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 800 (N.D. Ohio 2014) (quoting Smith v. Berghuis, 543 F.3d 326, 337 (6th Cir. 2008), *rev'd in part on other grounds*, 559 U.S. 314 (2010)).

97. Berghuis v. Smith, 559 U.S. 314, 323 (2010).

percent, which would very likely be sufficient to show underrepresentation.[98] Compared to absolute disparity, the percentage of disparity that courts require to determine underrepresentation is less consistent. Courts have found underrepresentation with comparative disparities as low as twenty-eight percent,[99] while other courts have concluded that comparative disparities as high as forty-nine percent did not constitute underrepresentation.[100]

The comparative disparity test, as with absolute disparity, is imperfect and "can be misleading when . . . members of the distinctive group compose only a small percentage of those eligible for jury service."[101] This is because "when the distinctive group's population is small, a small change in the jury pool distorts the proportional representation."[102] For example, if only one percent of the community is African American, then an absolute disparity of half of a percent would constitute a comparative disparity of fifty percent.[103]

Absolute disparity makes it difficult, and at times impossible, for small groups to show underrepresentation. On the other hand, a small difference between a group's percentage in the community and the group's percentage in the jury pool can result in a large comparative disparity depending on the size of the group in the community. Due in part to the flaws with both absolute and comparative disparity, the Supreme Court has not adopted one measurement as the preferred method.[104]

C. *Systematic Exclusion*

The third step of *Duren* is to show that a distinctive group's underrepresentation is the result of systematic exclusion.[105] The defendant must prove that the cause of the distinctive group's underrepresentation is "inherent in the particular jury-selection process utilized."[106] Moreover, "[a] showing of systematic exclusion must be based on more than statistical evidence relating to the jury pool in one case."[107] Rather,

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98. The formula for calculating comparative disparity is (n – x) / n where "n" is the percent that the group makes up the community at large and "x" is the percent that the group makes up the jury pool. In the example, 8 minus 2 equals 6, and 6 divided by 8 equals 0.75 or 75 percent.

99. *See* Garcia-Dorantes v. Warren, 801 F.3d 584, 601 (6th Cir. 2015) (finding comparative disparities of 42% for African Americans and about 28% for Hispanics sufficient to show underrepresentation). *See also* United States v. Rogers, 73 F.3d 774, 777 (8th Cir. 1996) (comparative disparity of thirty percent sufficient to make out prima facie case for fair cross section violation).

100. *See* People v. Bryant, 822 N.W.2d 124, 141–45 (Mich. 2012) (comparative disparity of 49.45% not unreasonable); United States v. Yazzie, 660 F.2d 422, 427 n.4 (10th Cir. 1981) (finding that a comparative disparity of 46.3% did not violate the Sixth Amendment).

101. Berghuis v. Smith, 559 U.S. 314, 329 (2010) (internal quotations omitted). *See also* United States v. Hafen, 726 F.2d 21, 24 (1st Cir. 1984) (rejecting comparative disparity statistics where "the group allegedly underrepresented forms a very small proportion of the total population.").

102. People v. Smith, 615 NW.2d 1, 3 (Mich. 2000), *aff'd sub nom.* Berghuis v. Smith, 559 U.S. 314 (2010).

103. (1 – 0.5) / 1 = 0.50 or 50 percent.

104. *Berghuis*, 559 U.S. at 329 ("[N]either *Duren* nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools.").

105. Duren v. Missouri, 439 U.S. 357, 364 (1979).

106. McGinnis v. Johnson, 181 F.3d 686, 690 (5th Cir. 1999) (quoting *Duren*, 439 U.S. at 366).

107. Diggs v. United States, 906 A.2d 290, 298 (D.C. 2006).

"[a] defendant must present evidence of a statistically significant sample, usually requiring analysis of the composition of past venires."[108] Where step two of the *Duren* test looks at whether the pool of eligible jurors underrepresented a distinctive group, step three analyzes whether this underrepresentation is habitual.

In *Duren*, a state law provided exemptions from jury service for women but not for men, and any woman who had not returned a questionnaire was presumed to have opted out.[109] The Supreme Court found that "the system by which juries were selected," i.e., a system where women but not men could opt out of jury service, "quite obviously" caused women to be underrepresented in jury venires.[110] The defendant in *Duren* also showed that the underrepresentation of women "occurred not just occasionally but in every weekly venire for a period of nearly a year. . . ."[111]

Systematic exclusion does not need to be intentional to be a violation under *Duren*.[112] In *United States v. Jackson*, a jury clerk erroneously relied on a jury pool that contained no potential jurors from the two cities with the judicial district's highest black and Hispanic populations.[113] In holding that the jury-selection process systematically excluded African Americans and Hispanics, the Second Circuit found that the intent of the clerk was irrelevant.[114] Although intentional discrimination need not be proven, systematic exclusion does need to result from "affirmative government action" and not from things such as the transient nature of a particular demographic.[115]

D. *Substantial State Interest*

If a defendant establishes a prima facie fair cross-section violation, the burden shifts to the prosecutor to prove that a significant state interest is manifestly and primarily advanced by the jury-selection process.[116] Absent such a showing, the jury-selection process violates the Sixth Amendment.[117] In death penalty cases, the state will likely assert that death qualification advances the state's significant interest in ensuring that the jury impaneled can listen to the facts of the case and apply the law accordingly. This argument was accepted in *Uttecht v. Brown*, where the Supreme Court recognized that "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes."[118]

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108. *Id.* (quoting Commonwealth v. Arriaga, 781 N.E.2d 1253, 1263–64 (Mass. 2003).

109. *Duren*, 439 U.S. at 366–67.

110. *Id.* at 367.

111. *Id.* at 366.

112. United States v. Jackman, 46 F.3d 1240, 1246 (2d Cir. 1995) ("The defendant need not prove discriminatory intent on the part of those constructing or administering the jury selection process.").

113. *Id.* at 1243–44. The qualified jury wheel relied upon had previously been invalidated in United States v. Osorio, 801 F. Supp. 966 (D. Conn. 1992). *Id.*

114. *Id.* at 1245. ("[W]e do not mean to fault [the clerk] individually or to fix responsibility for what occurred [on her].").

115. Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 803 (N.D. Ohio 2014).

116. Duren v. Missouri, 439 U.S. 357, 367 (1979).

117. State v. Nelson, 603 S.W.2d 158, 167 (Tenn. Crim. App. 1980).

118. Uttecht v. Brown, 551 U.S. 1, 9 (2007). *See also* Wainwright v. Witt, 469 U.S. 412, 423 (1985) ("Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might

III. DUREN FACTORS APPLIED TO CATHOLICS

This Section will analyze whether and how a capital defendant could raise a fair-cross section challenge by applying the *Duren* factors to Catholics. To raise a fair-cross section challenge in this scenario, the defendant does not need to personally be Catholic.[119] Rather, the defendant must show that: (a) Catholics are a distinctive group in the society where the jury pool is formed; (b) Catholics are underrepresented in capital juries; and (c) this underrepresentation is due to the jury selection process.[120]

A. *Catholics Constitute a Distinctive Group*

It is likely that Catholics constitute a distinctive group in the community under *Duren*. Using the Eleventh Circuit's test in Part II.A *infra*, a fair-cross section challenge for Catholics would need to show: (1) that Catholics are defined and limited by some factor; (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) there is a community of interest among members of the groups such that the group's interests cannot be adequately represented if the group is excluded from the jury-selection process.[121]

Catholics are easily definable as a distinctive group. Catholics are members of the Catholic Church who have received the sacraments of Baptism, Communion, and Confirmation.[122] Further, Catholics share similarities in attitudes, ideas, and experiences. These are beliefs inherent in their religion (e.g., belief in Jesus Christ as the Son of God, the Eucharist as the body and blood of Christ, and the Saints).[123]

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frustrate the State's *legitimate interest* in administering constitutional capital sentencing schemes by not following their oaths.") (emphasis added); Lockhart v. McCree, 476 U.S. 162, 180 (1986) (ruling that "the removal for cause of *Witherspoon*-excludables serves the State's entirely proper interest in obtaining a single jury . . . that could impartially decide all of the issues [in McCree's case].") (internal quotations omitted).

119. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (holding that a male defendant can successfully raise a fair cross-section challenge if females are systematically excluded from the jury venire).

120. *Duren*, 439 U.S. at 364.

121. Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983).

122. *See Catechism of the Catholic Church* No. 1285. ("Baptism, the Eucharist [communion], and the sacrament of Confirmation together constitute the 'sacraments of Christian initiation . . . .'").

123. The Apostles' Creed, *Prayers of the Rosary: The Apostles' Creed*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, http://usccb.org/prayer-and-worship/prayers-and-devotions/rosaries/prayers-of-the-rosary.cfm (last visited March 20, 2020), provides a summary of the fundamental beliefs of Catholicism:

> I believe in God, the Father the Almighty, Creator of Heaven and earth;
> and in Jesus Christ, His only Son Our Lord,
> Who was conceived by the Holy Spirit, born of the Virgin Mary,
> suffered under Pontius Pilate, was crucified, died, and was buried.
> He descended into Hell; on the third day He rose again from the dead;
> He ascended into Heaven, and is seated at the right hand of God,
> the Father almighty; from there He will come to judge the living and the dead.
> I believe in the Holy Spirit, the Holy Catholic Church, the communion of saints, the forgiveness of sins, the resurrection of the body and life everlasting.
> Amen.

Although "it might be doubted whether [all Catholics] . . . have similar attitudes or [all Catholics] share a community of interest" regarding issues of life,[124] it has never been a prerequisite of the fair cross-section requirement that a group of individuals all conform to the same ideologies and beliefs in order to qualify as distinctive. Women, for example, are not considered distinctive because they all share identical ideologies. Beyond the principles and ideologies inherent in the Catholic faith,[125] the Catholic Church through its followers collectively "feeds, houses, and clothes more people, takes care of more sick people, visits more prisoners, and educates more people than any other institution."[126]

The "distinctive group" will likely need to be all Catholics, or at least all Catholics confirmed in the Church. First, narrowing the group to "practicing Catholics" or "Catholics who follow Church teachings" would make the group ill-defined. What constitutes a "practicing Catholic?" Would group members need to follow every official Church teaching? The impossibility of examining the veracity of an individual's faith would make the group undefinable and thus not distinct.[127] Second, courts have routinely rejected purported groups that are either sub-groups of recognized distinctive groups or a combination of groups.[128] Although narrowing the group to "practicing Catholics" or "Catholics who follow Church teachings" could be beneficial towards showing underrepresentation, a narrowly classified group would not be distinct. Thus, the revision to the Catechism alone will do nothing to alter the current state of capital punishment in the United States. Rather, a significant number of Catholics would need to follow the Church's teaching—whether through their adherence to their faith or through their own personal convictions—for a fair-cross section challenge to be viable.

B. *Catholics are Underrepresented in the Capital Jury*

The second step under *Duren* is for a defendant to show that Catholics are underrepresented in the jury pool in death penalty cases.[129] Theoretically, this would be done by comparing the disparity between the percentage of Catholics in the jury pool and percentage of Catholics in the judicial district at large. However, applying the traditional methodology of determining underrepresentation is problematic when used to assess the capital jury. This Section will highlight those problems

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124. United States v. Raszkiewicz, 169 F.3d 459, 463 (7th Cir. 1999).

125. *See* Apostles' Creed, *supra* note 123.

126. Matthew Kelly, *Introduction* to REDISCOVER CATHOLICISM: A SPIRITUAL GUIDE TO LIVING WITH PASSION & PURPOSE (2002).

127. *See* Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983) (stating that a distinctive group must have a "definite composition").

128. *See*, *e.g.*, *Raszkiewicz*, 169 F.3d at 467 (rejecting Native Americans living on a reservation as a distinct group); United States v. Suttiswad, 696 F.2d 645, 649 (9th Cir. 1982) (rejecting "nonwhites" as a distinctive group); United States v. Barlow, 732 F. Supp. 2d 1, 42 (E.D.N.Y. 2010) (refusing to decide whether African-American men constitute a distinct group).

129. Duren v. Missouri, 439 U.S. 357, 364 (1979).

and propose an alternative method for assessing underrepresentation in the capital jury.

1. Why Traditional Methods for Determining Underrepresentation Do Not Work for the Capital Jury

Jury pools do not accurately reflect the chance of a defendant to have a representative jury in a death penalty case. The "Sixth Amendment guarantees the *opportunity* for a representative jury venire."[130] In non-death penalty cases, this opportunity may exist when juror questionnaires are randomly sent to names on a voter registration list,[131] those questionnaires are returned to the clerk of the court, and the jury pool is formed based on the responses on the questionnaires. However, for death penalty cases, jury pools erroneously inflate the opportunity for a representative sample of the community because jury pools include the *Witherspoon*-excludables. For instance, suppose that 100% of Catholics followed the Church's teaching regarding capital punishment. Now suppose that forty percent of eligible jurors in a judicial division were Catholic, and forty percent of the individuals in the jury pool were Catholic. Based on the jury pool, there would be no underrepresentation. In reality, though, every member of this distinctive group comprising forty percent of the division's total population would be ineligible to serve on the capital jury. Here, reliance on the jury pool creates the illusion of a representative jury.

Such a glaring omission of a distinct group in the community would fundamentally undermine the purpose of the jury: "to make available the commonsense judgment of the community."[132] The jury's duty to "guard against the *arbitrary* power" of the government to impose capital punishment would be decimated "if [a] large, distinctive group [was] excluded from the pool."[133] In such a situation, reliance on representations in jury pools cannot preserve "public confidence in the fairness of the criminal justice system" because "excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial."[134] Death qualification would erase any semblance of a representative jury.

Another problem with reliance on the jury pool would be collecting data on the number of Catholics within the jury pool. Juror questionnaires do not inquire about religion,[135] and when an individual is excused for cause during *voir dire*, the

130. United States v. Jackman, 46 F.3d 1240, 1244 (2d Cir. 1995).

131. "Voter registration lists are the presumptive statutory source for potential jurors." United States v. Odeneal, 517 F.3d 406, 412 (6th Cir. 2008) (citing 28 U.S.C. § 1863(b) (2000)).

132. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

133. *Id.* (emphasis added). For more detail on the arbitrariness of the death penalty, see Glossip v. Gross, 135 S. Ct. 2726, 2759–64 (2015) (Breyer, J. dissenting).

134. *Taylor*, 419 U.S. at 530.

135. For an example of a juror questionnaire form for a case involving homicide in the Eastern District of New York, see UNITED STATES JUROR QUESTIONNAIRE, https://www.fjc.gov/sites/default/files/2012/dpen0023.pdf (last visited Feb. 6, 2020).

prospective juror's religious scruples against the death penalty might not be mentioned. Even if Catholics were grossly underrepresented, proving so would be very difficult through looking at jury pools. Therefore, an alternative measurement must be used to determine whether a distinctive group in the community is underrepresented.

2. An Alternative Measurement for Underrepresentation in Death Penalty Cases

In order to determine whether Catholics (or any other distinct group) are underrepresented in capital juries, underrepresentation cannot be measured by the jury pool. Rather than relying on jury pools to measure underrepresentation in capital cases, courts should focus on whether capital juries in a given district consistently underrepresent a distinctive group. Although individual "[d]efendants are not entitled to a jury of any particular composition,"[136] if it could be shown that Catholics are continuously underrepresented in capital juries, then it can be argued that death qualification removes even the opportunity for a representative jury.

Underrepresentation can be inferred by social studies or polls indicating the percentage of Catholics in a given judicial district who follow the Church's teaching and thereby could not recommend the death penalty. If, for example, it can be shown that half of all Catholics follow the Church's teaching regarding capital punishment, then it can be inferred that any given capital jury would have a comparative disparity of fifty percent.

The likelihood of a successful fair cross-section challenge thus depends greatly on the number of Catholics who adhere to the Church's teaching on capital punishment. As of 2018, more Catholics remained in favor of the death penalty than opposed to it.[137] However, it is unclear which percentage of Catholics who oppose the death penalty would be unable to vote for its imposition in any situation. The more Catholics who could never vote in favor of capital punishment, the more likely Catholics will be underrepresented.

This proposed methodology for measuring representation in death penalty cases would combine parts of steps two and three of the *Duren* test. Step three of *Duren* requires the defendant to prove systematic exclusion—that is, that the distinctive group is routinely less likely to serve on the jury.[138] By shifting this burden of proof up to step two, the defendant can show that a distinctive group—in this case study, Catholics—are deprived of the opportunity to serve on the capital jury.

136. *Taylor*, 419 U.S. at 538.
137. *See* PEW, *supra* note 7.
138. Duren v. Missouri, 439 U.S. 357, 366 (1979).

C. *Catholics are Systematically Excluded from Capital Juries Because of the Current Jury-Selection Process*

If it can be shown that Catholics are underrepresented on capital juries, then the final step of *Duren* requires proof that this underrepresentation is due to procedures "inherent in the particular jury-selection process utilized."[139] A fair cross-section challenge would need to show that Catholics are systematically excluded as a result of "affirmative government action."[140] In *Taylor*, affirmative government action existed through Louisiana state law, which prohibited women from serving on juries except for those who had voluntarily requested to be eligible for jury service.[141] In *Duren*, affirmative state action existed through automatic exemptions from jury service for women exclusively.[142]

As with women in *Taylor* and *Duren*, an established law—death qualification—is the cause of underrepresentation on capital juries. Excluding individuals or a distinctive group of individuals because of their religious or moral convictions is an exclusion "inherent in the [capital] jury-selection process."[143] There is nothing random about death qualification. Rather, it is a lawful method of purposefully stacking the deck against individuals fighting for their lives in the most literal sense.[144] It is true that the constitutionality of excluding individuals who could not support the death penalty was upheld in *Lockhart v. McCree*.[145] However, an important factor in this decision was the Court's reasoning that "groups defined solely in terms of shared attitudes" regarding capital punishment "are not 'distinctive groups' for fair cross-section purposes."[146] Unlike the individual jurors excluded in *Lockhart*, Catholics are much more likely to constitute a distinctive group for the reasons already stated in this Note.

Systematic exclusion does not mean intentional exclusion of a particular group. For a fair cross-section challenge, it is irrelevant whether death qualification targets Catholics specifically.[147] This is one reason why a challenge to death qualification under the fair cross-section requirement is preferable to an equal protection challenge under the Fifth[148] or Fourteenth Amendment.[149] An equal protection claim has two important differences from a fair cross-section claim. First, the defendant

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139. McGinnis v. Johnson, 181 F.3d 686, 690 (5th Cir. 1999) (quoting *Duren*, 439 U.S. at 366).

140. Omotosho v. Giant Eagle, Inc., 997 F. Supp. 2d 792, 803 (N.D. Ohio 2014).

141. *Taylor*, 419 U.S. at 523.

142. *Duren*, 439 U.S. at 367.

143. *Id*. at 366.

144. *See* Richard Salgado, *Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in* United States v. Green, 2005 BYU. L. REV. 519, 528–532 (2005) (discussing how death-qualified juries are more prone to convict).

145. 476 U.S. 162, 184 (1986).

146. *Id*. at 174.

147. United States v. Jackman, 46 F.3d 1240, 1246 (2d Cir. 1995).

148. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law."). Although the Fifth Amendment does not include the phrase "equal protection," the Supreme Court has interpreted the Due Process Clause of the Amendment to afford similar protections. *See* Bolling v. Sharpe, 347

needs to be a member of the allegedly underrepresented group to raise an equal protection challenge,[150] whereas there is no such requirement for a fair cross-section claim.[151]

Second, for an equal protection challenge, the defendant must prove *purposeful discrimination* of an identifiable group.[152] This requires that a "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of,' its adverse effects upon an identifiable group."[153] Proving that death qualification is employed because of specific animus towards Catholics is very unlikely. There is no evidence that death qualification was employed or is used because of a particular animus towards Catholics or to specifically prevent Catholics from serving on a capital jury.

D. *There is No Substantial State Interest in Creating Conviction-Prone Juries*

If a defendant satisfies the first three parts of *Duren*, the burden shifts to the government to prove that a state interest is manifestly and primarily advanced by death qualification.[154] The state will likely assert that there is a substantial state interest in having jurors who are able to adhere to the law and be open to recommending death if the facts require such a verdict.[155] However, death qualification creates a capital jury "tilted in favor of capital punishment,"[156] and silences a significant portion of the population from voicing society's standards regarding an important social and moral issue.[157]

Contrary to the Court's logic in *Uttecht*, death qualification does not primarily advance a state's substantial interest in having jurors who can adhere to the law. Those who oppose the death penalty can still abide by their duties as jurors. It is true that following *Furman v. Georgia*,[158] death penalty statutes restrict a juror's discretion as to whether or not to recommend the death penalty.[159] Generally, death

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U.S. 693, 695 (1954) (noting that "it would be unthinkable that the same Constitution" prohibiting racially segregated public schools by states "would impose a lesser duty on the Federal Government.").

149. U.S. CONST. amend. XIV, § 1.

150. *See* Castaneda v. Partida, 430 U.S. 482, 494 (1977) ("[T]he defendant must show that the procedure employed resulted in substantial underrepresentation of *his race* or of the identifiable group *to which he belongs*.") (emphasis added).

151. *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (holding that Billy Taylor, a man, had standing to challenge Louisiana laws that systematically excluded women from jury service).

152. McCleskey v. Kemp, 481 U.S. 279, 292 (1987); Washington v. Davis, 426 U.S. 229, 239–40 (1976).

153. *McCleskey*, 481 U.S. at 298 (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

154. Duren v. Missouri, 439 U.S. 357, 367 (1975).

155. *See* Uttecht v. Brown, 551 U.S. 1, 9 (2007) ("[T]he State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes.").

156. *Id.* (citing Witherspoon v. Illinois, 391 U.S. 510, 521 (1968)).

157. *Id.* at 35 (Stevens, J. dissenting) ("Millions of Americans oppose the death penalty."). *See also* Roper v. Simmons, 543 U.S. 551, 564–70 (2005) (finding relevant societal standards in determining capital punishment of juveniles violative of the Eighth Amendment).

158. 408 U.S. 238 (1972).

159. *See* Wainwright v. Witt, 469 U.S. 412, 422 (1985).

penalty statutes require jurors at the sentencing phase to balance aggravating factors and mitigating factors.[160] If the aggravating factors outweigh the mitigating factors, the law compels the jury to recommend death.[161] However, these statutes also allow for some discretion in balancing the aggravating and mitigating factors that have been introduced into evidence.[162]

For example, in Alabama, if a defendant is found guilty of a capital offense,[163] the jury must return a verdict of death "if the jury determines that one or more aggravating circumstances . . . outweigh the mitigating circumstances, if any."[164] The Alabama Code provides that, "weighing the aggravating and mitigating circumstances" does not "mean a mere tallying of aggravating and mitigating circumstances . . . [but rather] a process by which circumstances relevant to sentence are marshalled and considered . . . for the purpose of determining . . . the proper sentence . . . ."[165] Alabama enumerates all aggravating factors that can be considered, but only provides a non-exhaustive list of mitigating factors which can be considered.[166] A juror cannot under Alabama law find that the aggravating factors outweigh the mitigating factors and vote against the death penalty anyway.[167] However, an individual whose subjective balancing determines that the mitigating factors outweigh the aggravating factors can recommend life imprisonment without violating his oath to adhere to the law.

The only time where this would present serious problems is in the instance when no mitigating circumstances are presented. No juror could rationally determine that mitigating factors outweigh aggravating factors when no mitigating factors have been presented as evidence. In these circumstances, a juror would be placed in the precarious position of either forsaking their juror oath or voting to impose a punishment they find reprehensible. In this limited circumstance, the state would have a substantial interest in preventing jurors from nullifying sentencing laws.

However, this circumstance can be avoided by requiring the defendant to proffer mitigating circumstances to the court prior to the jury being impaneled which a rational juror could determine, if proven, warrant life imprisonment. If the defendant cannot offer such a proffer, then the regular death qualification standards would apply. Although this would create another obligation for defense counsel pretrial,

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160. *See generally* ALA. CODE § 13A-5-46(e) (2019); IND. CODE § 35-50-2-9 (2016); OKLA. STAT. ANN. tit. 21 § 701.10 (West 2015).

161. *E.g.*, § 13A-5-46(e).

162. *See id.* at § 13A-5-48.

163. Capital offenses include: (1) murder during first degree kidnapping or robbery; (2) murder during first- or second-degree rape, sodomy, or burglary; and (3) murder of law enforcement personnel (police officer, state trooper, prison guard), while such officer or guard is on duty. *Id.* at § 13A-5-40.

164. *Id.* at § 13A-5-46(e).

165. *Id.* at § 13A-5-48.

166. *Compare* § 13A-5-49 ("Aggravating circumstances *shall be any of the following . . .*") *with* § 13A-5-51 ("Mitigating circumstances shall *include*, *but not be limited to*, the following . . .") (emphasis added).

167. *See* Boyde v. California, 494 U.S. 370, 377 (1990); Kuenzel v. State, 577 So.2d 474, 501 (Ala. Crim. App. 1990).

such a requirement would be worth ensuring that capital defendants are tried before truly impartial juries.

CONCLUSION

Pope Francis's disavowal of the death penalty in all cases is a new avenue for challenging the constitutionality of the jury-selection process in death penalty cases. If there is a significant number of Catholics excluded from serving as jurors in death penalty cases, then death qualification may violate defendants' rights to have their case heard before a fair cross-section of the community. Under *Duren*, Catholics would likely constitute a distinct group in the community. Catholics are a definable group with shared beliefs in their faith. Proving underrepresentation would require shifting focus from whether Catholics are underrepresented in jury pools and examining whether Catholics are continuously underrepresented on capital juries. Finally, the Supreme Court will have to conclude that death qualification does not in fact manifestly and primarily advance a significant state interest. Rather, death qualification results in capital juries that are more prone to convict and that do not fairly represent the voice of the community at large.[168] As opposition towards the death penalty continues to increase,[169] this misrepresentation of the community will continue to grow, and the capital jury will be less and less a fair cross-section of American communities.

168. *See* Glossip v. Gross, 135 S. Ct. 2726, 2758 (2015) (Breyer, J. dissenting) ("[F]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death") (quoting Susan D. Rozelle, *The Principled Executioner: Capital Juries Bias and the Benefits of True Bifurcation*, 38 ARIZ. S.L.J. 769, 807 (2006)).

169. *See* PEW, *supra* note 7.