

TOWARDS DEATH DISQUALIFICATION: DEBUNKING *LOCKHART V. MCCREE* ON SIXTH AMENDMENT AND ORIGINALIST GROUNDS TO DISMANTLE THE PRACTICE OF DEATH QUALIFYING CAPITAL JURIES

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ABSTRACT

In Lockhart v. McCree, the U.S. Supreme Court held that the practice of death-qualifying capital juries did not violate the Sixth Amendment's fair-cross-section requirement or right to an impartial jury. As a result, prospective jurors who are so opposed to capital punishment that they would not (1) find the defendant guilty regardless of the evidence or (2) consider death as a possible sentence regardless of the circumstances of the crime are automatically excluded "for cause" from capital jury service.

It is now widely accepted, however, that far from producing a law-abiding jury that considers all sentencing options, death qualification "systematically 'whitewashes' the capital eligible [jury] pool [and] leaves behind a subgroup that does not represent the views of its community" and that is "uncommonly conviction-and-death prone."¹ This problem has led several academics and practitioners to mount legal challenges to dismantle the practice of death qualification. This Note adds to that existing literature in its call to put the practice of death qualification to death.

First, I survey the U.S. Supreme Court's jury selection jurisprudence to expose a doctrinal inconsistency: the Court condemns discriminatory jury selection practices under the Fourteenth Amendment while affirming death qualification under the Sixth Amendment, even though it effectively constitutes a discriminatory jury selection practice. Then, I rebut the Court's opinion in Lockhart v. McCree by utilizing (1) the Court's own test, proffered in Duren v. Missouri, to identify a violation of the Sixth Amendment's fair-cross-section requirement and (2) modern empirical evidence to identify a violation of the Sixth Amendment's right to an impartial jury. Finally, I use the nineteenth-century judicial decisions from which the practice of death-qualifying capital juries arose as a case study to demonstrate how death qualification cannot be squared with

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1. Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 LAW & POL'Y 148, 165 (2018) [hereinafter Lynch & Haney, *Death Qualification in Black and White*] (quoting Aliza P. Cover, *The Eight Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L. J. 113, 121 (2016)).

either the original public meaning of, or original intent underlying, the Sixth Amendment's right to an impartial jury. Ultimately, I contend that dismantling the practice of death-qualifying capital juries—a necessary result of my rebuttal of Lockhart—is supported by an originalist assessment.

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INTRODUCTION

On September 16, 1999, inside a convenience store in Spartanburg, South Carolina, James Mahoney, a white store clerk, pulled a gun on Richard Moore, an

unarmed Black man, after he came up short on change.² Thereafter, a scuffle ensued as the two men struggled over control of the gun.³ Eventually, Moore gained possession and fired a fatal shot in Mahoney's chest while Mahoney, who had grabbed a second gun from behind the counter, shot Moore in the arm.⁴ On October 22, 2001, an all-white jury sentenced Moore to death,⁵ rejecting his defense counsel's argument that death was a disproportionate punishment for an unarmed defendant who killed in self-defense in the heat of the moment after being threatened by the armed victim.⁶ Twenty-three years later, on November 1, 2024, Richard Moore was executed by lethal injection, making him the only Black man on South Carolina's death row to be executed for a death sentence imposed by an all-white jury.⁷ South Carolina Supreme Court Justice Kay Hearn believed that the unique facts of Moore's case "highlight[] many of the pitfalls endemic to the death penalty, beginning with the role race plays."⁸

2. Sam Levin, *South Carolina Executes Richard Moore Despite Objections from Judge and Jurors*, THE GUARDIAN (Nov. 1, 2024), <https://www.theguardian.com/us-news/2024/nov/01/richard-moore-south-carolina-death-penalty> [https://perma.cc/7S7Z-G2CM].

3. *Id.*

4. Sam Levin, *South Carolina Executes Richard Moore Despite Appeals for Mercy*, CBS NEWS (Nov. 1, 2024), <https://www.cbsnews.com/news/richard-moore-execution-south-carolina/> [https://perma.cc/49BJ-XEBQ]. Thereafter, Moore went behind the counter and stole \$1,400 before fleeing the scene. *Id.* Soon afterwards, and only a short distance away, the police apprehended Moore, who did not resist his arrest and immediately confessed to the murder. *USA: Racial Bias as South Carolina Execution Set*, AMNESTY INT'L (October 8, 2024), <https://www.amnesty.org/en/documents/amr51/8606/2024/en/> [https://perma.cc/ACY3-AWDE].

5. Census data illustrates how the jury empaneled for Richard Moore's capital trial is not representative of the population in Spartanburg, South Carolina. The racial composition of Spartanburg, South Carolina, is 47.9% white and 42.3% Black. *See* Spartanburg, South Carolina, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/spartanburgcitysouthcarolina/RHI125223#RHI125223> [https://perma.cc/X8LC-P457]. Therefore, if Richard Moore's jury truly represented a fair cross-section of his community, it would be composed of at least five Black jurors.

6. Hayley Bedard, *Prisoners With Executions Dates in South Carolina and Idaho File Requests for Clemency*, DEATH PENALTY INFO. CTR. (Nov. 1, 2024), <https://deathpenaltyinfo.org/prisoners-with-executions-dates-in-south-carolina-and-idaho-file-requests-for-clemency> [https://perma.cc/XTX6-7BYR].

7. *South Carolina Executes Richard Moore Despite Broadly Supported Plea to Cut Sentence*, NPR (Nov. 2, 2024), <https://www.npr.org/2024/11/02/g-s1-31820/south-carolina-executes-richard-moore> [https://perma.cc/N7U3-K7VV]. Richard Moore's execution came after South Carolina Governor Henry McMaster rejected his request for clemency, which was supported by the trial judge and three jurors in Moore's case, as well as John Ozmint, the former director of South Carolina's Department of Corrections and a former prosecutor who generally supports the death penalty. *Id.*

8. *USA: Racial Bias as South Carolina Execution Set*, *supra* note 4. Dissenting from the South Carolina Supreme Court's denial of Richard Moore's petition for a writ of certiorari, Justice Kay Hearn noted that she could not find "any other case involving a defendant receiving the death penalty where he entered the place of business unarmed." *Governor Denies Clemency for Richard Moore Despite Plea from Jurors, Judge, and Former Prison System Director*, EQUAL JUST. INITIATIVE (Nov. 1, 2024), <https://eji.org/news/jurors-judge-and-former-prison-system-director-plead-for-clemency-for-richard-moore/> [https://perma.cc/XWH3-42H7]. Justice Hearn believes that the death penalty, which should be reserved for the "worst of the worst" murders, is a disproportionate punishment for Richard Moore, whose case "falls well short of engaging in a cold, calculated and premeditated murder." *Id.* Similarly, John Ozmint, the former director of South Carolina's Department of Corrections and a former prosecutor who supports the death penalty, believes that "objectively reviewed, [Moore's] crime would never have been considered for the death penalty in most [South Carolina] counties." *Id.*

How did an all-white jury get empaneled for Moore's capital trial? *Voir dire*, which is French for "to speak the truth," refers to "the process through which potential jurors are questioned by either the judge or jury to determine their suitability for jury service."⁹ Suitable jurors are those both legally qualified (i.e., law-abiding U.S. citizens who are at least eighteen years of age and able to adequately read, write, understand, and speak the English language) and impartial.¹⁰ Before the prosecution and defense are allowed to pose questions to and exclude potential jurors from being empaneled on a jury by exercising for-cause and peremptory challenges,¹¹ the trial judge conducting the *voir dire* in capital cases completes a process known as "death qualification."¹² To "death-qualify" the venire members, the trial judge poses questions regarding their attitudes towards the death penalty,¹³ and gauges their ability to consider aggravating and mitigating evidence to render a death sentence in an appropriate case.¹⁴ Prospective jurors who are so opposed to capital punishment that they either (1) would not find the defendant guilty regardless of the evidence or (2) would not consider death as a possible sentence regardless of the circumstances of the crime are not "death-qualified," are therefore excused for cause.¹⁵

The practice of death-qualifying capital juries, intended to produce a law-abiding jury that considers all sentencing options,¹⁶ has been subject to significant and persistent criticism by legal scholars and practitioners for its demonstrable exclusionary and biasing effects.¹⁷ For example, Mona Lynch and Craig Haney have criticized death qualification for "systematically 'whitewash[ing]' the capital eligible [jury] pool [and] leav[ing] behind a subgroup that does not represent the views of its community."¹⁸ Despite these criticisms and empirical evidence that death qualification results in the empaneling of ethnically cleansed juries that are "uncommonly conviction-and-death

9. *Voir dire*, WEX LEGAL DICTIONARY & ENCYCLOPEDIA, https://www.law.cornell.edu/wex/voir_dire [<https://perma.cc/8TTH-YN9P>] (last visited Apr. 7, 2025).

10. See *Juror Qualifications, Exemptions and Excuses*, U.S. COURTS, <https://www.uscourts.gov/court-programs/jury-service/juror-qualifications-exemptions-and-excuses> [<https://perma.cc/7L2M-96FF>]; see also U.S. CONST. amend. VI.

11. See Randall Coyne & Lyn Entzeroth, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 339 (Carolina Academic Press, 4th ed. 2012); Joshua Dressler et al., CRIMINAL PROCEDURE: PROSECUTING CRIME 1213 (West Academic Publishing, 8th ed. 2023).

12. See *Death Qualification*, CAPITAL PUNISHMENT IN CONTEXT, <https://capitalpunishmentincontext.org/resources/deathqualification> [<https://perma.cc/FB37-2MU6>].

13. See Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 677 (2002).

14. *Stages In a Capital Case*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/resources/high-school/about-the-death-penalty/stages-in-a-capital-case> [<https://perma.cc/X2DY-TJGY>].

15. *Id.*

16. *Id.*

17. See *infra* Part II.

18. Lynch & Haney, *Death Qualification in Black and White*, *supra* note 1, at 165.

prone,”¹⁹ the U.S. Supreme Court upheld the practice’s constitutionality in the landmark case of *Lockhart v. McCree*,²⁰ which is the focus of this Note.

Around the time *Lockhart* was decided in 1986, public support for the death penalty was at a historic high, with 70% of Americans favoring its use for defendants convicted of murder.²¹ Since then, there has been a dramatic shift in public opinion. Public support for the death penalty is currently at a five-decade low, receiving approval from only 52% of Americans.²² Furthermore, this support varies greatly by race, gender, religion, age, and political affiliation.²³ This diminishing and polarizing public support for the death penalty means that the death-qualified jurors who are being empaneled to serve on capital juries are increasingly unreflective of the “conscience of the community” and at odds with the role of the criminal jury envisioned by the Framers.²⁴ Therefore, as *Lockhart* approaches its fortieth anniversary, it is prudent to ask whether it can still defend the practice of death-qualifying capital juries in the face of constitutional challenges, empirical evidence, and shifting public opinion.

This Note adds to the existing literature in its call to put the practice of death qualification to death. In Part I, I provide a comprehensive review of the U.S. Supreme Court’s jury selection jurisprudence. I illustrate the dichotomy between the Court’s precedent explicitly condemning discriminatory jury selection practices under the Fourteenth Amendment, while simultaneously affirming the practice of death qualification under the Sixth Amendment. In Part II, I argue that death qualification is unconstitutional by dismantling the grounds the Court relied on to sanction the practice in *Lockhart v. McCree*. I first apply the test proffered by the Court in *Duren v. Missouri* and analyze modern empirical evidence to identify a

19. Alec T. Swafford, *Qualified Support: Death Qualification, Equal Protection and Race*, 39 AM. J. CRIM. L. 147, 148, 158 (2011); see Aliza P. Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 115 (2016).

20. See *Lockhart v. McCree*, 476 U.S. 162 (1986).

21. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [https://perma.cc/H3QM-LR7A] (last visited Apr. 7, 2026).

22. *Id.*

23. See, e.g., James D. Unnever, Francis T. Cullen & Cheryl Lero Jonson, *Race, Racism, and Support for Capital Punishment*, 37 CRIME & JUST. 45 (2008) (explaining the racial divide between death penalty support and opposition); John K. Cochran & Beth A. Sanders, *The Gender Gap in Death Penalty Support: An Exploratory Study*, 37 J. CRIM. JUST. 525 (2009) (explaining the gender divide regarding death penalty support and opposition); *Opinion Polls: Death Penalty Support and Religious Views*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/religious-statements/opinion-polls-death-penalty-support-and-religion> [https://perma.cc/TR6R-VP9N] (last visited Jan. 28, 2026) (illustrating the religious divide between death penalty support and opposition); Jeffrey M. Jones, *Drop in Death Penalty Support Led by Younger Generations*, GALLUP (Nov. 14, 2024), <https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations.aspx> [https://perma.cc/3SPK-23JR] (illustrating the age and generational divide between death penalty support and opposition); *Political Affiliation and the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/policy/public-opinion-polls/political-affiliation-and-the-death-penalty> [https://perma.cc/WEQ5-WK4G] (last visited Apr. 7, 2026) (illustrating the political divide between death penalty support and opposition).

24. See *infra* Part III.

violation of the Sixth Amendment's fair-cross-section requirement. I then evaluate the deliberative capabilities of the remaining death-qualified jurors, as opposed to the excluded non-death-qualified jurors, to identify a violation of the Sixth Amendment right to an impartial jury. In Part III, I contend that dismantling the practice of death-qualifying capital juries—a necessary result of my rebuttal of *Lockhart*—is supported by an originalist assessment. Using the nineteenth-century judicial decisions from which the practice of death-qualifying capital juries arose as a case study, I demonstrate how death qualification cannot be squared with both the original public meaning of, and original intent underlying, the Sixth Amendment right to an impartial jury. I conclude with remarks on the importance of challenging the repugnant practice of death qualification and highlight other potential challenges for academics and practitioners to consider.

I. THE U.S. SUPREME COURT'S JURY SELECTION JURISPRUDENCE

The U.S. Supreme Court's jury selection jurisprudence reveals an unusual dichotomy. The Court has repeatedly condemned the discriminatory exclusion of various protected classes via the exercise of peremptory strikes as violative of the Fourteenth Amendment's Equal Protection Clause.²⁵ In doing so, the Court has acknowledged the impropriety of manipulating the jury selection process for invidious purposes.²⁶ For example, in *Ballard v. United States*, the Court explained that the injury resulting from "systemic and intentional" gender, racial, and socio-economic discrimination "is not limited to the defendant," it extends to "the jury system, . . . the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the process of our courts."²⁷ At the same time, the Court, in rejecting Sixth Amendment death qualification challenges, has permitted this invidious discrimination to manifest in the practice of systematically death-qualifying jurors in capital cases.²⁸ Because death qualification is a discriminatory jury selection practice,²⁹ the Court's jury selection jurisprudence appears to be one of selective enforcement. Evidence of this selective enforcement further supports this Note's proposal to raise a new challenge to *Lockhart* to dismantle the practice of death qualification.

25. See *infra* Part I.A.

26. See J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1115–33 (explaining, by surveying precedent, how "[t]he lengthy history of jury selection litigation . . . suggests the Court's significant concern that the jury trial system . . . not be contaminated by racial discrimination" and "that citizens not be arbitrarily excluded from jury service based on race, ethnicity, or gender").

27. *Ballard v. United States*, 329 U.S. 187, 195 (1946); see also *Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire communication. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

28. See *infra* Part II.

29. See *id.* (presenting empirical evidence regarding the discriminatory effects of the death qualification process).

A. Precedent Sanctioning Death Qualification: What, in Effect, Constitutes a Discriminatory Jury Selection Practice?

When the Court first addressed the issue of death-qualifying capital juries in the 1968 case of *Witherspoon v. Illinois*, it only considered the constitutionality of certain standards rather than the practice as a whole.³⁰ In *Witherspoon*, the Court held 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.”³¹ However, the Court held it was permissible to exclude prospective jurors for cause based on their views regarding the death penalty under certain circumstances.³² In a famous footnote, Justice Potter Stewart explained that because “the most that can be demanded of a venireman . . . is that he be willing to consider all of the penalties . . . prospective jurors may be excluded for cause if they make it unmistakably clear that (1) they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) their attitude would prevent them from making an impartial decision as to the defendant’s guilt.”³³ This footnote became the standard for evaluating challenges to “*Witherspoon*-excludables.”³⁴

However, in the 1980 case of *Adams v. Texas*, the Court first considered the possibility that *Witherspoon* was a flawed standard.³⁵ In *Adams*, three potential jurors were excluded from serving on the defendants’ capital jury after stating that they “would be ‘affected’ by the possibility of the death penalty.”³⁶ The Court held that the removal of these prospective jurors constituted a “*Witherspoon* error” because their statement only meant that “the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally,” not that “[their] beliefs about capital punishment would lead them to ignore the law or violate their oaths.”³⁷ In light of *Adams*, the Court revisited—and relaxed—the standard for excluding prospective jurors for cause because of their views on capital punishment in the 1985 case of *Wainwright v. Witt*.³⁸ In *Witt*,

30. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

31. *Id.* at 522.

32. See *id.*

33. *Id.* at 522 n.21.

34. See, e.g., *Boulden v. Holman*, 394 U.S. 478, 481 (1969) (affirming and applying the standard Justice Stewart promulgated in *Witherspoon* for evaluating challenges to veniremen excluded from capital jury service based on death penalty attitudes); *Adams v. Texas*, 448 U.S. 38, 43–47 (concluding prospective jurors were improperly excluded from capital jury service in violation of the Sixth and Fourteenth Amendments, as construed and applied in Justice Stewart’s opinion in *Witherspoon*); see also *Lockhart v. McCree*, 476 U.S. 162, 162 (1986). (referring to the group of prospective jurors excluded from capital jury service based upon statements that they could not, under any circumstances, vote to impose the death penalty as “*Witherspoon*-excludables.”).

35. See *Adams*, 448 U.S. at 40.

36. *Id.* at 49.

37. *Id.* at 49–50.

38. See *Wainwright v. Witt*, 469 U.S. 412, 429 (1985).

the Court acknowledged that “the proper standard . . . is whether the juror’s views would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’”³⁹ This revised standard has stood the test of time in evaluating challenges to “*Witherspoon*-excludables.”⁴⁰

One year after *Witt* was decided, the Court, for the first time, considered and upheld the constitutionality of the practice of death qualification in the landmark case of *Lockhart v. McCree*.⁴¹ In *Lockhart*, the Court—assuming that the fair-cross-section requirement extended to petit juries—first held that death-qualifying capital juries do not violate the Sixth Amendment’s fair-cross-section requirement because “‘*Witherspoon*-excludables’ . . . are not ‘distinctive groups’ for fair-cross-section purposes.”⁴² The Court reasoned that *Witherspoon* excludables were not a “distinctive group” because their exclusion (1) purportedly did not contravene the purposes of the fair-cross-section requirement,⁴³ (2) was based on shared attitudes rather than immutable characteristics like race or gender, and (3) was not absolute because they could still serve on non-capital juries.⁴⁴ The Court also held that death-qualifying capital juries does not violate the Sixth Amendment’s right to an impartial jury because excluding “*Witherspoon*-excludables” yields a jury “who will conscientiously apply the law and find the facts,” which is all that an impartial jury requires.⁴⁵ Part III of this Note revisits and rebuts this flawed reasoning to support the argument that, as *Lockhart* approaches its fortieth anniversary, it is time to reverse and rechart a course “towards death disqualification,” beginning with the Court declaring the practice of death qualification unconstitutional.⁴⁶

B. Precedent Condemning Discriminatory Jury Selection Practices

The Court’s opinion in *Lockhart*, which stands on weak constitutional grounds for reasons explored in Part II, is even more ripe for review and reversal in light of the Court’s precedent condemning discriminatory jury selection practices.⁴⁷ By

39. *Id.* at 420.

40. *See, e.g.,* *Uttecht v. Brown*, 551 U.S. 1, 3 (2007) (affirming the *Witherspoon-Witt* rule).

41. *See Lockhart v. McCree*, 476 U.S. 162, 177 (1986).

42. *Id.* at 174–75.

43. The Court in *Lockhart*, citing *Taylor v. Louisiana*, 419 U.S. 522, 530–31 (1975), stated that the purposes of the fair-cross-section requirement are “(1) guard[ing] against the exercise of arbitrary power and ensuring that the commonsense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor, (2) preserving public confidence in the fairness of the criminal justice system, and (3) implementing our belief that sharing in the administration of justice is a phase of civic responsibility.” 476 U.S. at 174–75.

44. *See id.*

45. *Id.* at 177–78.

46. *See infra* Part II.

47. The fact that Supreme Court precedent condemning discriminatory jury selection practices arises in the form of challenges to the Fourteenth Amendment’s Equal Protection Clause, rather than the Sixth Amendment, should not diminish the value of the distinction drawn in this paper for several reasons. First, the practice of death qualification also raises serious equal protection concerns. *See Swafford, supra* note 19 at 162–65. Second, the Sixth Amendment must be considered in tandem with the Fourteenth Amendment, with the latter requiring jury selection procedures to comply with the commands of the Equal Protection Clause. *See, e.g.,* John D. Bessler,

highlighting the Court's repeated condemnation of the discriminatory exclusion of protected classes of individuals from jury service, this Note casts further doubt on the legitimacy of death qualification—a Supreme Court-sanctioned practice that perpetuates discrimination on the basis of race, gender, religion, political affiliation, and class.⁴⁸

The Court first began condemning racially discriminatory jury selection practices as early as 1880, in the case of *Strauder v. West Virginia*.⁴⁹ In *Strauder*, the Court held that the statutory exclusion of all African Americans from grand and petit jury service in West Virginia violated the Fourteenth Amendment's Equal Protection Clause.⁵⁰ The Court reasoned that all persons have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.⁵¹ Twenty years later, the Court demonstrated its commitment to safeguarding against racial discrimination in jury selection in *Carter v. Texas*, when it affirmed and clarified *Strauder*'s holding:

Whenever by any action of a state, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States.⁵²

The Court's repudiation of discriminatory jury selection statutes that flaunted the commands of the Fourteenth Amendment's Equal Protection Clause did not fully eradicate the discriminatory exclusion of protected classes from jury service.⁵³

The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments, 22 WASH. & LEE L. REV. 487, 551 (2017). Furthermore, the fact that this precedent differs from death qualification in terms of how the protected classes of prospective jurors were excluded from jury service (i.e., removal by the prosecution/defense via the exercise of a peremptory strike or removal for cause by the trial judge during the death qualification process) should also not weaken the comparison drawn. Even if for-cause removal during the death qualification process is considered less invidious or yields lesser exclusionary effects, this removal is nonetheless discriminatory and repugnant to the Constitution.

48. See Logan A. Yelder, Monica K. Miller & Clayton D. Peoples, *Capital-izing Jurors: How Death Qualification Relates to Jury Composition, Jurors' Perceptions, and Trial Outcomes*, 2 ADVANCES IN PSYCH. & L. 27, 36 (Bornstein et al. ed., 2016).

49. See *Strauder v. West Virginia*, 100 U.S. 303, 305 (1880); see also Sullivan, *supra* note 26, at 1111 (using *Strauder* to support the proposition that "[t]he argument that the exclusion of African Americans from criminal juries violates constitutional protections has long been recognized by the Supreme Court.").

50. *Strauder*, 100 U.S. at 305–06.

51. See *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986) (citing *Strauder*, 100 U.S. at 305).

52. *Carter v. Texas*, 177 U.S. 442, 447 (1900).

53. See EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 10–12 (2010), <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf> [<https://perma.cc/3KWC-TRHS>] (illustrating how the *Strauder* Court's strongly-worded condemnation of statutes that expressly restricted jury service to white persons service was easily circumvented by other forms of race-based discrimination in jury service, such as exclusion from jury rolls, vague and manipulable requirements for jury service, state-sponsored intimidation, and peremptory challenges).

Therefore, the Court extended *Strauder*'s holding to the non-statutory, and thus non-absolute, exclusion of African Americans from jury service in the famous "Scottsboro Boys" case of *Norris v. Alabama* (1935) when it reversed the conviction of an African American defendant who was convicted of rape by an all-white jury.⁵⁴ The Court's reversal in *Norris* was based upon evidence that African Americans were systematically excluded from grand and petit jury service in Alabama, rather than a racially discriminatory jury selection statute.⁵⁵ Subsequently, the Court extended the principles of *Strauder* and its progeny to other "protected classes" of individuals who were "substantially underrepresented" in jury service, further demonstrating its sincere commitment to eradicating discrimination in jury selection.⁵⁶ In *Ballard v. United States* (1946), the Court held that because women were a distinct "class," they could not be purposefully and systematically excluded from jury service.⁵⁷ And in *Hernandez v. Texas* (1954), the Court held that Mexican-Americans were a "distinct class" subject to the protections of the Fourteenth Amendment's Equal Protection Clause.⁵⁸

Thereafter, the Court's jury selection jurisprudence shifted to policing a less obvious, but equally invidious, form of discrimination: the exercise of peremptory challenges during *voir dire*.⁵⁹ In the 1986 case of *Batson v. Kentucky*, the Court held that "peremptory challenges are subject to the commands of the Equal Protection Clause," which "forbids the prosecutor [from] challeng[ing] potential jurors solely on account of their race or on the assumption that Black jurors as a group will be unable to impartially consider the State's case against a Black defendant."⁶⁰ Less than a decade later, in *Georgia v. McCollum* (1992), the Court reaffirmed its intolerance to racially discriminatory jury selection practices when it extended the principles of *Batson* to the defense counsel's exercise of peremptory

54. *Norris v. Alabama*, 294 U.S. 587, 596, 599 (1935).

55. *See id.* at 597–99; *see also* *Smith v. Texas*, 311 U.S. 128, 129–30 (1940) (holding that a conviction of an African American "based upon an indictment returned by a jury so selected is a denial of equal protection"); *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 330 (1970) (holding that "once the State chooses to provide grand and petit juries . . . it must hew to federal constitutional criteria in ensuring the selection of membership is free of racial bias").

56. *See, e.g.,* sources cited *infra* note 70.

57. *See Ballard v. United States*, 329 U.S. 187, 193–94 (1954).

58. *See Hernandez v. Texas*, 347 U.S. 475, 478, 479–80 (1954); *see also* *Castaneda v. Partida*, 430 U.S. 482, 495, 501 (1977) (explaining it is "no longer open to dispute that Mexican-Americans are a clearly identifiable class" and holding that a *prima facie* showing of discrimination was made against this class in grand jury selection in a Texas county).

59. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986) (barring the prosecution's exercise of racially discriminatory peremptory challenges in criminal trials); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (extending *Batson* to the defense's exercise of racially discriminatory peremptory challenges in criminal trials); *J.E.B. v. Alabama*, 511 U.S. 127, 128–29 (1994) (extending *Batson* to either party's exercise of discriminatory peremptory challenges on the basis of gender in criminal trials); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 617 (1991) (extending *Batson* to civil trials). *But see* *Swain v. Alabama*, 380 U.S. 202, 205, 227–28 (1965) (illustrating how, prior to *Batson*, the Court failed to police the prosecution's exercise of racially discriminatory peremptory challenges to impanel all-white juries by requiring proof to question a prosecutor's motivation for raising such challenges).

60. *Batson*, 476 U.S. at 89.

challenges.⁶¹ Subsequently, the Court extended the principles of *Batson* to the context of gender discrimination.⁶² In *J.E.B. v. Alabama ex rel. T.B.* (1994), the Court held that the “intentional discrimination on the basis of gender . . . [in the jury selection process] violates the Equal Protection Clause” because “all persons . . . have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.”⁶³

Today, the Court remains steadfast in its opposition to, and intolerance for, discriminatory jury selection practices that exclude protected classes of individuals from jury service.⁶⁴ For example, the Court has repeatedly reversed convictions obtained by juries whose composition has been manipulated by the prosecutors’ discriminatory exercise of peremptory strikes during *voir dire*.⁶⁵ Overall, the Court’s jury selection jurisprudence, which recognizes that “meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service,”⁶⁶ is difficult to square with *Lockhart*’s holding and practical implications. In this regard, the Court’s own precedent is consistent with this paper’s call for “death disqualification.”

II. THE CONSTITUTIONAL CASE AGAINST DEATH QUALIFICATION: CHALLENGING *LOCKHART V. MCCREE*’S SIXTH AMENDMENT ANALYSIS

To support this Note’s thesis that it is time for the Supreme Court to put the practice of death qualification to death for good, this Part revisits the Court’s opinion in *Lockhart*, which upheld the constitutionality of the practice on Sixth Amendment grounds.⁶⁷ By rebutting the Court’s Sixth Amendment fair-cross-section requirement and impartial jury right analysis, I provide a framework for legal advocates to raise a revised challenge to *Lockhart*, and ultimately, the practice of death-qualifying capital juries.

61. *McCollum*, 505 U.S. at 59.

62. See *J.E.B.*, 511 U.S. at 141–42.

63. *Id.* at 130–31, 141–42.

64. See, e.g., source cited *infra* note 77.

65. See, e.g., *Foster v. Chatman*, 578 U.S. 488, 491, 515 (2016) (holding that defendant established a *Batson* violation because he showed purposeful discrimination in the State’s striking two Black prospective jurors); *Flowers v. Mississippi*, 588 U.S. 284, 301 (2019) (affirming *Batson* and the principle that “[e]qual justice under law requires a criminal trial free of racial discrimination in the jury selection process.”); *Miller-El v. Dretke*, 545 U.S. 231, 234 (2005) (holding that habeas petitioner was entitled to a certificate of appealability because “[t]he prosecutors’ chosen race-neutral reasons for the strikes do not hold up and are so far at odds with the evidence that pretext is the fair conclusion. The selection process was replete with evidence that prosecutors were selecting and rejecting potential jurors because of race.”); *Miller-El v. Cockrell*, 537 U.S. 322, 324, 336 (2003) (holding that habeas petitioner was entitled to a certificate of appealability because “reasonable jurists could debate whether” the prosecution’s use of peremptory strikes against African American prospective jurors was the result of purposeful discrimination).

66. *Ballew v. Georgia*, 435 U.S. 223, 236–37 (1978).

67. See *infra* Part II.A.

A. The Fair-Cross-Section Requirement

In *Lockhart*, the Court—assuming that the fair-cross-section requirement extended to petit juries—mistakenly held that death qualification does not violate the Sixth Amendment’s fair-cross-section requirement.⁶⁸ The Court’s error lies in mischaracterizing the “distinctive group” allegedly excluded by the practice of death-qualifying capital juries as “*Witherspoon*-excludables,” which enabled the conclusion that such excludables are not a “distinctive group” for fair-cross-section purposes because their exclusion was based on shared attitudes rather than immutable characters such as race and gender.⁶⁹ If the Court’s analysis instead focused on African Americans and women,⁷⁰ it would have been impossible to deny that death qualification “systematic[ally] exclu[des]” a “distinctive group in the community,” which is “the essence of a fair-cross-section claim.”⁷¹ Based on these recharacterized “distinctive groups,” I apply the Court’s test for establishing a fair-cross-section violation, from *Duren v. Missouri* (1979),⁷² and conclude that the *Lockhart* Court erroneously held that death qualification satisfies this constitutional command.

1. African Americans and Women Are “Distinctive Groups” For Fair-Cross-Section Purposes

In *Duren v. Missouri*, the Court explained that “in order to establish a prima facie violation of the fair-cross-section requirement, the defendant must first show that the group alleged to be excluded is a ‘distinctive’ group in the community.”⁷³ The distinctiveness of African Americans and women—two groups often excluded from capital jury service as a result of death qualification—has been confirmed by the Supreme Court itself.⁷⁴ In *Peters v. Kiff* (1972), the Court recognized that the exclusion of African Americans, who are a “discernable class,” from jury service “destroys the possibility that the jury will reflect a representative cross-section of

68. See *Lockhart v. McCree*, 467 U.S. 162, 174 (1986).

69. See *id.* at 174–75.

70. African Americans and women are not the only “distinctive group” that death qualification disproportionately excludes from capital jury service. Prior research has considered how death qualification systematically eliminates venire members with certain religious characteristics from capital jury service, such as Catholics. See A. Summers, R. D. Hayward & M. K. Miller, *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. APP. SOC. PSYCH. 3218, 3218 (2010). For example, Catholics and Evangelicals are more likely to be excluded from capital jury service than religious fundamentalists, who are “more likely to interpret the Bible literally and to have a harsh image of God,” and Protestants. *Id.* at 3320. Although the exclusion of religious and social groups is outside the scope of this paper, their exclusion implicates the broader concerns explored in this paper, as well as other First Amendment concerns which should be explored by future scholarship. In particular, it is worth considering whether a constitutional challenge to death qualification can be made out on the grounds the practice violates the freedoms of religion and speech. See *infra* Conclusion.

71. See *Lockhart*, 467 U.S. at 174.

72. See *Duren v. Missouri*, 439 U.S. 357, 364–68 (1979); see also *infra* Parts II.A.1–4.

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

74. See, e.g., *Peters v. Kiff*, 407 U.S. 493, 498–500 (1972); *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

the community.⁷⁵ And in *Taylor v. Louisiana* (1975), the Court held that the fair-cross-section requirement is violated by the systematic exclusion of women, who are “distinct” from men.⁷⁶ Furthermore, and contrary to *Lockhart*, these “concepts of distinctiveness” are linked to the purposes of the fair-cross-section requirement.⁷⁷ In *Taylor*, the Court’s recognition of women as a “distinctive group” rested on the same fair-cross-section principles that the Court discussed in *Lockhart*.⁷⁸ And in *Peters*, the Court reasoned that systematically excluding African Americans denies the distinctive group the “privilege of participating equally . . . in the administration of justice” and “stigmatizes” the distinctive group, “even those who do not wish to participate, by declaring them unfit for jury service.”⁷⁹

Furthermore, the distinctiveness of African Americans and women can be confirmed by the test for distinctiveness which was proffered by the U.S. Court of Appeals for the Eleventh Circuit in *Willis v. Zant* (1983) and has since garnered approval from other circuit courts.⁸⁰ In *Willis*, the Eleventh Circuit explained that “to show a group is distinct or cognizable under the Sixth Amendment, a defendant must show (1) that the group is 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) 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.”⁸¹ African Americans and women would both be considered “distinctive groups” under the *Willis* test because (1) these groups are defined by the “definite composition” of race and gender,⁸² (2) a common experience of historical exclusion from jury service runs through this group,⁸³ and (3) these groups’ interests in exercising their constitutional right to jury service and representing the conscience of the community—which is becoming increasingly opposed to capital punishment—cannot be adequately represented if they are excluded from capital jury service.

75. See *Peters*, 407 U.S. at 498–500.

76. See *Taylor*, 419 U.S. at 531; see also *Ballard v. United States*, 329 U.S. 187, 193–94 (1954) (finding women distinct from men such that their exclusion from jury service makes the jury less representative of the community).

77. See *Lockhart*, 467 U.S. at 174–75.

78. See *Taylor*, 419 U.S. 522 at 530; see also *Lockhart*, 476 U.S. at 174–75 (explaining the purposes of the Sixth Amendment fair-cross-section requirement).

79. See *Peters*, 407 U.S. at 499.

80. 720 F.2d 1212, 1216 (11th Cir. 1983); see *United States v. Fletcher*, 965 F.2d 781, 782 (9th Cir. 1992) (approving of the *Willis* “distinctiveness” test for purposes of the fair-cross-section requirement); *United States v. Raszkievich*, 169 F.3d 459, 460 (7th Cir. 1999) (same).

81. *Willis*, 720 F.2d at 1216.

82. See *id.*

83. See *id.* African Americans also share several other common experiences that inform their opinions on capital punishment, including the racist history of capital punishment to maintain the institution of slavery and lynching to maintain the social order. See Swafford, *supra* note 19 at 152–54.

2. The Current Representation of African Americans and Women on Capital Juries Is Unfair and Unreasonable in Relation to the Community

In order to establish a *prima facie* violation of the fair-cross-section requirement, *Duren v. Missouri* next requires proof “that the representation of this [distinctive] group in [petit juries] is not fair and reasonable in relation to the number of such persons in the community.”⁸⁴ Several empirical studies demonstrate that the current representation of African Americans and women on capital juries is not fair and reasonable given the number of such persons in the community.⁸⁵ For example, a study of South Carolina capital trial transcripts between 1997 and 2012 revealed that death qualification excluded 32% of Black prospective jurors, compared to 8% of white prospective jurors, and 13.68% of female prospective jurors, compared to 9.72% of male prospective jurors.⁸⁶ Similarly, a study of Caddo Parish, Louisiana capital trial transcripts resulting in death sentences between 2009 and 2013 revealed that Black prospective jurors were 1.8 times more likely to be struck under *Witherspoon* than white prospective jurors.⁸⁷ Furthermore, a study of jury-eligible citizens from six leading death penalty states—Alabama, Arizona, California, Florida, Oklahoma, and Texas—concluded that “death qualification leads to more male and [w]hite juries.”⁸⁸ This conclusion was derived from the results of a simulated *voir dire* which, under the *Witt* standard, excluded 35.7% of Black prospective jurors, compared to 16.8% of white prospective jurors, and 24% of female prospective jurors, compared to 14.3% of male prospective jurors.⁸⁹

Perhaps motivated by the findings of these empirical studies, the American Civil Liberties Union (“ACLU”) filed motions in Florida, North Carolina, and Kansas challenging the constitutionality of the practice of death qualification under each state’s constitution, as well as the Sixth Amendment’s fair-cross-section requirement and impartial jury right.⁹⁰ In support of each motion, the ACLU presented

84. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979). The Sixth Amendment’s fair-cross-section requirement traditionally applies to venires, not the petit jury empaneled in a particular case. See *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). However, the Court in *Lockhart* assumed, for sake of its analysis, that the requirement extended to petit juries. See *id.* Therefore, the analysis undertaken in this sub-section makes the same assumption.

85. See *infra* Part I.A.2.

86. See Ann M. Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9 NE. L. J. 299, 333–34 (2017); Ann M. Eisenberg et al., *If It Walks like Systematic Exclusion and Quacks like Systematic Exclusion: Follow-up on Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases, 1997-2014*, 68 S.C. L. REV. 373, 380 (2017).

87. See Cover, *supra* note 20 at 137.

88. See Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. REV. 513, 553, 558 (2014).

89. *Id.* at 558.

90. Additionally, each lawsuit contends that death qualification violates the Eighth Amendment’s prohibition against cruel and unusual punishment and the Fourteenth Amendment’s guarantees of equal protection and due process. See *ACLU Demands an End to Racist Jury Selection Tactic in North Carolina Death Penalty Trial*, AM. C. L. UNION (August 16, 2022), <https://www.aclu.org/press-releases/aclu-demands-end-racist-jury-selection->

empirical studies demonstrating how death qualification “warps the jury from a cross-section of peers to be whiter, more male, more conviction prone, less likely to debate the evidence, and far more likely to sentence a defendant to death.”⁹¹ For example, the study of twelve capital trial transcripts in Duval County, Florida, from 2010 to 2018 revealed that, of the venire members who were otherwise willing and eligible to serve, death qualification excluded 38.6% of Black prospective jurors, compared to 17.1% of white prospective jurors.⁹² Similarly, the study of ten capital trial transcripts in Wake County, North Carolina, from 2008 to 2019 revealed that death qualification excluded 25% of Black prospective jurors, compared to 11% of white prospective jurors, and 17% of female prospective jurors, compared to 11% of male prospective jurors.⁹³ Additionally, survey data revealed that Black prospective jurors in Sedgwick County, Kansas, were 50% more likely to be excluded from capital jury service by the death qualification process than white prospective jurors, and were 10.1% more likely to be deemed “death-disqualified” than white prospective jurors who expressed the same general opposition to the death penalty.⁹⁴ Overall, the conclusions drawn from these studies further illustrate how the representation of African Americans and women on capital juries is unfair and unreasonable in relation to the community.

tactic-north-carolina-death-penalty-trial [https://perma.cc/DW6Q-F29X]; *State of Florida v. Luther Douglas & State of Florida v. Donald Banks*, AM. C. L. UNION (April 12, 2023), <https://www.aclu.org/cases/state-of-florida-v-luther-douglas-state-of-florida-v-donald-banks> [https://perma.cc/JJH6-U97T]; *ACLU and Partners Challenge Death Qualification and the Death Penalty in Kansas*, AM. C. L. UNION (October 16, 2024), <https://www.aclu.org/press-releases/aclu-and-partners-challenge-death-qualification-and-the-death-penalty-in-kansas> [https://perma.cc/J6BN-S4XL].

91. See sources cited, *supra* note 90.

92. See Motion to Declare Death Qualification Unconstitutional at Exhibit B (Report of Jacinta M. Gau), *State of Florida v. Dennis Thurnado Glover* (February 15, 2022). Viewed differently, the study concluded that Black prospective jurors comprised 25.9% of the venire, but were 39.5% of prospective jurors excluded by death qualification, while white prospective jurors comprised 65.4% of the venire, but were only 45% of the prospective jurors excluded by death qualification. *Id.* The study also concluded that the 2:1 rate at which Black prospective jurors are excluded from capital juries, compared to white prospective jurors, is even greater when the state’s peremptory strikes are taken into account. *Id.*

93. See Motion to Bar Discriminatory Death Qualification Process at Exhibit A (Report on Wake County Jury Selection Study by Catherine M. Grosso & Barbara O’Brien), *State of North Carolina v. Brandon Hill* (Aug. 16, 2022). The study further concluded that, in addition to death qualification excluding Black prospective jurors at a rate 2.27 times greater than white prospective jurors, the prosecutors’ peremptory strikes excluded the remaining Black prospective jurors at twice the rate of white prospective jurors. *Id.* The study also noted that these results are even more troublesome in light of the fact that the venire in Wake County, which was 76% white and 16% Black is unrepresentative of the County, whose population is 67% white and 21% Black. *Id.* Finally, this study considered the intersection of race and gender, and concluded that the gender disparity is primarily driven by the exclusion of Black women. See *id.*

94. See Motion Challenging Death Qualification as Unconstitutional Under the State and Federal Constitutions at Exhibit A (Mona Lynch Expert Report: Death Qualification in Sedgwick County), *State of Kansas v. Antoine Fielder*, No. 2018-CR-000640, <https://www.aclu.org/cases/challenging-death-qualification-and-the-death-penalty-in-kansas?document=Exhibit-A-Mona-Lynch-Expert-Report-Death-Qualification-in-Sedgwick-County#legal-documents> [https://perma.cc/R7YK-JFVM].

3. The Underrepresentation of African Americans and Women on Capital Juries Is Due to Their Systematic Exclusion in the Capital Jury Selection Process

Finally, in order to establish a *prima facie* violation of the fair-cross-section and shift the burden to the government, *Duren v. Missouri* requires showing “that this underrepresentation is due to systematic exclusion of the group in the jury selection process.”⁹⁵ *Duren* itself clarifies that a defendant making a fair-cross-section claim need not show that the absence of a fair-cross-section is the result of a discriminatory purpose or intent, but only that its absence is the inherent product of the particular method of selection used.⁹⁶ Underrepresentation of the “distinctive groups” of African Americans and women serving on capital juries is the inherent product of the death qualification process.⁹⁷ This underrepresentation is systematic because differences in public opinion regarding the death penalty are widely understood to be held consistently over time by these “distinctive groups.”⁹⁸

Regarding race, “a racial divide in American public opinion about capital punishment clearly exists and is enduring.”⁹⁹ This racial divide can be illustrated by Gallup polling data, which reported that between 1972 and 2006, 71.8% of white persons supported the death penalty, compared to 44.2% of Black persons.¹⁰⁰ Data from the National Opinion Research Center’s General Social Survey further confirms this racial divide, finding that, between 1974 and 2004, an average of 77.5% of white persons supported the death penalty, compared to 49.3% of Black persons.¹⁰¹

Regarding gender, “the male-female difference in death penalty support observed is greater than any socio-demographic characteristic, except for race.”¹⁰² This gender divide is supported by data from the National Opinion Research Center’s General Social Survey, which between 1972 and 2002 reported that 74.6% of men supported the death penalty, compared to 63.2% of women.¹⁰³ Pew Research Center’s finding that, in 2018, 61% of men supported the death penalty, compared to 46% of women, further illustrates that this gender gap has not only endured over time but has also become more pronounced.¹⁰⁴

95. See *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

96. *Id.* at 366; see also *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (holding that proving an Equal Protection Clause violation for grand jury selection requires “a defendant [to] show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs”).

97. See *infra* Part II.A.

98. See e.g., John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85, 85 (2006) (noting that the racial difference in opinion about the death penalty is “so robust that it was observed in virtually every public opinion poll and social scientific survey undertaken within this country over the past fifty years.”).

99. Unnever et al., *supra* note 23, at 56.

100. *Id.* at 55.

101. *Id.* at 54.

102. Cochran & Sanders, *supra* note 23, at 525.

103. *Id.* at 530.

104. J. Baxter Oliphant, *Public support for the death penalty ticks up*, PEW RSCH. CTR. (June 11, 2008), <https://www.pewresearch.org/short-reads/2018/06/11/us-support-for-death-penalty-ticks-up-2018/> [https://perma.cc/SX3E-CD6C].

Taken together, public opinion polls explain why the underrepresentation of African Americans and women serving on capital juries is an inherent consequence of death qualification.

4. The Government Cannot Justify This Infringement of the Fair-Cross-Section Requirement

The U.S. government, and thus individual state governments in death penalty states, are unable to carry the burden set forth by the Supreme Court in *Duren*:

[A] prima facie showing of an infringement of [the] constitutional right to a jury drawn from a fair cross section of the community [has been made], it is the [government] that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant [governmental] interest.¹⁰⁵

First, “the [] concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial”¹⁰⁶ is not furthered by death qualification. At the guilt phase, there is no evidence to support the belief that non-death-qualified jurors will disregard their role in determining a defendant’s guilt or innocence.¹⁰⁷ In fact, “most death penalty opponents prefer accurate convictions,” and therefore “would vote to convict” if the evidence “convince[s] [them] beyond a reasonable doubt that the defendant [was] guilty of a death-eligible crime.”¹⁰⁸ This is especially true now that the death penalty is a discretionary punishment, instead of a mandatory one imposed automatically upon conviction of a capital offense.¹⁰⁹ And at the penalty phase, there are serious reasons to believe that death-qualified jurors,

105. See *Duren v. Missouri*, 439 U.S. 357, 368 (1979).

106. *Lockhart v. McCree*, 467 U.S. 162, 175 (1986). *Lockhart* held that “any interest the defendant has in a wholly impartial trial jury is outweighed by the state’s efficiency interest in impaneling a single, death-qualified jury to decide both the defendant’s guilt or innocence and his appropriate punishment.” Sam Kamin & Jeffrey J. Pokorak, *Death Qualification and True Bifurcation: Building on the Massachusetts Governor’s Council’s Work*, 80 IND. L.J. 131, 131 (2005).

107. There are no empirical studies suggesting that non-death-qualified jurors are impaired in faithfully executing their role of applying the law to the facts of the case during the guilt phase of a capital trial.

108. Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 776 (2006).

109. Historically, the death penalty was a mandatory punishment upon conviction. See *Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (explaining that, at the time the Eighth Amendment was adopted, all the States provided mandatory death sentences for specified offenses). Under a mandatory death penalty regime, concerns that death-scrupled capital jurors will impermissibly consider the death penalty in making a determination regarding a defendant’s factual and legal guilt was not entirely unreasonable, even if at odds with the jury’s historical power of nullification. However, today the death penalty operates as a discretionary punishment. See *id.* at 301. Under discretionary death penalty regime, capital trials are bifurcated, meaning the guilt and sentencing phases are conducted separately. See Katherine E. Berger, *Death Qualification of Juries as a Violation of the Social Contract*, 12 WASH. U. JURIS. REV. 115, 117 (2019). Bifurcation permits the guilt or innocence of a defendant to be determined according to strict evidentiary rules. *Id.*

who are “slanted” towards conviction, will be unable to impartially apply the law to the facts.¹¹⁰

Second, the U.S. Supreme Court has explained that the government’s legitimate interests in, or purposes served by the death penalty, are retribution and deterrence.¹¹¹ These interests are not impeded by ending the practice of death qualification because imposing a sentence of life without parole at the penalty phase is sufficiently serious to serve the government’s legitimate interests. In regard to deterrence, empirical studies consistently debunk the common misconception that imposing the death penalty yields greater general deterrence effects than imposing a sentence of life without parole.¹¹² In fact, the proposition that a death sentence is a greater deterrent than a sentence of life without parole has been doubted by the Court since *Gregg v. Georgia* (1976).¹¹³ As to retribution, not only is it “no longer the dominant objective of the criminal law,”¹¹⁴ but it is suggested that the “incremental retributive effects” of a death sentence punish a greater number of innocent people than a sentence of life without parole.¹¹⁵ Because the government is unable to justify its infringement of the Sixth Amendment’s fair-cross-section requirement, the practice of death qualification cannot be defended on this ground. Therefore, the *Lockhart* Court was mistaken to hold that death qualification comports with this constitutional command.

B. The Right to an Impartial Jury

In *Lockhart*, the Court was also mistaken to hold that the practice of death-qualifying capital juries does not violate the Sixth Amendment’s right to an impartial jury.¹¹⁶ The Court erred by focusing its analysis on the excluded non-death-qualified jurors.¹¹⁷ If the Court had focused its analysis on the remaining death-qualified jurors, it would have recognized how these jurors are partial under the Court’s definition because they are unable to “conscientiously apply the law and find the facts,”¹¹⁸ and are also susceptible to biases.¹¹⁹ For this reason, the *Lockhart* Court

110. See *infra* Part II.B.

111. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

112. See *Studies on Deterrence, Debunked*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/policy/deterrence/discussion-of-recent-deterrence-studies> [<https://perma.cc/755C-EWGB>] (last visited Apr. 11, 2026) (explaining and linking several recent studies about the deterrence effects of the death penalty); *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, DEATH PENALTY INFO. CTR. (Apr. 1, 1993), <https://deathpenaltyinfo.org/research/analysis/reports/in-depth/sentencing-for-life-americans-embrace-alternatives-to-the-death-penalty> [<https://perma.cc/LVA7-DFQH>] (finding the death penalty is no more effective of a deterrent than a lengthy prison sentence).

113. See *Gregg*, 428 U.S. at 184–85.

114. *Id.* at 183.

115. See Michael L. Radelet, *The Incremental Retributive Impact of a Death Sentence Over Life Without Parole*, 49 U. MICH. J.L. REFORM 795, 797 (2016).

116. See *Lockhart v. McCree*, 467 U.S. 162, 163, 177–84 (1986).

117. See *id.* at 177–78.

118. *Id.* at 178 (citations omitted) (defining what constitutes an “impartial” jury).

119. See *infra* Part I.B.3.

erroneously held that the death qualification process yields an impartial jury when, in reality, empirical research consistently demonstrates how “the death qualification process operates to ‘stack the deck against defendants.’”¹²⁰

1. Death-Qualified Jurors Are Unable to Conscientiously Apply the Law

Death-qualified juries fail to guarantee capital defendants their Sixth Amendment right to an impartial jury because such jurors are “unable to conscientiously apply the law.”¹²¹ Since the Supreme Court’s 1976 decision in *Gregg v. Georgia*, capital jurors have been required to evaluate aggravating and mitigating factors related to the crime and characteristics of the offense and offender in order to determine whether to impose a sentence of death or life without the possibility of parole.¹²² However, empirical evidence consistently demonstrates that death-qualified capital jurors are either unable or unwilling to abide by this constitutional requirement.¹²³

Death-qualified jurors are “significantly more likely to endorse the view that the only thing that need[s] to be considered in deciding whether to impose the death penalty was the nature of the crime itself, rather than the legally correct view that the background and characteristics of the defendant should at least be considered in making that decision.”¹²⁴ Death-qualified jurors are also more likely to disregard mitigating evidence and misuse it as the basis for imposing a death sentence, and are more likely to attribute significance to aggravating evidence.¹²⁵ Overall, “by creating a jury whose members are unusually hostile to mitigation, death qualification may functionally undermine capital defendants’ ability to have their case in

120. Craig Haney, Eileen L. Zurbriggen & Joanna M. Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 PSYCH. PUB. POL’Y & L. 1, 13 (2022) (quoting *United States v. Fell*, 224 F. Supp. 3d 327, 338 (D. Vt. 2016)) [hereinafter Haney et al., *The Continuing Unfairness of Death Qualification*] (explaining how the death qualification process “is not the solution to inherent jury bias, but rather a substantial part of the problem”).

121. *Compare Lockhart*, 476 U.S. at 163 (explaining how an impartial jury requires “jurors who will conscientiously apply the law”) with *infra* Part I.B.1 (explaining, with empirical research, how death-qualified jurors are unable to conscientiously apply the law, as required by *Lockhart*’s definition of an impartial jury).

122. See Yelderman et al., *supra* note 48, at 38.

123. See, e.g., Lynch & Haney, *Death Qualification in Black and White*, *supra* note 1, at 152; Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 L. & HUM. BEHAV. 175, 183 (2002) [hereinafter Butler & Moran, *Aggravating and Mitigating Circumstances*].

124. Haney et al., *The Continuing Unfairness of Death Qualification*, *supra* note 120, at 12.

125. See *id.* (explaining that “the death qualification process selects persons who are more likely to respond punitively or negatively to aggravating qualities of capital defendants or the crimes for which they were convicted and less likely to respond mercifully to sympathetic or tragic aspects of defendants background”); Lynch & Haney, *Death Qualification in Black and White*, *supra* note 1, at 152 (explaining that “death-qualified capital jurors are more likely to disregard or misuse mitigating evidence as compared to aggravating evidence”); Butler & Moran, *Aggravating and Mitigating Circumstances*, *supra* note 123, at 182–83 (explaining the “relationship between death qualification under *Witt* and the evaluations of aggravating and mitigating circumstances,” as illustrated by empirical studies).

mitigation accurately heard, properly understood, and effectively acted upon.”¹²⁶ Furthermore, the conflation and skewed valuations of aggravating and mitigating evidence is exacerbated by race.¹²⁷ Death-qualified jurors evaluate mitigation evidence in different ways depending on the race of the defendant.¹²⁸ For example, they are more likely to discount key pieces of mitigation evidence when the defendant is Black and victim is white.¹²⁹ Overall, the “continued [] countenance [on] a process that . . . selects jurors who are significantly more likely to discount mitigation altogether or to use it as the basis for reaching a death sentence” is difficult to square with the fact that “the [Supreme] Court has repeatedly reversed death verdicts in cases where the record showed that mitigation was explicitly ignored by the sentencer or where trial counsel failed to fully uncover and/or effectively present it.”¹³⁰

Not only are death-qualified jurors more likely to incorrectly identify and weigh aggravating and mitigating factors, but they are also more likely to misunderstand the trial judge’s instructions regarding how to consider such factors in reaching a sentence.¹³¹ Death-qualified jurors often “dismiss [mitigating evidence] out of hand as no excuse for [] murder” because they mistakenly believe that “the law, or the judge’s instructions, made clear that if an[y] [singular aggravating] factor was

126. Lynch & Haney, *Death Qualification in Black and White*, *supra* note 1, at 167.

127. See, e.g., *id.* at 152 (explaining how white capital jurors give less weight to mitigating evidence than Black jurors generally and especially in cases involving Black defendants).

128. Levinson et al., *supra* note 88, at 532. This racial bias manifests because the consideration of aggravating and mitigating factors, such as “whether the defendant committed a heinous, atrocious or cruel” murder is an amorphous inquiry, compared to an ordinary question of fact, such as whether “the defendant fire[d] this weapon.” *Id.* Relatedly, death-qualified jurors weigh victim impact testimony differently depending on the race of the victim. *Id.* at 533. Such evidence can be used to magnify the humanity of white victims and marginalize the humanity of Black defendants. *Id.* at 538.

129. See Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & HUM. BEHAV. 481, 494 (2009) [hereinafter Lynch & Haney, *Capital Jury Deliberation*]; see also *id.* at 539; William Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1531–32 (finding that white capital jurors are less receptive to mitigation evidence in cases where there is a Black defendant and white victim). This racial disparity in considering mitigation evidence is likely the result of:

[J]urors’ inability or unwillingness to empathize with a defendant of a different race—that is, [w]hite [death-qualified] jurors who simply could not or would not cross the ‘empathic divide’ to fully appreciate the life struggles of a Black capital defendant and take those struggles into account in deciding on his sentence.

Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 584 (2001).

130. Lynch & Haney, *Death Qualification in Black and White*, *supra* note 1, at 167.

131. See, e.g., Brooke Butler & Gary Moran, *The Role of Death Qualification and Need for Cognition in Venirepersons’ Evaluations of Expert Scientific Testimony in Capital Trials*, 25 BEHAV. SCI. & L. 561, 562 (2007) [hereinafter Butler & Moran, *Expert Scientific Testimony*] (explaining how death-qualified jurors are more likely to exhibit lower levels of instructional comprehension); Lynch & Haney, *Capital Jury Deliberation*, *supra* note 129, at 491–92 (concluding that instructional comprehension of death-qualified jurors “fell far below what would be expected of rational decision-makers whose sentencing verdicts were being properly guided by judicial instructions”).

present, [then] the proper sentence would be death.”¹³² For example, “many [death-qualified] jurors wrongly think they *must* return a death sentence if they find [that] the defendant’s crime was especially heinous, or [that] the defendant himself is especially likely to present a risk of future danger,” regardless of the mitigation evidence presented.¹³³ Furthermore, many death-qualified jurors erroneously believe that the existence of a mitigating factor must be proved beyond a reasonable doubt or unanimously agreed upon to be considered.¹³⁴ Overall, these misunderstandings illustrate how death-qualified jurors are partial because they are “unable to conscientiously apply the law,” and their partiality unfairly disadvantages capital defendants seeking mercy.¹³⁵

2. Death-Qualified Jurors Are Unable to Conscientiously Find the Facts

Death-qualified juries further fail to guarantee capital defendants their Sixth Amendment right to an impartial jury because, in comparison to “mixed” juries (i.e., juries comprised of both death-qualified jurors and excludables), they have lesser deliberative capabilities, which raise concerns about their ability to “conscientiously . . . find the facts.”¹³⁶ Death-qualified juries are “more likely to . . . view ambiguous expert scientific testimony as valid, important in [the] decision-making process[], unbiased, and of high quality.”¹³⁷ Death-qualified juries are also less likely to “strategically and accurately incorporate trial evidence into their decision-making.”¹³⁸ This is because death-qualified jurors are more likely to exhibit a “low need for cognition,” meaning they are more likely to rely on superficial heuristics to make decisions in situations that require deliberate thought.¹³⁹ In contrast with death-qualified juries, mixed juries are “more critical of the witnesses . . . and better able to remember the evidence,” which “suggest[s] that diversity may improve

132. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1013, 1031–32, 1042–44 (2002).

133. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1542 (1998).

134. See James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided*, 70 IND. L.J. 1161, 1167 (1995); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORN. L. REV. 1, 11 (1993).

135. See Eisenberg & Wells, *supra* note 134, at 12 (explaining how death-qualified jurors, who already have a strong inclination to vote for a death sentence, are more likely to do so when they misunderstand the trial judge’s sentencing instructions); see also *infra* Part III.B.3.

136. Compare *Lockhart v. McCree*, 467 U.S. 162, 163 (1986) (explaining how an impartial jury requires jurors who will conscientiously “find the facts”) with *infra* Part II.B.2 (explaining, with empirical research, how death-qualified jurors are unable to conscientiously find the facts, as required by *Lockhart*’s definition of an impartial jury).

137. Butler & Moran, *Expert Scientific Testimony*, *supra* note 131, at 561.

138. Yelderman et al., *supra* note 48, at 39.

139. See Butler & Moran, *Expert Scientific Testimony*, *supra* note 131, at 563, 566. Butler and Moran explain that the “need for cognition” is “defined as ‘the tendency to engage in and enjoy effortful cognitive activity.’” *Id.* at 563. Unlike people with a “high need for cognition,” people with a “low need for cognition” do not enjoy engaging in activities that require effortful thought, and are therefore less likely to systematically process complex concepts. *Id.*

the vigor, thoroughness, and accuracy of the jury's deliberation."¹⁴⁰ These deliberative shortcomings raise concerns about whether death-qualified jurors are capable of "conscientiously . . . find[ing] the facts," and thus capable of being impartial as the Sixth Amendment requires.¹⁴¹

3. Death-Qualified Jurors Are Susceptible to Biases

In addition to their lesser deliberative capabilities and inability to abide by constitutionally required sentencing procedures, death-qualified jurors are also susceptible to several biases, which raise further concerns about their ability to serve as impartial jurors.

First, death-qualified juries are susceptible to a "conviction-bias."¹⁴² Empirical studies consistently conclude that death-qualified jurors are more likely than non-death-qualified jurors to find defendants guilty.¹⁴³ The results of these empirical studies can be explained by examining the death qualification process itself, which prematurely diverts prospective jurors' attention to the penalty phase and erodes the presumption of innocence.¹⁴⁴ Studies have found that imagining the penalty phase makes its occurrence more likely.¹⁴⁵ Relatedly, asking potential jurors whether they would be willing and able to impose the death penalty may lead jurors to erroneously believe that the judge wants them to select capital punishment during the sentencing phase, and primes them to do so.¹⁴⁶ Therefore, prematurely mentioning the issue of punishment can "seriously distort [the jury's] decision-making process, influence a juror's role as factfinder, and constitute reversible error."¹⁴⁷ Alternatively, this conviction-bias may stem from the inherent beliefs of death-qualified jurors, who endorse more punitive criminal justice views in general, and are less concerned about due process protections, the possibility of

140. Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53, 53, 73–75 (1984).

141. See *Lockhart*, 476 U.S. at 163 (explaining how an impartial jury requires jurors who will conscientiously "find the facts").

142. See Butler & Moran, *Aggravating and Mitigating Circumstances*, *supra* note 123, at 183; Eisenberg & Wells, *supra* note 134, at 12 (explaining there is a presumption of death in capital trials because the sentencing phase "commences with a substantial bias in favor of death").

143. See sources cited, *supra* note 142.

144. Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 L. & HUM. BEHAV. 133, 136 (1984) [hereinafter Haney, *Examining Death Qualification*].

145. *Id.* at 139.

146. See Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn Death*, 49 STAN. L. REV. 1447, 1482 (1997). Haney notes that:

[When] jurors are often repeatedly asked whether they can 'follow the law' and impose the death penalty, . . . [the questions] may seem to imply that the law actually *requires* jurors to reach death verdicts. Under this rubric, death qualification may come to resemble a kind of 'obedience drill' in which jurors feel they are voluntarily relinquishing the power to deviate from the outcome 'the law' seems to favor.

Id.

147. Haney, *Examining Death Qualification*, *supra* note 144, at 146–47; see, e.g., *Rogers v. United States*, 422 U.S. 35, 40 (1975) (holding that a jury is required to reach its verdict without regard to what sentence might be imposed).

innocent persons being sentenced to death, and whether contemporary methods of execution are too painful and cruel.¹⁴⁸ These punitive beliefs translate to death-qualified jurors “hav[ing] a lower threshold of conviction.”¹⁴⁹

Second, death-qualified juries are more likely to be biased against capital defendants and towards the prosecution.¹⁵⁰ Death qualification “influences the way in which individuals perceive and evaluate various people during the trial process.”¹⁵¹ Death-qualified jurors are more likely to have negative perceptions of the defendant and defense counsel, and positive perceptions of the prosecution and prosecution witnesses.¹⁵² For example, they are more likely to view the defendant less favorably than those excluded and are less likely to believe that the defendant can be rehabilitated in prison.¹⁵³ Conversely, death-qualified jurors are more likely to have positive perceptions of the prosecutor, prosecution witnesses, and victims.¹⁵⁴ Therefore, they are more likely to view evidence and testimony presented by the prosecution and their witnesses as more “believable, credible, and helpful.”¹⁵⁵ Taken together, these studies illustrate how “the death qualification process operates to ‘stack the deck against defendants.’”¹⁵⁶

Finally, death-qualified juries report higher levels of homophobia, racism, and sexism, which can lead to potentially prejudicial decisions regarding defendants who identify with various minority groups.¹⁵⁷ Racial bias is especially troublesome in the context of the capital jury because the death penalty is disproportionately sought against and imposed on Black defendants.¹⁵⁸ Death-qualified jurors are

148. Haney et al., *The Continuing Unfairness of Death Qualification*, *supra* note 120, at 9, 12.

149. See William C. Thompson, Claudia L. Cowan, Phoebe C. Ellsworth & Joan C. Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes Into Verdicts*, 8 L. & HUM. BEHAV. 95, 95 (1984). “[T]he standard [for conviction, which is proof beyond a] reasonable doubt is only vaguely defined [to jurors] . . . jurors largely determine for themselves their threshold of conviction.” *Id.* at 98. This threshold is lower for death-qualified jurors than excludables, who “associate greater disutility (regret) with erroneous convictions, relative to erroneous acquittals.” *Id.* at 106–07.

150. See Yelderman et al., *supra* note 48, at 38.

151. See *id.*

152. *Id.* at 37–38.

153. Brooke Butler, *The Role of Death Qualification in Venirepersons’ Susceptibility to Victim Impact Statements*, 14 PSYCH. CRIM. & L. 133, 139 (2008).

154. See Yelderman et al., *supra* note 48, at 38.

155. Butler & Moran, *Expert Scientific Testimony*, *supra* note 131, at 562; Thompson et al., *supra* note 149, at 104.

156. Haney et al., *The Continuing Unfairness of Death Qualification*, *supra* note 120, at 13 (citing *United States v. Fell*, 224 F. Supp.3d 327, 338 (2016)).

157. Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants’ Right to Due Process*, 25 BEHAV. SCI. & L. 857, 863–866 (2007); see also Haney et al., *The Continuing Unfairness of Death Qualification*, *supra* note 120, at 13 (explaining that “heightened levels of both explicit and implicit racial bias are present on death-qualified juries”).

158. *Race and the Death Penalty*, NAT’L ASS’N CRIM. DEFENSE LAWS. (December 7, 2022), <https://www.nacdl.org/Content/Race-and-the-Death-Penalty> [<https://perma.cc/P2LA-FVM2>]. The death row population is over 41% Black, even though Black people make up about 13% of the U.S. population. *Id.*; see also Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 349 (2000) (finding that jurors are more likely to impose the death penalty on a Black defendant than a white defendant); Taylor Bonner, *New Analysis of Racial Bias and Death Eligibility in 2025*, DEATH PENALTY INFO. CTR. (Jan. 14, 2026), <https://deathpenaltyinfo.org/new-analysis-of-racial-bias-and-death-eligibility-in-2025> [<https://perma.cc/D6M3-48PG>] (noting that, in 2025, 75% of

more likely than non-death-qualified jurors to possess both implicit and explicit racial biases.¹⁵⁹ In particular, they are more likely to implicitly associate white defendants with positive stereotypes, such as being virtuous and hard-working, and Black defendants with negative stereotypes, such as being aggressive and lazy.¹⁶⁰ Relatedly, death-qualified jurors are more likely to devalue the lives of Black defendants by implicitly subscribing to the “value of life” stereotype, which views white people as valuable and Black people as worthless or expendable.¹⁶¹ Furthermore, death-qualified jurors view Black defendants as “more inherently violent, dangerous, and prone to criminality,” and thus “less deserving of mercy or empathy” than white defendants.¹⁶² These biases have been proven to implicate race-based decision-making, as death-qualified jurors are more likely to impose the death penalty on Black defendants in general, especially when the victim is white.¹⁶³ Therefore, “the decision to sentence a person to death is based not on a rational determination, a weighing of the evidence, or the finding that the particular defendant is indeed guilty of the worst of the worst offenses, but rather on a series of unconscious decisions in which rac[ial and other biases] affect[] the processing of the underlying evidence and tilt the scales of justice.”¹⁶⁴

Taken together, the biasing effects of death qualification and evidence demonstrating death-qualified jurors’ inability to “conscientiously apply the law and find the facts” prove that the *Lockhart* Court was mistaken to hold that the practice of death-qualifying capital juries does not violate capital defendants’ Sixth Amendment right to an impartial jury. The Court’s error is clearer than ever today, as the “biasing effects of death qualification continue, and if anything, have intensified in the face of ongoing changes in the overall death penalty attitudes in the United States.”¹⁶⁵

III. THE ORIGINALIST CASE AGAINST DEATH QUALIFICATION: *LOCKHART* V. *MCCREE*’S DEPARTURE FROM FORMER PRACTICE AND THE FRAMERS’ PROMISE

The decision in *Lockhart* stands on even riper grounds for reversal in light of the fact that its analysis was not grounded in originalist principles,¹⁶⁶ which a majority

defendants against whom state prosecutors across death eligible states sought death sentences were people of color).

159. See Levinson et al., *supra* note 88, at 49. “Implicit bias refers to the automatic attitudes and stereotypes that appears in individuals” and which “affect [a] broad range of behaviors and decisions.” *Id.* at 4.

160. *Id.* at 43, 46.

161. See *id.* at 43, 45–47.

162. Robert J. Smith & G. Ben Cohen, *Capital Punishment: Choosing Life or Death (Implicitly)*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 229, 232, 234 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Smith & Cohen, *Choosing Life or Death*].

163. Levinson et al., *supra* note 88, at 7, 13–16, 45.

164. Smith & Cohen, *Choosing Life or Death*, *supra* note 162, at 233. This reality is even more concerning in light of the fact that death-qualified jurors are more likely to believe that racial discrimination is no longer a problem in the United States. See Butler, *supra* note 157, at 864–65.

165. Haney et al., *The Continuing Unfairness of Death Qualification*, *supra* note 120, at 12.

166. Douglas Colby, *Death Qualification and the Right to Trial by Jury: An Originalist Assessment*, 43 HARV. J.L. & PUB. POL’Y 815, 817 (2020) (explaining how Justice Rehnquist’s opinion in *Lockhart v. McCree* “relied on precedent and reason rather than analysis of the original public meaning of the Constitution” to find death qualification did not violate the Sixth Amendment).

of the sitting U.S. Supreme Court Justices have repeatedly made clear they subscribe to and are persuaded by, especially when re-evaluating their Sixth Amendment jurisprudence.¹⁶⁷ First, *Lockhart*'s analysis of the Sixth Amendment's fair-cross-section requirement is largely pragmatic: the requirement, which is notably absent from the Constitution's text, is a judicial creation intended to ensure representative juries.¹⁶⁸ Second, the definition of impartiality controlling the Court's right to an impartial jury analysis is derived from the Court's own precedent, rather than the Constitution's text or original meaning.¹⁶⁹ Taken together, *Lockhart*'s analysis stands in sharp contrast with other criminal procedure cases recently decided in the midst of the Court's originalist revolution.¹⁷⁰ With an eye to this additional shortcoming, Part III utilizes originalist methodologies to critique the cases from which the practice of death-qualifying capital juries emerged. Ultimately, this "case study" demonstrates how the Court's decision in *Lockhart* and the practice of death qualification are not faithful to an originalist interpretation of the Sixth Amendment's right to an impartial jury.¹⁷¹

Critical to this analysis is the fact that the American colonies, and subsequently the member States of the United States, initially adopted the jury selection practices of the English common law.¹⁷² However, these practices—which made no allowance for questioning jurors regarding their belief in capital punishment, much less the practice of death qualification—were abandoned by a series of nineteenth-century judicial decisions issued in the context of a young nation struggling with religious freedom.¹⁷³ By upholding individualized instances where members of the Quaker religion were excluded from capital jury service,¹⁷⁴ these judicial decisions

167. See, e.g., *id.* at 815 (“[T]he Court’s Sixth Amendment jurisprudence is in the midst of an originalist revolution.”); Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 959 (2010) (“The Supreme Court has shown an increasing enthusiasm for originalist methodology in the field of criminal procedure and with respect to the jury trial in particular.”).

168. See Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 J. CONST. L. 931, 931 (2011). Chhablani explains that:

In response to the persistent underrepresentation of women, African Americans and other minorities on juries, the Supreme Court in a series of celebrated decisions during the early years of the Burger Court, held that the Sixth Amendment right to a jury trial included the right to have the jury selected from a “fair cross-section” of society.

Id.

169. See *Lockhart v. McCree*, 467 U.S. 162, 178 (1986).

170. See Colby, *supra* note 166.

171. This Part focuses on how the practice of death qualification cannot survive an originalist assessment of the Sixth Amendment’s right to an impartial jury only. It does not discuss the Sixth Amendment’s Fair-Cross-Section Requirement because, as a judicial creation not in existence at the Founding, it is inherently incompatible with any originalist assessment.

172. See G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 CASE W. RES. L. REV. 87, 92 (2008) [hereinafter Cohen & Smith, *Death of Death Qualification*].

173. *Id.* at 92, 122.

174. The Quakers were a death-scrupled Christian denomination frequently ostracized during this time period. See *id.* at 93; see generally *United States v. Cornell*, 25 F. Cas. 650 (C.C.D. R.I. 1820) (No. 14,868)

laid the groundwork for the widespread emergence of the modern practice of death qualification.¹⁷⁵

With this background in mind, this Part utilizes originalist methodologies to critique those foundational cases and ultimately demonstrate how death qualification cannot be squared with either the original public meaning of, or original intent underlying, the Sixth Amendment's right to an impartial jury.¹⁷⁶ Despite sharing the view that the meaning of a constitutional provision was fixed at the time it was enacted, original public meaning originalism and original intent originalism diverge sharply on the object of interpretation.¹⁷⁷ Original intent originalism imputes meaning to a constitutional provision by ascertaining the intentions of its Framers and Ratifiers.¹⁷⁸ Original public meaning originalism "seeks the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."¹⁷⁹ Despite becoming increasingly popular among originalists in recent years, original public meaning originalism's focus on the text "is inadequate by itself for faithfully interpreting the Constitution, particularly where its open-textured provisions, which are most often the subject of adjudication, are concerned."¹⁸⁰ One such "open-textured provision" is the Sixth Amendment's right to an impartial jury.¹⁸¹ For this reason, the originalist assessment undertaken in this Part utilizes both methodologies to eliminate any doubts that this Note's call, to declare death qualification a dead letter, is supported by an originalist interpretation of the Sixth Amendment's impartial jury right.

A. *United States v. Cornell* (1820)

United States v. Cornell is the earliest reported case in which a prospective juror was removed from the venire for cause based on their conscientious objection to a particular law or punishment.¹⁸² In that case, Justice Joseph Story, sitting as a circuit judge, upheld a federal district court's *sua sponte* exclusion of two Quakers,

(excluding a Quaker from capital jury service); *Commonwealth v. Leshner*, 17 Serg. & Rawle 155 (Pa. 1828) (same).

175. By 1892, the U.S. Supreme Court observed that death qualification was practiced "by the courts of every State in which the question has arisen and by express statute in many states." John Quigley, *Exclusion of Death-Scrupled Jurors and International Due Process*, 2 OHIO ST. J. CRIM. L. 261, 273 (2004) (citing *Logan v. United States*, 144 U.S. 263, 298 (1892)).

176. John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371, 1373 (2019).

177. *Id.*

178. Scott Boykin, *Original Intent Originalism: A Reformulation and Defense*, 60 WASHBURN L.J. 245, 246–47 (2021).

179. See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004).

180. Boykin, *supra* note 178, at 246–47.

181. See, e.g., Stephanos Bibas & Jeffrey L. Fisher, *The Sixth Amendment: Common Interpretation*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-vi/interpretations/127> [<https://perma.cc/CP5L-C4TA>] (last visited Apr. 7, 2025).

182. See Quigley, *supra* note 175, at 270.

who expressed “conscientious scruples” against capital punishment, from serving on the capital jury in William Cornell’s trial for the murder of William Kane.¹⁸³ In sanctioning this for-cause challenge, Justice Story’s opinion relied on no precedent and disregarded the Framers’ intent for the jury to serve as the “conscience of the community” and to retain their historical independence to nullify the law.¹⁸⁴

To reach this holding, Justice Story first reasoned that “compel[ling] a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience or to commit a solemn perjury.”¹⁸⁵ This reasoning is not only incorrect, but directly at odds with the Framers’ intent for the jury to serve as the “conscience of the community.”¹⁸⁶ For example, John Adams believed that “[i]t is not only [the juror’s] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court . . . The [] law obliges no man to decide a cause upon oath against his own judgment.”¹⁸⁷ Furthermore, in the famous case of *People v. Croswell*, Alexander Hamilton, while successfully defending political journalist Harry Croswell on libel charges for publishing allegedly defamatory statements about then-President Thomas Jefferson, expressed his belief that, because it is the jury’s duty to exercise their judgments upon the law, if jurors have a clear conviction that the law is different from what is stated to be by the court, they are “bound by the superior obligations of conscience to follow their own convictions.”¹⁸⁸

Justice Story also reasoned that “to insist on a juror’s sitting in a cause when he acknowledges himself to be under influences, no matter whether they are from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to the law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt the proceedings of the courts of justice.”¹⁸⁹ This incorrect reasoning misunderstands both the “influences,” or partiality, the Sixth Amendment impartial jury trial right is concerned with, as well as the objectives the Framers sought to achieve through the trial by jury and the powers they entrusted to criminal juries to fulfill them.

First, the “influences” that Justice Story claimed warranted exclusion from capital jury service—specifically “prejudices and religious influences”¹⁹⁰—impermissibly and dangerously expanded the narrow grounds recognized in 1791 for challenging

183. *United States v. Cornell*, 25 F. Cas. 650, 651–52 (C.C.D. R.I. 1820).

184. *See infra* pp. 5, 14–15.

185. *Cornell*, 25 F. Cas. at 655.

186. *See, e.g.,* Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 4 U. ILL. L. REV. 1255, 1270 (2018) (providing support for the belief that “criminal jurors are often described as the community’s conscience”).

187. JOHN ADAMS, 2 THE WORKS OF JOHN ADAMS 161–62 (Liberty Fund 2011) (1850).

188. Darryl E. Williams Jr., *Disqualifying Death: Why Capital Abolitionists Should Look Back to Move Forward*, HOW. L.J. 305, 321 (2024) (citing *People v. Croswell*, 3 Johns. Cas. 337, 346 (N.Y. Sup. Ct. 1804)).

189. *Cornell*, 25 F. Cas. at 655–56.

190. *Id.*

prospective jurors as partial in violation of the Sixth Amendment.¹⁹¹ As Douglas Colby correctly explained in his originalist assessment defending the practice of death qualification, “[t]o be disqualified as impartial, a juror must either have a familial or other close personal association with the defendant or, alternatively, be financially interested in the case.”¹⁹² Colby’s use of these “narrow criteria” to “contrast . . . the sources of impartiality that the defendant proposed in *Lockhart*, which involved ideological predisposition rather than any direct, personal bias” applies with equal force to challenge Justice Story’s reasoning for affirming the federal district court judge’s *sua sponte* removal of the prospective Quaker jurors. Justice Story’s affirmance—which rested on the Quakers’ “religious opinions”¹⁹³ instead of “any direct, personal bias”¹⁹⁴—therefore cannot be reconciled with the original public meaning of the term impartiality.

Second, Justice Story’s concern that death-scrupled capital jurors would “subvert” the objects of the criminal trial by failing to “giv[e] a true verdict according to the law” misunderstands what those of the Founding era considered to be the object of criminal trials.¹⁹⁵ Justice Story himself described the “great object of a trial by jury in criminal cases” as “guard[ing] against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.”¹⁹⁶ Similarly, the Framers believed that because juries serve “the central purpose of being ‘the voice of the people,’”¹⁹⁷ and as a “valuable safeguard of liberty,”¹⁹⁸ the trial by jury is “the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”¹⁹⁹ The dominant scholarly position is that, with an eye to this objective, the Framers in 1791 entrusted juries with the power to judge both the law and facts.²⁰⁰ For example, in *People v. Croswell*, Alexander Hamilton contended that “[a]ll the cases agree that the jury ha[s] the power to decide the law as well as the fact,” which is “essential to the security of personal rights and public liberty.”²⁰¹ This

191. See *infra* Part III.B (explaining Blackstone and Coke’s definition of impartiality in greater detail).

192. See Colby, *supra* note 166, at 823. Although Colby’s ultimate conclusion—that death qualification is supported by an originalist assessment—is incorrect, his analysis of the narrow criteria used to evaluate impartiality remain sound.

193. *Id.* at 823.

194. *Id.*

195. See Cornell, 25 F. Cas. at 655–56; *infra* Part III.A.

196. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (1833).

197. See Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 115 n.115 (citing 2 THE WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., 1850)) (“Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, *without the concurrence of the voice of the people.*”) (emphasis added).

198. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that “the friends and adversaries of the plan of the convention . . . regard [trial by jury] as a *valuable safeguard to liberty.*”) (emphasis added).

199. CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 290 (2014).

200. See Larsen, *supra* note 167, at 968–70; see also CONRAD, *supra* note 199, at 47–48 (discussing scholars’ competing views on the role of the criminal juries at the Founding).

201. See *People v. Croswell*, 3 Johns. Cas. 337, 345–46 (N.Y. Sup. Ct. 1804) (Alexander Hamilton).

understanding of the jury's power is confirmed by Noah Webster's *Dictionary of the English Language* (1828), which, in defining the petit jury, explained that it has the power to "decide both the law and the fact in criminal prosecutions."²⁰² Although Webster's dictionary was not published in 1791, it is still relevant to an originalist assessment because, as the first American dictionary of the English language, it reflects the understandings of the drafters of the Bill of Rights.²⁰³ In particular, this definition captures the Framers' understanding that "the right of jurors to judge 'according to conscience' . . . was implicit within the word 'jury.'"²⁰⁴ This understanding relates to, and provides support for, the concept of jury nullification.

The doctrine of jury nullification (i.e., jury independence) either flows from, or is encompassed within, the eighteenth-century jury's prerogative to determine the facts and law.²⁰⁵ This doctrine—which originated from the English common law in *Bushell's Case* (1670)²⁰⁶ and was affirmed by Chief Justice John Jay in *Georgia v. Brailsford* (1794)²⁰⁷—provides that jurors in a criminal case have the power, if not the right, to acquit the defendant against the evidence,²⁰⁸ based on their belief that the law or its punishment is unjust in general or in a particular case.²⁰⁹ The Framers, informed by the traditions of the English common law and colonial America, intended for the jury's nullification power to serve as a check on government—one of the "objects of a trial by jury."²¹⁰ For example, John Adams

202. CONRAD, *supra* note 199, at 47 n.6 (citing NOAH WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1st. ed., 1828)).

203. *See generally id.* (using Webster's dictionary to ascertain the original public meaning of language in the Bill of Rights).

204. *Id.* at 47.

205. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 238–39 (2005).

206. *Bushell's Case* is widely understood as the English common law's first recognition of the concept of jury independence. *See e.g.*, G. Frank Gormlie, *Jury Nullification: History, Practice, and Prospects*, 53 GUILD PRAC. 49, 52–53 (1996). In that case, Edward Bushell was one of the twelve jurors who, in contravention of the law and trial judge's instructions, voted to acquit famous Quakers William Penn and William Mead "of the capital offenses of unlawful and tumultuous assembly, disturbance of the peace, and riot." CONRAD, *supra* note 199, at 24. After Bushell refused to pay the judge-imposed fine for this act of defiance, he sought a writ of *Habeas Corpus ad Subjiciendum* from his imprisonment in the English Court of Common Pleas. *Id.* at 27. In granting the writ, Chief Justice John Vaughan held that because the jury has virtually unreviewable power to determine the facts, the court cannot rule that the jury's verdict was contrary to the court's instructions on the law. *Id.* at 27–28. However, a jury could be punished for its verdict if it was proved to be delivered in bad faith, such as through bribery or perjury. *Id.*

207. *See Georgia v. Brailsford*, 3 U.S. 1, 4 (1794); *see also Stettinius v. United States*, 22 F. Cas. 1322, 1333 (C.C.D.D.C. 1839) (affirming the jury's power of nullification by holding that jurors were free to not apply a law that they found unjust); *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993) ("[A]lthough a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.").

208. *See* AMAR, *supra* note 205, at 238–39.

209. *See* CONRAD, *supra* note 199, at 52–53.

210. *Id.* at 66 n.2 (citing *United States v. Cornell*, 25 F. Cas 650, 655–656 (C.C.D. R.I. 1820)). *Bushell's* recognition of the jury's independence led to the "trial by jury emerg[ing] as the principal defense of English [and Colonial] liberties." *Id.* at 28 (citing J.M. Beatle, *London Juries In The 1690's*, in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 214 (J.S. Cockburn & Thomas A. Green, eds., 1988)). In England, criminal juries frequently nullified the law in order to show mercy to defendants charged with one of the

believed that “the common people[] should have as complete a control, as decisive a negative, in every judgment of a court of judicature’ as they have, through the legislature, in other decisions of government.”²¹¹ Taken together, juries “checked courts (as the voice of the common law) and legislatures by ensuring that the substantive law comported with the local community’s sense of justice.”²¹² That the Framers intended to confer this right or power on criminal juries is confirmed by the British *Jacob’s Law Dictionary*, the most common legal dictionary in colonial Virginia, which, in defining *jury*, stated that “[juries] are not fineable for giving their verdict contrary to the evidence.”²¹³ Furthermore, evidence of this right is supported by state practice,²¹⁴ where criminal juries retained their grip on questions of law until the close of the nineteenth century.²¹⁵

Therefore, because independent juries have no obligation to give a verdict according to law and evidence, it is actually Justice Story who subverted the “objects of a trial by jury” by upholding the district court’s *sua sponte* removal of the Quaker prospective jurors.²¹⁶ The errors of Justice Story’s opinion become even more dangerous when *United States v. Cornell* is viewed as not an anomaly, but rather as precedent enabling other courts to curtail the intended jury’s function as the “conscience of the community.”

two-hundred capital offenses under England’s “Bloody Codes.” *Id.* at 205. In the American colonies, criminal juries used this liberty-safeguarding power to express opposition to the crown. The most famous example comes from the famous case of *Rex v. Zenger*, which has been described as “the American primer on the role and duties of jurors.” See *Rex v. Zenger*, How. St. Tr. 17:675 (1735); Larsen, *supra* note 167, at 969–70. In that case, John Peter Zenger was charged with seditious libel for publishing statements critical of William Crosby, the Crown-appointed colonial governor of New York, in *The New York Weekly Journal*. See CONRAD, *supra* note 199, at 32–36. Alexander Hamilton, representing Zenger, successfully convinced the jury to nullify the Crown’s unjust libel law—which sought to control the trial’s outcome by limiting the jury’s role to determining whether the defendant published the statement and, thereafter, having the judge determine whether the writing was libelous. See *id.*; Paul Butler, *In Defense of Jury Nullification*, 31 LITIG. 46 (2004).

211. CONRAD, *supra* note 199, at 45–46 (citing *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964)); 2 THE WORKS OF JOHN ADAMS 160 (Charles Francis Adams ed., 1850). Lysander Spooner also believed that the jury must be free to judge the whole case, including the justice of the law, without any dictation from the government. LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 10 (John P. Jewett & Co., 1852). Otherwise, “the jury will be mere puppets in the hands of the government,” and the trial by jury—which “will be, in reality, a trial by the government” where the “government will determine its own power over the people, instead of the people[] determining their own liberties against the government”—will not serve “as a palladium of liberty,” or as any protection to the people against the oppression and tyranny of the government.” *Id.*

212. Larsen, *supra* note 167, at 969.

213. CONRAD, *supra* note 199, at 46 (citing WILLIAM HAMILTON BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA XVI (1978)).

214. See Colby, *supra* note 166, at 821 (explaining how Justice Thomas’ originalist methodology to ascertain the original public meaning of the Sixth Amendment included looking at state practice at the time of the founding).

215. See Larsen, *supra* note 167, at 974.

216. See *Cornell*, 25 F. Cas. at 656.

B. *Commonwealth v. Lesher* (1828)

Commonwealth v. Lesher is the earliest reported case where a prosecutor moved to exclude a death-scrupled prospective juror from the venire for cause.²¹⁷ In that case, a Pennsylvania trial judge granted the prosecutor's for cause challenge and excluded Isaac Morris, a Quaker prospective juror, from serving on the jury in William Lesher's capital murder trial after he independently declared that, because of his "conscientious scruples on the subject," he would never agree to a verdict imposing capital punishment.²¹⁸ A divided Pennsylvania Supreme Court rejected Lesher's motion for a new trial and held that the state may properly raise a for cause challenge to exclude a prospective juror in a capital case if "he declares that he has conscientious scruples on the subject of capital punishment" and that "he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being the punishment, though the evidence required such a verdict."²¹⁹ Despite stating that "the rules of the common law must govern [the court's] decision,"²²⁰ the majority opinion sharply departs from the common law by sanctioning a for cause challenge beyond one of the four traditionally recognized categories.²²¹

Justice John Tod, writing for a majority of the Pennsylvania Supreme Court, reasoned that any juror who "in any possible way . . . has been warped by any preconceived opinion which may affect his verdict, or has made up his mind what verdict he is to give, and declared it, is [properly] excluded" by the common law *propter affectum* challenge because such a juror is incapable of being impartial between the state and defendant.²²² Justice Tod's reasoning departs from historical practice as he either misunderstands or erroneously expands, without any textual or historical justification, the *propter affectum* challenge.

The American colonies, and subsequently the United States, adopted the jury selection practices of the English common law,²²³ which, as Blackstone explained, permitted the prosecution and defense to raise four narrow types of for cause challenges during the process of empaneling a jury from the venire.²²⁴ The first challenge, *propter honoris respectum*, allowed a Lord to be removed from the venire on account of respect for nobility.²²⁵ The second challenge, *propter delictum*, allowed a person previously convicted of a felony or misdemeanor to be removed

217. See Quigley, *supra* note 175, at 270.

218. *Commonwealth v. Lesher*, 1827 WL 2776, at *1–2 (Pa. 1828).

219. *Id.* at *1.

220. *Id.* at *2.

221. See *infra* Part III.B. (describing the four traditionally recognized categories of for cause challenges).

222. *Lesher*, 1827 WL 2776 at *2; see Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 95.

223. See Quigley, *supra* note 175, at 270.

224. See Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 92 n.27 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 353 (1769)). The defense only was also entitled to exercise thirty-five peremptory challenges. *Id.* at 92.

225. *Id.*

from the venire on account of crime.²²⁶ The third challenge, *propter defectum*, allowed an alien or slave to be removed from the venire on account of defect.²²⁷ The fourth and final challenge, *propter affectum*—which the Pennsylvania Supreme Court erroneously relied upon in the case—allowed a prospective juror to be removed from the venire on account of favor or bias.²²⁸

That the Pennsylvania Supreme Court erroneously expanded the *propter affectum* challenge becomes clear when an originalist assessment is undertaken.²²⁹ Because the meaning of the Sixth Amendment's right to a trial by an impartial jury—which the *propter affectum* challenge purports to safeguard—is not immediately apparent from the face of the constitutional text,²³⁰ originalist methodology turns to the original public meaning at the time of ratification.²³¹ To determine original public meaning, originalists often look to commentators on the English common law, from which the Sixth Amendment and American trial by jury system derived.²³² Two of the most influential English commentators of the time, Blackstone and Coke, both understood the scope of the *propter affectum* challenge to be narrower than the understanding adopted by the Pennsylvania Supreme Court.²³³

Blackstone understood the *propter affectum* challenge's qualification of impartiality to be limited to relational bias.²³⁴ Based on this understanding, Blackstone believed that veniremen were properly subject to removal under this challenge if they (i) were related to either party; (ii) were the defendant's master, servant, counsel, steward, or attorney; (iii) belonged to the same society or corporation as the defendant; (iv) had properly served as a juror or arbitrator in the same cause; (v) had an action pending against the defendant; or (vi) had taken money for the verdict.²³⁵

Coke understood the *propter affectum* challenge's qualification of impartiality to be limited to actual bias, meaning bias stemming from a "personal interest" in the outcome of the case.²³⁶ Coke's understanding stemmed from his maxim that a juror "must . . . stand[] indifferent, as he stands unsworn."²³⁷ He believed that the "indifference" with which this maxim, and thus the *propter affectum* challenge, was concerned with was indifference "as to the parties."²³⁸ Judge Gibson's dissent

226. *Id.*

227. *Id.*

228. *Id.*

229. See *infra* Part III.B.

230. Colby, *supra* note 166, at 820.

231. See generally ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (discussing original meaning originalism as his preferred method of textual interpretation).

232. See Colby, *supra* note 166, at 820–21.

233. See *infra* Part III.B.

234. See Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 92 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 353 (1769)).

235. *Id.* at 116, n.118 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 363 (1769)).

236. *Id.* at 89, 116.

237. Commonwealth v. Leshner, 1827 WL 2776, at *7 (Pa. 1828) (Gibson, J., dissenting) (citation omitted).

238. *Id.*

explained that Coke's definition of indifference did not encompass jurors' views regarding the law.²³⁹ Therefore, under a proper interpretation of the *propter affectum* challenge, a juror had a personal interest making them incapable of "stand[ing] indifferent" when they had "express[ed] favor or . . . malice" towards one of the parties.²⁴⁰ In contrast, a juror did not have a personal interest if that juror had "express[ed] favor or . . . malice" towards a particular punishment or law.²⁴¹ This is because a prospective juror's view on the constitutionality of a particular law was widely accepted as being within the province of the jury,²⁴² and thus "an important component of society's deliberative process."²⁴³

Taken together, Blackstone and Coke—and by extension, the Framers—did not understand the *propter affectum* challenge's qualification of impartiality to permit the removal of prospective jurors who were partial "between the State and the [D]efendant" because of their views regarding capital punishment.²⁴⁴ Chief Justice John Gibson, writing in dissent, was therefore correct to accuse the majority opinion of "judicial activism [] infringing upon the right to an impartial jury" and "changing the common law."²⁴⁵ This latter accusation is especially persuasive when viewed in light of the "dominant scholarly position" that Founding-era juries had the right to judge both the law and facts. Chief Justice Gibson's critique becomes even more compelling when coupled with the fact that subsequent judicial opinions relied on Justice Tod's flawed reasoning to enshrine the modern-day death qualification process into practice, thus eroding juries' traditional powers.²⁴⁶

C. *People v. Damon* (1835)

People v. Damon is the earliest reported case where, after *voir dire* style questioning, non-Quaker,²⁴⁷ prospective jurors were removed from the venire for cause based on a death qualification statute.²⁴⁸ In this case, while empanelling the capital jury for Joseph Damon's murder trial, a New York trial judge permitted the district attorney to *voir dire* the prospective jurors to determine whether they had "conscientious scruples against finding a verdict of guilty for [a capital] offense" and whether those opinions were based on their belonging to a religious denomination

239. *Id.*

240. *Id.*

241. *Id.*

242. See *supra* Part III.A.

243. Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 89.

244. *Id.* at 95.

245. See *id.*; Quigley, *supra* note 175, at 271.

246. See Larsen, *supra* note 167, at 968 & n.47 (citing a host of scholars who agree that juries of the Founding era also had the right to judge the law); see also *supra* Part III.A (explaining the role of the jury in 1791). Larsen's conclusion regarding the "dominant scholarly position" undercuts Colby's unjustifiably strong claim that the Judiciary Act of 1789 irrefutably demonstrates that Sixth Amendment did not grant juries the right to judge law. See Colby, *supra* note 166, at 826.

247. See, e.g., *United States v. Cornell*, 25 F. Cas. 650, 651 (C.C.D. R.I. 1820) (excluding a Quaker from capital jury service); *Commonwealth v. Leshner*, 1827 WL 2776 (Pa. 1828) (same).

248. See Quigley, *supra* note 175, at 272.

which held such scruples.²⁴⁹ Later, the trial judge—relying on a New York statute from 1813²⁵⁰ precluding “[p]ersons of any religious denomination whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death” from serving as capital jurors—granted the district attorney’s for cause challenges to two prospective jurors who respectively, expressed conscientious objections to capital punishment despite not belonging to any religious denomination and that departed from the views of his religious denomination.²⁵¹ The New York Supreme Court rejected Damon’s motion for a new trial and held that both prospective jurors were properly removed for cause under the statute, which, properly understood, renders any person—regardless of religious denomination—an incompetent juror in a capital trial if their opinions would preclude them from finding a defendant guilty of an offense punishable with death.²⁵²

Chief Justice John Savage, writing for the unanimous New York Supreme Court, first reasoned that the New York State Legislature’s choice to include the language “of *any* religious denomination,” served as evidence of their belief that “it is not the opinions of the denomination which render the juror unfit to serve, but his own opinions.”²⁵³ The fact that the court’s opinion is based on state statutory law “suggests that the common law did not provide for the exclusion of death-scrupled jurors,”²⁵⁴ which further suggests that death qualification statutes cannot be viewed as faithful to an originalist interpretation of the Sixth Amendment’s impartial jury right. Also, even if this statutory interpretation is technically “correct,” the logical conclusion stemming from it—that it is permissible to exclude venire members from jury service because of their opinions—not only raises First Amendment concerns,²⁵⁵ but also prevents the jury from representing the “conscience of the community” as the Framers intended.²⁵⁶

Chief Justice Savage then purported to justify the outcome of his statutory interpretation by reasoning that, if an unfit juror (i.e., one who would always vote to acquit regardless of the defendant’s guilt or innocence) were permitted to serve on a jury, it would be a misnomer to call the proceeding a trial when it is really a mockery.²⁵⁷ This reasoning, which dangerously expands the scope of excludable venire members, undermines the objectives of the trial by jury, which are greater

249. *People v. Damon*, 13 Wend. 351, 351–52 (N.Y. Sup. Ct. 1835).

250. “Persons of any religious denomination, whose opinions are such as to preclude them from finding any defendant guilty of an offence punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offence punishable with death.” *Id.* at 354.

251. *Id.* at 351–52, 354.

252. *Id.* at 351, 353.

253. *Id.* at 354.

254. *See Quigley*, *supra* note 175, at 272.

255. Although the First Amendment is beyond the scope of this paper, future scholarship should consider how death qualification violates the constitutionally guaranteed freedoms of speech and religion. *See infra* Conclusion.

256. *See supra* Part III.A.

257. *See Damon*, 13 Wend. at 355.

than simply adjudging moral blameworthiness.²⁵⁸ Because the trial by jury right is a right of the people,²⁵⁹ and not solely a right of the accused, no trial—not even one entirely comprised of jurors predetermined to acquit—can accurately be declared a mockery. This is because the Framers viewed the jury as “a political institution embodying popular sovereignty and republican self-government”²⁶⁰ that protects against governmental overreaching—whether by the overzealous prosecutor, corrupt judge, or non-responsive legislature—by exercising their power of “jury review.”²⁶¹ If Chief Justice Savage’s flawed reasoning cannot adequately support his statutory interpretation, such reasoning would surely not be sufficient to support an analogous constitutional interpretation.

Chief Justice Savage’s opinion notably did not consider the propriety of the trial judge’s permittance of the district attorney’s specific *voir dire* questions.²⁶² However, his consideration of the issue would have not only served as grounds to grant Damon’s motion for a new trial, but also as a significant roadblock to the New York Supreme Court—and other courts relying on his opinion as persuasive precedent—implementing its dangerously broad holding regarding the permissible scope of excludable capital jurors. This is because the *voir dire* is considered a “uniquely American practice” that departed from the English common law tradition of not permitting either the defense or prosecution to question the venire members in general, and specifically regarding issues of prejudice.²⁶³ This bedrock

258. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185 (1991) [hereinafter Amar, *Bill of Rights*].

259. See Akhil Reed Amar, *Sixth Amendment First Principles: Foreword*, 84 GEO. L.J. 641, 681–86 (1996) [hereinafter Amar, *Sixth Amendment*].

260. *Id.* at 684.

261. Using an analogy to federal legislative bicameralism, Akil Reed Amar explains how jurors act as a check and balance on the judiciary in a manner akin to other checks and balances inherent in the structure of the U.S. government, which was founded on separation of powers principles. *Id.* at 682–83. “[T]he Senate[,] sitting without the House[,] is not a federal legislature capable of passing laws” because the House is needed to “monitor and expose—check—any partiality or corruption in the Senate.” *Id.* Similarly, “[a] federal judge sitting without a jury is simply not a federal court capable of trying criminal cases” because “the jurors on the lower bench [are needed to] check a corrupt or partial set of judges on the upper bench.” *Id.* at 683. Amar’s analogy finds support in several Ratification-era sources. For example, Thomas Jefferson believed “[i]t is necessary to introduce the people into every department of the government” and especially the judiciary because “permanent judges acquire an *Esprit de corps*, [are known to be] liable to be tempted by bribery . . . [and] misled by favor, by relationship, by a spirit of party, by a devotion to the Executive or Legislative . . .” *Id.* at 683 (citing Letter from Thomas Jefferson to L’Abbe Arnoux (July 19, 1789), reprinted in 15 THE PAPERS OF THOMAS JEFFERSON 282–83 (Julian P. Boyd ed., 1958)). Even the Anti-Federalists agreed with Jefferson on the importance of the jury “as ‘the democratic branch of the judiciary power—more necessary than representatives in the legislature.’” *Id.* (citing *Essays by a Farmer (IV)*, in 5 THE COMPLETE ANTI-FEDERALIST 38 (Herbert J. Storing ed., 1981). See generally Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1262, 1278–84 (2016) (explaining the ways in which “the founders . . . understood that the American jury had an independent role like the executive, the legislature, the judiciary, and the states—specifically to protect against actions by those other actors”).

262. See generally Damon, 13 Wend. 351 (failing to contest district attorney’s *voir dire* questions regarding jurors’ conscientious concerns against finding a guilty verdict for a capital offense).

263. See April J. Anderson, *Peremptory Challenges at the Turn of the Nineteenth Century: Development of Modern Jury Selection Strategies as Seen in Practitioners’ Trial Manuals*, 16 STAN. J. C.R. & C.L. 1, 7, 14–15 (2020) (explaining the English common law tradition of precluding *voir dire* style questioning and specifically

component²⁶⁴ of the American trial by jury system can be traced back to *United States v. Burr* (1807).²⁶⁵ However, the reasoning underlying Chief Justice Marshall's opinion in that case—that *voir dire* questioning ensures an impartial jury is empaneled, as required by the Sixth Amendment—cannot be reconciled with the death qualification process because a juror's views regarding a particular law or punishment do not prevent them from standing indifferent as they stand unsworn.²⁶⁶ Therefore, even if one accepts the *voir dire* as being faithful to principles of originalism, an originalist interpretation would still support following the English common law tradition of not making any “allowance for asking questions from which to determine whether a venireman could apply a death sentence.”²⁶⁷ Adherence to this tradition would have made it difficult, or outright prevented, the modern-day practice of death-qualifying capital jurors during *voir dire*. In this respect, the method of *voir dire* implemented in the practice of death-qualifying prospective capital jurors fails an originalist assessment.

D. *State v. Kennedy* (1845)

State v. Kennedy is the an early case authorizing the *practice* of death-qualifying capital juries.²⁶⁸ In this case, a Louisiana trial judge granted the attorney general's for cause challenge to exclude two prospective jurors from serving on the capital jury in Patrick Kennedy's murder trial after they affirmatively answered, during *voir dire*, the attorney general's question of “whether they had any conscientious and religious scruples against finding a verdict of guilty[] in any case involving the life of the accused.”²⁶⁹ The Louisiana Supreme Court rejected Kennedy's motion for a new trial and unanimously held “this objection to a juror [is] a good one” because veniremen with conscientious objections to capital punishment can never serve as jurors in a capital case.²⁷⁰

Justice George King, writing for the Louisiana Supreme Court, first reasoned that because death-scrupulous prospective jurors are predisposed to acquit, they are incapable of “stand[ing] indifferent between the State and the accused.”²⁷¹ This

questions regarding prejudices because “[c]ompelling a juror to admit that he had prejudged a case would embarrass and degrade him,” English judges would not allow counsel to ask about issues of prejudice in order to “shield[] veniremen from potentially embarrassing questions,” “protect[] potential jurors' dignity,” and “avoid[] tempting [prospective jurors] into untruthful answers”).

264. See Michael L. Neff, *In Defense of Voir Dire: Legal History and Social Science Demand Appropriate Voir Dire*, 17 GA. BAR J. 14, 15 (2011) (explaining that Justice Marshall's vision on *voir dire* is a bedrock component of our judicial system).

265. See *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (holding that defense counsel was permitted to ask the venire members if they had already formed an opinion about whether former Vice President Aaron Burr was guilty of treason to ensure an impartial jury was empaneled in his trial).

266. See *id.*; *supra* Part III.B.

267. Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 92.

268. See *State v. Kennedy*, 8 Rob. 590 (La. 1845).

269. *Id.* at 594.

270. *Id.* at 595; see also Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 98.

271. *Kennedy*, 8 Rob. at 595.

reasoning is not only at odds with Lord Coke's interpretation of his own maxim,²⁷² but it is also undermined by Justice King himself. Justice King first attempts to dismiss the relevance of the fact that no judicial opinions contained in the common law reports support his interpretation of Lord Coke's maxim by assuming that "opinions opposed to capital punishments do not prevail in England."²⁷³ However, this attempt fails because there is a well-documented history of public opposition by both the British and colonial Americans to capital punishment under England's "Bloody Codes."²⁷⁴

Justice King then erroneously assumes that "an English judge would not hesitate, in a capital case, to reject jurors professing such opinions, upon the common law principle, that they did not stand indifferent,"²⁷⁵ even though there is "[n]othing within the English [common] law, or American [] law, suggest[ing] that jurors could be excused because following the law required them to 'decide a cause upon oath against his own judgment.'"²⁷⁶ Critics are therefore correct to condemn Justice King's "transform[ation]" of the common law rule "into a requirement of willingness to follow and impose the law"²⁷⁷ as judicial activism that undermines the objects of the trial by jury, furthered by jury independence.²⁷⁸ This critique illustrates a powerful theme: that the practice of death qualification is an invention of judicial activism, which cannot find support from an originalist assessment.

Justice King then reasoned that the opinions in *People v. Damon*, *United States v. Cornell*, and *Commonwealth v. Leshner* support the widespread exclusion of death-scrupulous venire members from capital jury service.²⁷⁹ However, Justice King's reliance on those opinions to cure the weakness of his own is misplaced because *Damon*, *Cornell*, and *Leshner* each diverge from the historical context surrounding, and original intention underlying, the Sixth Amendment's jury trial right.²⁸⁰ Taken together, these judicial opinions illustrate how modern-day death qualification—originating from *State v. Kennedy*—cannot be viewed as faithful to an originalist interpretation of the Sixth Amendment's right to an impartial jury. Therefore, if the Supreme Court is truly committed to its "originalist revolution,"²⁸¹ it must recognize that the death qualification defies principles of originalism and declare the practice a dead letter.

272. See *supra* Part III.B.

273. *Kennedy*, 8 Rob. at 595.

274. CONRAD, *supra* note 199, at 205–07.

275. *Kennedy*, 8 Rob. at 595.

276. Williams Jr., *supra* note 188, at 321.

277. See Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 97; Quigley, *supra* note 175, at 272.

278. See *supra* Part III.A.

279. *Kennedy*, 8 Rob. at 595.

280. See *supra* Parts III.A–C.

281. See Cohen & Smith, *Death of Death Qualification*, *supra* note 172, at 88 ("[T]he Court's Sixth Amendment jurisprudence is in the midst of an originalist revolution. Starting with *Jones v. United States* and continuing through . . . *Blakely v. Washington* and *Crawford v. Washington*, the Court stands poised to refasten Sixth Amendment jurisprudence to its historical underpinnings.").

CONCLUSION

The rights conferred by the Sixth Amendment, specifically the defendant's right to a trial by an impartial jury and the public's right to jury service, are among the most important rights the Constitution confers on individuals.²⁸² These rights reflect the Framers' unequivocal intention for all juries—and especially the capital jury because “death is different”²⁸³—to represent the “conscience of the community” and serve as a “valuable safeguard of liberty.”²⁸⁴ The Framers' vision can only truly be realized if all features of the American trial by jury system—but perhaps most importantly its selection procedures—effectively protect against all forms of discrimination, whether invidious or merely consequential, on the basis of race, gender, religion, political opinion, age, or class. With these background principles in mind, and for the reasons explored in this paper, it becomes indisputably clear that the practice of death-qualifying capital juries—which prevents the most serious of verdicts from being reached by a fair-cross-section of the community and by an impartial jury—is intolerably repugnant to the Sixth Amendment.²⁸⁵

The topics explored in this paper also suggest that death qualification implicates several other constitutional provisions. First, the demonstrable exclusionary effects of death qualification, specifically in regard to race, gender and religion, provide grounds for a constitutional challenge to be brought under the Fourteenth Amendment's Equal Protection Clause.²⁸⁶ Second, and relatedly, reframing the exclusionary effects of death qualification in terms of opinions, rather than protected classes, provides grounds for a constitutional challenge to be brought under

282. See, e.g., Berger, *supra* note 109, at 115 (contending, through the lens of the social contract, that the practice of death qualification “delegitimizes the State's use of capital punishment, and harms both the excluded jurors and the criminal defendant.”); Amar, *Bill of Rights*, *supra* note 256, at 1183–85, 1187–89 (explaining how jurors serve as “[p]opulist [p]rotectors” and “[p]olitical [p]articipants”); Amar, *Sixth Amendment*, *supra* note 257, at 681–86 (explaining how “the relevant legal interests” of the trial by jury “are not merely the accused's but also the people's” and how this understanding can be confirmed by Thomas Jefferson himself, who referred to jury trials as “trials by the people themselves.”) (citing Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), reprinted in THE PAPERS OF THOMAS JEFFERSON, 1788–89, at 676, 678 (Julian P. Boyd ed., 1958)).

283. See generally Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004) (explaining how death is different from other forms of punishment).

284. See *supra* Part III.

285. See *supra* Parts II & III.

286. See Swafford, *supra* note 20, at 148, 155–58; *Fatal Flaws: Revealing the Racial and Religious Gerrymandering of the Capital Jury*, AM. C.L. UNION, at 3, 13, 19, 26–28 (June 2025); Summers et al., *supra* note 70, at 3218. The exclusionary effects of certain religious groups, specifically Catholics, may also present grounds for a constitutional challenge to be brought under the First Amendment's Free Exercise Clause. See *Amend 1.4.1 Overview of the Free Exercise Clause*, Constitution Annotated, constitution.congress.gov/browse/essay/amdt1-4-1/ALDE_00013221/ [https://perma.cc/6PU4-CFWZ]. Such a challenge would likely find support in history given the Framers' concerns regarding religious freedom. See Thomas Jefferson, *A Bill for Establishing Religious Freedom* (1779), National Constitution Center, https://constitutioncenter.org/the-constitution/historic-document-library/detail/thomas-jefferson-a-bill-for-establishing-religious-freedom [https://perma.cc/TPP5-2U68]; Vincent Phillip Munoz, *James Madison's Principle of Religious Liberty*, 97 AM. POL. SCI. REV. 1 (Feb. 2003).

the First Amendment's Free Speech Clause.²⁸⁷ Alternatively, because death qualification excludes "dissenting" opinions from the capital jury and the Framers intended for the jury to act as a "check" against tyranny and oppression, a constitutional challenge may also be raised under the First Amendment's Freedom of Petition Clause.²⁸⁸ Third, the biasing effects of the death qualification process, which erode a defendant's presumption of innocence and right to a fair trial, provide grounds for a constitutional challenge to be brought under the Fourteenth and Fifth Amendments' Due Process Clauses.²⁸⁹ Finally, to the extent the Supreme Court still subscribes to the "evolving standards of decency" test, a constitutional challenge may be brought under the Eighth Amendment on the ground that the death qualification distorts the inquiry of whether society views capital punishment as "cruel and unusual."²⁹⁰ These challenges should be further explored by future scholarship and eventually raised in future legal challenges so the U.S. criminal justice system can move "towards death disqualification."

287. To date, scholarship has not considered this constitutional challenge. This challenge would contend that death qualification "punishes" objections to death qualification by excluding persons holding such views from capital jury service.

288. Scholarship has also not explored this potential constitutional challenge or any potential First Amendment challenges to death qualification.

289. See *supra* Part II.B.

290. See, e.g., Cover, *supra* note 19, at 115.