An Investigation of Death Qualification as a Violation of the Rights of Jurors

Adam M. Clark
AN INVESTIGATION OF DEATH QUALIFICATION AS A VIOLATION OF THE RIGHTS OF JURORS

ADAM M. CLARK

Remorse for Any Death

Free of memory and hope,
unlimited, abstract, almost future,
the dead body is not somebody: It is death.
Like the God of the mystics,
whom they insist has no attributes,
the dead person is no one everywhere,
is nothing but the loss and absence of the world.
We rob it of everything,
we do not leave it one color, one syllable:
Here is the yard which its eyes no longer take up,
there is the sidewalk where it waylaid its hope.
It might even be thinking
what we are thinking.
We have divided among us, like thieves,
the treasure of nights and days.  

- Jorge Luis Borges

I. INTRODUCTION

"I yield to no one in the depth of my distaste, antipathy,
and, indeed, abhorrence, for the death penalty."  
These are the words of Justice Blackmun, dissenting in Furman v. Georgia, and voting to uphold the death penalty. He goes on to say:
That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not

compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life."³

The varied opinions of justices of the Supreme Court provide a graphic illustration of the divisiveness of the death penalty issue. They range from those who vote to abolish the death penalty, to those like Blackmun, who are opposed to the practice, but think it is not the Court's job to overrule it. On the other extreme, one Justice reportedly encouraged the Supreme Court to hold that racially discriminatory executions were not a constitutional problem,⁴ simply so that states could "get on promptly with the business of killing."⁵

This paper focuses on the use of the "death-qualified" jury. Death-qualified juries allow the exclusion from jury service of anyone who would refuse to sentence a defendant to death in a capital case. However, as the Supreme Court stated in one case, "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."⁶ Our nation's legal and judicial system can be seen as "uncommonly willing to condemn a man to die."⁷ The United States has been treading water in an effort to retain the death penalty,⁸ while most of the world's developed nations, and many developing nations, have abolished it.⁹

---

³ Id. at 405-06.
⁷ Witherspoon v. Illinois, 391 U.S. 510, 520-21 (1968) ("[T]he State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.").
⁹ See infra Part IV, International Law Documents; infra Part V, The Current State of the Death Penalty Within and Beyond the United States. See also, e.g.,
This paper argues that the process of death-qualifying a jury is a serious violation of the rights of potential jurors. This is a step beyond the usual argument that the process violates defendants' rights. The excluded jurors are prevented from serving on a jury which, arguably, is as important as the right to vote, because of a belief that is reasonably held in light of a wide range of both international and domestic opinions. The Supreme Court has spoken of those who would not return a death sentence as being "unable to follow the law." The Court has also said that the issue of the death penalty should be left up to majority processes such as legislation, referendums, and decisions by elected executives.

While this paper looks at issues and cases from international law, the goal of this paper is not to make an international legal argument against the death penalty or death-qualified juries. In the first place, although the death penalty is strongly opposed in much international law, the American system of jury sentencing is not

---

Craig S. Smith, *Threats and Responses: Two Worldviews; Joking Aside, a Serious Antipathy To Things American Rises in Europe*, N.Y. Times, Feb. 14 2003, at A13 ("The death penalty, for example, has been overwhelmingly rejected by the majority of Europeans as a barbaric throwback to less civilized times. Its abolition is required for membership in the European Union."); *Turkey Agrees Death Penalty Ban*, BBC News UK Edition, at http://news.bbc.co.uk/1/hi/world/europe/3384667.stm (Jan. 9, 2004) (explaining that Turkey signed Protocol 13 to the European Convention, which abolishes the death penalty during times of war and peace, and that Turkey's parliament voted to abolish the death penalty in 2002).

It has frequently been argued that death qualification violates the rights of the accused facing trial, but the Supreme Court has rejected these claims. See, e.g., *Lockhart v. McCree*, 476 U.S. 176 (1986).


*Lockhart*, 476 U.S. at 184.

*See, e.g., Furman v. Georgia*, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting) ("If we were possessed of legislative power I would either join with [Justices voting for the abolition of the death penalty] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes.").
required by international law, and is seen in the same form only in common law nations. While abolishing death qualification could end or significantly reduce actual death sentences, anything short of completely outlawing the death penalty probably would not satisfy the international principles that are important here. This paper argues against a specific use of the jury system, rather than arguing for the complete abolition of the death penalty or a more complete implementation of international law. Secondly, even if the death-qualified jury could be demonstrated to be illegal under international law, this would not have any direct effect on the law of the United States. The United States has a dualist legal system, meaning that any international law must be enacted as a law within this country before it can give rights to U.S. citizens. The United States has also shown extreme unwillingness to accept international legal arguments in regard to issues like the death penalty. One writer noted that "[w]ith respect to international developments, the United States seems to have a studied indifference, possibly the consequence of its long isolationist traditions, but more likely attributable to the arrogance associated with its status as the last remaining superpower."\(^{14}\)

Part II of this paper gives a background and explanation of death qualification. It also explains Witherspoon v. Illinois,\(^{15}\) the foundational case for modern death qualification. Part III gives a further background of some other important Supreme Court death penalty cases. It details some of the patterns of death penalty law in the United States over the last thirty years.

Part IV explains some of the international law documents that seem, at least facially, to argue against the death penalty. This part also details some regional treaties that have completely or almost completely abolished the death penalty. Part V details some international and domestic law cases and opinions that have rejected the death penalty. This part also gives some details and statistics about the death penalty, both in the United States and


\(^{15}\) 391 U.S. 510 (1968).
around the world. This is intended not as a legal argument, but
rather to underscore just how reasonable it is to be 'unable' to
sentence anyone to death. As reasonable persons who are arguably
within the worldwide majority view, death penalty opponents
should not be kept out of juries.

Part VI explains Lockhart v. McCree,16 a case in which the
Supreme Court stated that death qualification does not interfere
with the substantial rights of jurors. It demonstrates that these
statements do not necessarily preclude further argument on the
issue. It also clarifies some reasons why death qualification
interferes with jurors’ important political rights. The Court in
Lockhart equates a juror’s ability to apply the death penalty with
following the “rule of law.”17 Part VII examines the idea that the
death penalty may not fit within the rule of law in the United
States as established in some of the Supreme Court’s opinions.

Part VIII explains that the retention of the death penalty
may be causing economic and developmental harm to the United
States. In fact the jurors who are excluded tend to be lower on the
economic scale, and so are arguably harmed the most by these
policy choices. Part IX explains that the right to life, and the right
to protect life, is far too important to be left entirely to the
majority. In regards to the death penalty, the rights of the minority
should be protected from the tyranny of the majority. Although at
the nation’s founding the death penalty was clearly allowable,18
protection of certain rights against the will of the majority is also
central and foundational to the Constitution.19

---

16 476 U.S. 162.
17 Id. at 176.
18 See U.S. CONST. amend. V (“No person shall be held to answer for a capital,
or otherwise infamous crime, unless on a presentment or indictment of a grand
jury. . . .”).
19 E.g., U.S. CONST. amend. V (No person shall “be deprived of life, liberty, or
property, without due process of law; nor shall private property be taken for
public use, without just compensation.”). See also THE FEDERALIST NO. 51
(James Madison).
Part X argues that the process of death qualifying juries is a substantial violation of rights because it forces jurors and potential jurors to bear a certain amount of complicity in the application of death. Jurors with strong beliefs about the death penalty must face a difficult choice between turning their backs and lying to say they could apply the death penalty. Jurors who are honest about their beliefs will be rejected from service and the opportunity to defend life, and this applies a certain amount of guilt for being honest. Those who lie about their beliefs can get into the jury, and add their beliefs to the debate, but the lying juror is exactly the juror that society should seek to avoid.

Part XI suggests some alternative solutions for death qualification. It argues that the best solution would be to end the process of excluding death-opposed jurors. Part XII concludes the paper and demonstrates that it can be considered within the Supreme Court's powers to end death qualification. The end of death qualification would not necessarily mean the end of the death penalty, and it would also not interfere with the public good.

II. DEATH QUALIFICATION BACKGROUND AND ISSUES

When a jury is formed there are two separate processes by which jurors are weeded out. During the first stage the judge or attorneys question potential jurors, and the juror may be excluded...
for cause. These challenges are based on the juror's inability to serve in the case based, for example, on personal association with one of the parties, or some form of prejudice. These challenges are not limited in number. The second stage involves peremptory challenges, where attorneys for each side can challenge jurors for no particular reason, although not in an intentionally discriminatory way. Peremptory challenges are limited in number, so a prosecutor may not want to waste these challenges on those who are opposed to the death penalty, but would give a fair reading on guilt.

Death qualification allows persons who "would not consider" the death penalty to be excluded at the for cause stage. Such persons are held to be unable to serve in a death penalty case. Death qualification is usually encoded in state common law or statutes. The opposite process also takes place; "life-qualification" allows for cause exclusion of anyone who would automatically vote for the death penalty without considering mitigating factors. Criminal juries are not selected in this way in any situation other

---

21 See BLACK'S LAW DICTIONARY 223 (7th ed. 1999) ("A party's challenge supported by a specified reason, such as bias or prejudice, that would disqualify that potential juror.").

22 See Peters v. Kiff, 407 U.S. 493, 501-02(1972) (Examples of for cause exclusion are issues that may cause bias against the defendant, including juror insanity, the threat of mob violence against the jury, and a juror who already has a fixed opinion about the case. Issues which lend the appearance of bias also can lead to exclusion; for example, a judge or juror who would have a personal or monetary interest in the outcome of the case.).

23 See BLACK'S LAW DICTIONARY 223 (7th ed. 1999).


25 See supra note 23.


than death penalty cases.\textsuperscript{28}

The primary purpose for death qualification of juries is to avoid jury nullification. Nullification occurs when a juror applies her beliefs about the death penalty to the guilt phase of the trial. In order to avoid the death penalty, the defendant is found not guilty in spite of the weight of the evidence.\textsuperscript{29} A secondary purpose for death qualification is to insure that the death penalty can be applied, even if a large number of people in a given community are opposed to it.

It has been argued, and even assumed by the Supreme Court, that the death-qualified jury is more prone to convict a criminal than a non-death-qualified jury.\textsuperscript{30} It has also been argued that this is a violation of the defendant’s right to an “impartial” jury taken from a “fair cross section” of the community.\textsuperscript{31} The Supreme Court, however, has held that death-qualified juries do not violate the fair cross-section requirement.\textsuperscript{32}

\textit{Witherspoon v. Illinois},\textsuperscript{33} decided in 1968, is the modern Supreme Court’s first significant death penalty case.\textsuperscript{34} The Court gave a strong holding against use of death-qualified juries.\textsuperscript{35} \textit{Witherspoon} is based on a challenge to an Illinois statutory scheme which gave juries full discretion to decide whether to impose a death sentence, and excluded from jury service anyone who “on being examined state[s] that he has conscientious scruples against

\textsuperscript{30} Lockhart v. McCree, 476 U.S. 162, 177 (1986) (holding “that ‘death qualification’ does not violate the fair-cross-section requirement.”).
\textsuperscript{31} \textit{Id.} at 184 (“[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial . . . .”).
\textsuperscript{32} \textit{Id.} at 177.
\textsuperscript{33} 391 U.S. 510 (1968).
capital punishment, or that he is opposed to the same."\footnote{Witherspoon, 391 U.S. at 512 (quoting Ill. Rev. Stat., c. 38, § 743 (1959)).} The holding in Witherspoon created two allowable exclusions: (1) those who would “automatically” vote against the death penalty, and (2) “nullifiers” who would allow their feelings about the death penalty to interfere with their decision about the defendant’s guilt.\footnote{WHITE, supra note 34, at 34.}

Many arguments against the death penalty are focused on circumstantial factors, such as unfair application by race or socioeconomic status, or the execution of innocent persons. The death qualification process under Witherspoon requires only that a juror be willing to consider all the evidence in a case, including all mitigating and aggravating factors, and make a choice between life imprisonment and death. A specific choice of life or death is not mandated, merely the consideration, and the acceptance of that duty to consider.

The death qualification process essentially boils the death penalty debate down to its purest form; the question is not whether the death penalty actually deters, whether it is the best form of retribution, or whether it is unfairly applied, but simply whether it should ever be used. To be excluded from a death-qualified jury, a juror must state that she would not consider even an obviously ‘fair’ use of the death penalty against a defendant who is obviously guilty. The person excluded from a death-qualified jury is a person who believes that no human being should be put to death, no matter what he or she has done.\footnote{See, e.g., Wainwright v. Witt, 469 U.S. 412, 426 n.6 (giving an example of voir dire questioning of an excludable juror where the trial judge asked: “You yourself are in such a frame of mind that regardless of how horrible the facts and circumstances are, that you would automatically vote against the imposition of the death penalty?” (quoting O’Bryan v. Estelle, 714 F.2d 365, 379 (5th Cir. 1983), cert denied, 465 U.S. 1013 (1984)).}

The question to be answered is whether the belief that human life should never be violated by the State is in itself reasonable. It is at this point that evidence related to unfair
application of, and international views about, the death penalty once again become factors. The failings of the death penalty do not prove that the death penalty should be abolished; rather, they prove that it is reasonable to believe that this punishment is one of society's evils. It can then be argued that a juror should not be restricted from jury duty because of this reasonably held belief.

It is important to note that the death penalty is substantially different from other 'moral' restrictions on jury service. In his dissent in Witherspoon, Justice Black cites to Logan v. United States, an 1892 case allowing the exclusion of jurors with scruples against the death penalty.\(^39\) In Logan, the Court stated that a juror who has scruples against the death penalty is not impartial,\(^40\) comparing death penalty opposition to support for polygamy: "This court has accordingly held that a person who has a conscientious belief that polygamy is rightful may be challenged for cause on a trial for polygamy."\(^41\) This comparison points to an important difference between the death penalty and other moral scruple issues (such as abortion, polygamy, homosexuality, religion, etc.). In all of these other moral issues, the defendant stands accused of something relating to the rejected jurors' moral standards. In the case of polygamy, the person who believes that polygamy should be allowable does not think the polygamist-defendant committed a crime at all. In the case of the death penalty, the abolitionist agrees that murder is a crime\(^42\) that should be punished or deterred, and that society should be protected from the murderer. A more accurate comparison to the polygamy-excludable juror would be a person who felt that murder was not wrong. A more accurate comparison to certain abortion belief exclusions would be a juror who believes that it is right to break

\(^{39}\) See Witherspoon, 391 U.S. at 536-37 (Black, J., dissenting) (quoting Logan v. United States, 144 U.S. 263 (1892)).

\(^{40}\) Logan, 144 U.S. at 298.

\(^{41}\) Id. (citing Reynolds v. United States, 98 U.S. 145, 147, 157 (1878); Miles v. United States, 103 U.S. 304, 310 (1880)).

\(^{42}\) Arguably, the abolitionist values human life more than those who would consider the death penalty; they think that not even a horrible murderer should be deprived of life.
the law in order to stop an execution, in a case where the defendant is in fact accused of breaking the law to prevent an execution. Exclusion because of death penalty beliefs is akin to exclusion based on a certain theory of punishment, such as excluding those who have retributive views, or excluding utilitarians.

The very process of death qualification may make the jury more likely to convict or vote for death.43 A famous psychological study by Stanley Milgram shows one way in which the process of death qualification could prejudice jurors to favor conviction or death sentences.44 In this study, volunteer “teachers” were asked to “teach” volunteer “students” by administering electric shocks every time the student answered a question incorrectly.45 The doctors in charge of the experiment would tell any “teacher” who expressed doubts that “the experiment says you must go on.”46 In this way, they were able to coerce the “teachers” into giving increasingly painful shocks long past the point where the “students” begged for the shocks to stop.47 Clearly if volunteers are willing to follow the rather ambivalent orders of doctors in an experiment, those who are told by a judge that the rule of law requires them to consider the death penalty are likely to be affected in some way. This amounts to coercing those who have scruples against the death penalty to participate in it, and excluding those who hold firmly to their scruples. Added to this is the fact that

---

43 Lockhart v. McCree, 476 U.S. 162, 169-70, 170 n.6 (1986) (citing Craig Haney, On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process, 8 LAW & HUM. BEHAV. 121 (1984)). See also Rozelle, supra note 29, at 694 (Haney’s study shows that jurors who sit through the death-qualification questions are more likely to feel “(1) that the judge, defense counsel, and prosecutor all believe that the defendant is guilty, and (2) that the defendant is in fact guilty.”).

44 Robert Weisberg, Deregulating Death, 1983 SUP. CT. REV. 305, 391-93 (citing STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974)).

45 Id. The students were in fact actors, who only pretended to be shocked, but the teacher volunteers were unaware of this.

46 Id.

47 Id.
Milgram’s volunteers were sympathetic innocent students, while a person before a death penalty jury is likely to be (in perception at least, all presumption of innocence aside), the least sympathetic person that the average juror will ever come across. It would actually be rather surprising if the judge’s pre-trial questions and comments had no effect on the jurors.

This could in turn be argued to mean that excludable jurors are better jurors because they are the most consistent in their beliefs. They would rather suffer painful personal rejection by an authority figure than do what they truly believe to be wrong. It may tend to be the least nervous, and most consistent and rational types of jurors who could admit that they are ‘unable to follow the law.’ More unsteady types, or those who have never given any thought to the issue, will likely make an effort to please the questioning judge by quickly claiming that they can apply the death penalty.

III. A BRIEF HISTORY OF RECENT DEATH PENALTY LAW IN THE UNITED STATES

After Witherspoon, the next major death penalty jury case was McGautha v. California.\(^48\) The Supreme Court held that it was not a violation of the Constitution to leave the choice of death sentence completely up to jury discretion.\(^49\) The Court further held that a single jury could be used for both the sentencing and the guilt decision in a case.\(^50\)

In 1972, the Court decided the important Furman\(^51\) case, which basically brought an end to the way states had been applying the death penalty.\(^52\) Furman was based on the Eighth Amendment

\(^{48}\) 402 U.S. 183 (1971).
\(^{49}\) Id. at 207-08 ("In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution").
\(^{50}\) Id. at 209-210.
\(^{52}\) See, e.g., Walton v. Arizona, 497 U.S. 639, 659 (1990) (Scalia, J., concurring in part and concurring in the judgment) (explaining the holding in Furman and
right to be free from cruel and unusual punishment.\textsuperscript{53} Two justices wrote opinions stating that the death penalty was always a cruel and unusual punishment, but ultimately the case would be applied to mean simply that death was cruel and unusual in the way that states had been applying it.\textsuperscript{54}

Following \textit{Furman}, states had to rewrite their laws in order to continue to use the death penalty, and they came up with two different basic methods. The first was mandatory death sentencing, meaning that if a jury found guilt for certain offenses, the defendant would automatically be sentenced to death. Mandatory death sentences were held to be unconstitutional in 1976 in \textit{Woodson v. North Carolina}\.\textsuperscript{55} The second way that states found to apply the death penalty within the boundaries of \textit{Furman} was by giving juries guided discretion in choosing the death penalty. The death penalty was applied at the full discretion of juries in most death penalty states before 1972.\textsuperscript{56} Discretion was given to juries because the problem of jury nullification was widespread with mandatory death penalty laws. If the jurors thought that a defendant should not be executed, they would acquit if they didn't have flexibility to give a lighter sentence.\textsuperscript{57} \textit{Furman} seemed to overrule the idea of complete jury discretion, because full discretion meant that the death penalty was applied in too arbitrary and capricious a manner, so the idea of guided discretion was advanced.\textsuperscript{58} Under guided discretion, the jury decides the sentence,

\begin{itemize}
\item its subsequent legal applications), \textit{overruled by} Ring v. Arizona, 536 U.S. 584 (2002).
\item \textit{Walton}, 497 U.S. at 657-58.
\item \textit{Id.} at 659.
\item 428 U.S. 280 (1976).
\item WHITE, \textit{supra} note 34, at 1-2.
\item Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").
\end{itemize}
but is required to consider certain aggravating and mitigating factors. In *Gregg v. Georgia*, again in 1976, guided juror discretion was found to be allowable.

*Gregg* brought an end to a *de facto* moratorium on the death penalty that had existed since the late 1960s, while the court was busy deciding *Witherspoon, McGautha* and *Furman*. *Gregg* also essentially reinstated the death penalty after many thought that *Furman* had abolished it, and as a result modern death penalty statistics generally refer to this 1976 reinstatement.

In 1986, the Court decided *Lockhart v. McCree*, which upheld death qualification. The challenge this time was based on whether death qualification was unconstitutional because it led to more "conviction prone" juries. The court assumed that death-qualified juries were more prone to convict, but held that the exclusion process still did not violate the defendant's rights.

*Lockhart* clarified that the category of excludable jurors had broadened somewhat since *Witherspoon*. The original standard set by *Witherspoon* had been changed by two cases, *Adams v. Texas* and *Wainwright v. Witt*, into a single prong question of "substantial impairment" of the juror's ability to apply the law. Rather than basing exclusion on nullification or automatic votes, the new question was whether a juror was able to follow the law if it called for the death penalty. Under this adjusted standard, the court held that jurors who would not vote for

---

59 *Walton*, 497 U.S. at 659.
60 *Gregg*, 428 U.S. at 189.
61 See *Furman*, 408 U.S. at 434 n.18.
63 *Id*.
64 *Id*. at 173.
65 *Id*. at 177.
66 See *id* at 167 n.1.
69 *Lockhart*, 476 U.S. at 167 n.1 (citing *Adams*, 448 U.S. at 45; *Witt*, 476 U.S. at 433 ("[T]he proper constitutional standard is simply whether a prospective juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' ")

70 *Lockhart*, 476 U.S. at 167 n.1.
the death penalty were excludable as "unable to follow the law." 71

In 2002, the Court decided in Ring v. Arizona that trial judges could not find any facts that were not found by the jury. 72 Arizona law provided that if a jury returned a first-degree murder conviction, the trial judge would decide whether certain aggravating factors existed. 73 Based on these factors the judge would decide between a sentence of death and life in prison. 74 The holding in Ring means that although judges can be given discretion to decide a sentence, this discretion is bound within a very narrow range. A judge cannot decide any aggravating element that would lead to a punishment more severe than that provided for by the jury. 75 Ring essentially confirms juror discretion in death penalty cases, as well as further weakening statutory attempts at quasi-mandatory sentences. 76

Also in 2002, the Court held in Atkins v. Virginia that executions of mentally retarded persons were no longer allowable. 77 The decision was based on "evolving standards of decency" as to whether the punishment was cruel and unusual under the Eighth Amendment. 78 This decision effectively overruled previously existing common law and statutes that had upheld the death penalty for the mentally retarded. 79

In 2005, the Court abolished the execution of persons who committed capital crimes before they reached the age of eighteen in Roper v. Simmons. 80 This opinion was notable for its references

71 Id. at 176.
73 Id.
74 Id.
75 Id. at 588-89.
76 Ring also overruled Walton v. Arizona, 497 U.S. 639 (1990), which had upheld the Arizona sentencing scheme. See Ring, 536 U.S. at 588-89.
78 Id. at 321.
79 Id. at 313-14.
to international opinions and documents, not as binding, but as "instructive." On the other hand, perhaps just as important is the criticism, beginning with Justice Scalia's dissent, that the Court has received for its consideration of the opinions of other nations.

**IV. INTERNATIONAL LAW DOCUMENTS**

Many International legal opinions and national laws have moved against the death penalty in recent years. The United States is the only nation of the top twenty executing nations which is considered to have an "above-average record in human rights matters." Most of Western Europe has abolished the death penalty, but the European abolitionist attitude has also developed relatively recently. The first post-Furman execution in the United States took place in 1977, and in the same year France executed

---

81 See id. at 1198:

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet at least from the time of the Court's decision in Trop, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."

*Id.* (citing Trop v. Dulles, 356 U.S. 86 (1958)).

82 See id. at 1198 (Scalia, J., dissenting):

The Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.


84 *Id.* at 213.
two people by guillotine. These beheadings took place in a nation where only 27 percent of the citizenry opposed the death penalty (including the French President). Sixty-one percent favored continued use of the guillotine. However, these executions were the last to occur in Western Europe. The fall of European Communism in the early 1990s also led to significant death penalty abolitions, including in East Germany, Czechoslovakia, Hungary, and Romania. In 2001, Canada’s Supreme Court held that extraditing a criminal who would face the death penalty in the United States would violate the Canadian Constitution.

Along with a groundswell of opinions and legal precedents against the death penalty within other nations, there are also significant written treaties that argue against the death penalty. The international law of individual human rights is based on three major documents. The first is the Universal Declaration of Human Rights (UDHR). The original charter of the United Nations did not contain a bill of rights, and so in 1949 the UDHR was adopted to work toward this goal. The UDHR is a declaration, so it is not legally binding on signatory nations. In its preamble, the UDHR recognizes "the inherent dignity and . . .

---

85 Id.
86 Id. at 213-14.
87 Id. at 214.
88 Id.
89 Id. at 215. Romania executed its former leader and abolished the death penalty within a one month period. Id.
90 Schabas, supra note 14, at 187.
91 See generally infra Part V.
94 Eleanor Roosevelt was instrumental in the drafting of the UDHR. STEINER & ALSTON supra note 92, at 138-39.
95 On the other hand, it could be considered as evidence of practice that would lead toward the adoption of law as custom.
the equal and inalienable rights of all members of the human family . . . ."96 Article 3 states: "Everyone has the right to life, liberty and security of person."97 While these statements would seem to clearly refer to the death penalty, they in fact do not. Many of the signatory nations other than the United States still applied the death penalty at the time of the drafting of the UDHR. The death penalty was used as a punishment in the Nuremberg Trials just a few short years before.98

The desired bill of rights was not achieved until 1976, and then it came in the form of two separate documents, a split which was largely caused by Cold War antagonism between the East and West. The West, led by the United States, favored civil and political rights as dominant, and adopted the International Covenant on Civil and Political Rights (ICCPR) in 1976.99 The East, favoring economic and social rights, was more supportive of the International Covenant on Economic, Social and Cultural Rights (ICESCR),100 which was also put into action in 1976. President Carter signed the ICESCR, but the Senate has not ratified it.101 As the Covenant to which the United States is a party, the ICCPR will be focused on here, but the refusal to put the ICESCR into force demonstrates important ideas about the United States' economic ideals.102

Article 6 of the ICCPR states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."103 This is immediately

---

96 UDHR, supra note 93, at pmbl. para. 1.
97 UDHR, supra note 93, at art. 3.
98 See STEINER & ALSTON supra note 92, at 33.
101 See STEINER & ALSTON supra note 92, at 250.
102 For a further discussion of economic issues, see infra Part VIII, Economics and Development.
103 ICCPR, supra note 99, at art. 6(1).
followed, however, by an exception which allows the death sentence to be applied by "countries which have not abolished the death penalty . . . for the most serious crimes. . . ." This exception shows the inherent weakness of any international law document which is made at the free will of the parties. In order to get parties to sign and adhere to the law, certain exceptions must be allowed. Although the ICCPR would have more integrity as a document without this exception, it also would lack the world's one remaining 'superpower' as a signatory. It is important also to note that there are exceptions to the exception, which the United States did not meet until recently. Specifically Article 6(5) states: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. . . ." The United States continued to carry out these "juvenile executions" until they were abolished in 2005 by *Roper v. Simmons*.

Article 7 of the ICCPR states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Taken along with the exception allowing death, this could be taken to mean that the method of execution should not be "cruel, inhuman or degrading." Another way to look at this article is to consider the death penalty as a form of mental

---

104 Id. at art. 6(2).
105 Id. at art. 6(5).
106 See supra notes 80-82 and accompanying text.
107 Id. at art. 7.
108 As an interesting side note, the electric chair, which is not considered to be cruel and unusual in the United States, was not invented as a 'kind' form of execution. Rather it was invented as a part of market competition in the early days of electric utilities. Specifically Thomas Edison wanted to prove that alternating current electricity (favored by his competitors in Westinghouse) was more dangerous to humans than direct current, which he was attempting to sell. Edison thought that if executions were carried out with alternating current, people would see it as dangerous, and not want it in their homes. Pursuant to this, Edison designed and created the first electric chair. See generally Dawn Macready, The "Shocking" Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocution, 26 OHIO N.U. L. REV. 781 (2000).
torture. The Supreme Court of Zimbabwe in 1993 overturned four
death sentences where the delays between sentencing and actual
execution were seen as "prolonged" and "dehumanizing."\footnote{109} While
the delays in the Zimbabwe case were as long as 72 months, death
row stays in the United States are often significantly longer than
this.\footnote{110} It should be noted that there is a certain danger to making
length-of-stay arguments, in that these arguments tend to
legitimize less procedurally adequate death sentences. The pace of
executions in the United States has sped up since the Effective
Death Penalty Act\footnote{111} was enacted in 1996, but this Act is not
usually considered to be protective of the rights of prisoners.

In 1989, the U.N. adopted the Second Optional Protocol to
the ICCPR,\footnote{112} which abolishes the death penalty, allowing only a
limited exception during time of war. The Second Optional
Protocol refers back to Article 3 of the UDHR and Article 6 of the
ICCPR. Article 1 of the protocol states "[n]o one within the
jurisdiction of a State Party to the present Protocol shall be
executed."\footnote{113} The Second Optional Protocol currently has 57 Party
Nations,\footnote{114} but the United States has not signed the Protocol.

\footnote{109} See Catholic Commission for Justice and Peace in Zimbabwe v. Attorney
General, Supreme Court of Zimbabwe, Judgment No. S.C. 73/93, 14 Hum. Rts.
L.J. 323 [1993], reprinted in part in Steiner & Alston, supra note 92, at 19.

\footnote{110} For example average death row stays in Texas are 10.43 years. See Texas
Department of Criminal Justice, Death Row Facts, at

\footnote{111} AEDPA, supra note 8.

\footnote{112} Second Optional Protocol to the ICCPR, Aiming At the Abolition of the
Death Penalty, G.A. Res. 44/128, U.N. GAOR, 44\textsuperscript{th} Sess., Supp. No. 49, at 206,

\footnote{113} Second Optional Protocol, supra note 112 at art. 1.

\footnote{114} The current signatories are Australia, Austria, Azerbaijan, Belgium, Bosnia-
Herzegovina, Bulgaria, Canada, Cape Verde, Colombia, Costa Rica, Croatia,
Cyprus, Czech Republic, Denmark, Djibouti, Ecuador, Estonia, Finland,
Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liberia,
Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco,
Mozambique, Namibia, Nepal, Netherlands, New Zealand, Norway, Panama,
Paraguay, Portugal, Romania, San Marino, Serbia and Montenegro, Seychelles,
Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Timor-
Leste, Turkey, Turkmenistan, United Kingdom, Uruguay, and Venezuela. See
Amnesty International, Ratification of International Treaties,
Protocol 6 to the European Convention on Human Rights (ECHR), and the Protocol to the American Convention on Human Rights both abolished the death penalty in terms similar to the Second Optional Protocol. In 2002, the ECHR adopted the Protocol 13, which removed the wartime exception; parties cannot execute under any circumstances. It seems clear that the United States is outside the common practice of civilized nations in continuing to apply the death penalty.

International treaties may also provide some protection of the rights of jurors. Article 14 of the ICCPR deals with courts and tribunals, but it does not require nations to give jury trials. Article 25 of the ICCPR is an example of a possible protection against jury service exclusion, stating:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives .

(c) To have access, on general terms of equality, to public service in his country.

http://web.amnesty.org/pages/deathpenalty-treaties-eng (last updated Mar. 21, 2006). It is interesting to note that many nations that the United States has criticized for human rights violations in the past are on this list.

Id.

Id.

ICCPR, supra note 99, at art. 14(1) ("[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal. . ."); see also Id. at art. 3. Article 14(1) does say that "[a]ll persons shall be equal before the courts and tribunals," and the well-known inequities in death penalty application, as well as the inequities in juror exclusion, could be considered unequal treatment before the courts. See also infra Part VIII, Economics and Development.

ICCPR, supra note 99, at art. 25.
Article 2 in turn states that rights should be respected and ensured “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (emphasis added).

Although death qualification does seem to discriminate by race, sex, and social class, these distinctions are facially neutral. Discrimination by political or other opinion on the other hand is the express goal of any death qualification policy. The death penalty may clearly be seen as a political issue, and so those who are opposed to it should be allowed to “take part in the conduct of public affairs” through jury service.

V. The Current State of the Death Penalty Within and Beyond the United States

At the outset of this section, I would like to make it clear that the purpose of giving numbers, facts, and international opinions is not to make an international (or intranational) legal argument against the death penalty. I leave this idea to other writers and other papers. My purpose here is to demonstrate the reasonableness of the abolitionist viewpoint. Potential jurors who would refuse to apply the death penalty are backed up in their beliefs by a wide variety of facts and legal opinions from around the world. In the face of this, it cannot easily be said that an abolitionist juror is incompetent to serve. Rather, it is clear that these jurors have given more thought to issues of law and fact than have many who would vote to apply the death penalty.

Currently 122 countries have abolished the death penalty in

---

119 Id. at art. 2.
120 See generally infra Part VIII, Economics and Development.
2005-2006

Death Qualified Juries

23

law or practice.122 (This includes 25 countries that have laws allowing the death penalty, but have not carried it out for more than 10 years).123 Seventy-four countries retain and use the death penalty, but not all of these carry out executions every year. In 2004, 3,797 documented executions took place in 25 different countries, with 97 percent of these taking place in China (3,400 known), Iran (159), and the United States (59).124

Although international treaties, including the ICCPR, forbid the execution of prisoners who were under the age of eighteen at the time of their crime, these executions continue.125 Prior to abolishing the juvenile death penalty, the United States carried out the highest documented number of these executions (19 since 1990).126

As of April 8, the United States had executed 12 people in 2006, bringing the total number of executions since 1976 to 1,016.127 The United States executed 60 prisoners in 2005.128 At the end of 2005, over 3,300 inmates were on death row in the United States.129 Thirteen U.S. jurisdictions have abolished the

123 Id.
124 Id.
125 Eight countries have carried out documented juvenile executions since 1990: China, Congo, Iran, Nigeria, Pakistan, Saudi Arabia, United States and Yemen. Id. Of four documented “juvenile executions” in 2002 and 2003, three took place in Texas, and one in Oklahoma, but these executions have now been outlawed in the U.S. See supra notes 80-82 and accompanying text.
126 Facts and Figures on the Death Penalty, supra note 122.
128 Id.
death penalty, while the thirteen top executing states have carried out almost 90 percent of all U.S. executions. Texas alone is responsible for 35 percent of the total.

The United States’ tenacious grip on the death penalty has placed it in the same category as nations it otherwise criticizes. If the United States did not allow the death penalty, it would be easier and less hypocritical for it to criticize other nations’ human rights abuses. The United States has continually criticized the state of human rights in China, but China officially outlawed use of the juvenile death penalty before the United States. This in turn allowed China to turn the tables, and criticize human rights in the United States. When Nigeria executed environmentalist Ken Saro Wiwa, along with eight others, on falsified murder charges, many in the United States were outraged. However, since the

---


131 Texas (362 executions), Virginia (94), Oklahoma (79), Missouri (66), Florida (60), North Carolina (41), Georgia (39), South Carolina (35), Alabama (34), Louisiana (27), Arkansas (27), Arizona (22), Ohio, 20. The total for these 13 is 906, which equals 89.173% of the national total of 1016. (Calculations based on figures found at Amnesty International, *Facts and Figures: Executions in the USA by State*, supra note 130).

132 Id.

133 Permanent Mission of the People’s Republic of China to the United Nations Office at Geneva and Other International Organizations in Switzerland, *Figures and Facts from the Human Rights Record of the United States in 2002*, http://www.china-un.ch/eng/rqrd/jzzdh/t85080.htm (Mar. 4, 2003) (“The United States is one of the few countries to impose capital punishment on child offenders and mentally ill people in the world. Two thirds of the executions of child offenders over the past decade worldwide were carried out in the United States.”).

United States has almost certainly executed at least some innocents, it is left without much room to criticize others.135

There are also many nations that have abolished the death penalty, and criticize the United States as the only developed democracy to retain it.136 The European Union (EU) has abolished the death penalty within its borders, and abolition is a requirement for new joining members.137 The EU has expressed concern about the death penalty in the United States.138 In 1999, at the United Nations annual meeting on global democratic rights, United States allies like Germany, Italy, Norway, and Finland, joined together with traditional U.S. enemies like Cuba in criticizing the American death penalty.139

In 1995, the Constitutional Court of South Africa overruled

---

135 Since 1973, 122 prisoners sentenced to death in the U.S. have subsequently been found to be innocent and released. This is generally considered as evidence that at least some innocent defendants have been executed. See Amnesty International, Facts and Figures on the Death Penalty, supra note 122.


137 See, e.g., supra note 9.


The EU is deeply concerned about the increasing number of executions in the United States of America (USA), all the more since the great majority of executions since reinstatement of the death penalty in 1976 have been carried out in the 1990s.

See also Letter from the EU Presidency to the Governor of Texas, http://www.eurunion.org/legislat/DeathPenalty/PanettiTxGovLett.htm (pleading for the life of Scott Panetti, who was scheduled to be executed on February 4, 2004). Panetti was granted a stay of execution by a federal court. See Mike Tolson, Debate renewed over executing the mentally ill, HOU. CHRON., May 10, 2004, at A1.

139 Elizabeth Olson, Good Friends Join Enemies To Criticize U.S. on Rights, N.Y. TIMES, Mar. 28, 1999, § 1, at 9. That year also marked the first year the United States was put on Amnesty International’s list of human rights violators. Id.
the death penalty. Although South Africa's relatively new constitution did not prohibit the death penalty, it did prohibit "cruel, inhuman or degrading treatment or punishment." The President of the Court's Opinion stated: "Unjust imprisonment is a great wrong . . . but the killing of an innocent person is irremediable." The President concluded his opinion by writing:

The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in [the South African Constitution]. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.

The Makwanyane opinion relies heavily on the law of other nations, including many references to the United States. The court cited Gregg and Furman. It also referred to the Eighth Amendment's prohibition of cruel and unusual punishment, and the rejection of mandatory sentences. One important difference that the court points out between United States law and South African Law is that the South African Constitution includes the "unqualified right to life vested in every person. . . ." The U.S. Constitution does not directly include the right to life. Rather, it

---

141 Makwanyane, at ¶ 8, in STEINER & ALSTON, supra at 39.
142 Makwanyane, at ¶ 54, in STEINER & ALSTON, supra at 45.
143 Makwanyane, at ¶ 144, in STEINER & ALSTON, supra at 53.
144 Makwanyane, at ¶ 40, in STEINER & ALSTON, supra at 42.
145 Makwanyane, at ¶ 43, in STEINER & ALSTON, supra at 43.
146 Makwanyane, at ¶¶ 40, 42, in STEINER & ALSTON, supra at 53.
147 Makwanyane, at ¶ 80, in STEINER & ALSTON, supra, at 47.
includes a protection against taking of life without due process of law.\textsuperscript{148} In 2003, Mexico brought suit against the United States in the International Court of Justice (ICJ) for sentencing 52 Mexican nationals to death in violation of the Vienna Convention.\textsuperscript{149} Mexico has accused the United States of sentencing the defendants to death without informing them of their right to legal assistance from the Mexican consulate.\textsuperscript{150} Mexico cited the earlier \textit{LaGrand} case, which involved two German nationals who were sentenced to death in Arizona.\textsuperscript{151} In that case, two hours before the first execution was to take place, the ICJ ordered the United States to "take all measures at its disposal to ensure that Walter LaGrand is not executed pending [a] final decision."\textsuperscript{152} Germany took the order to the U.S. Supreme Court to ask for a stay, but the Court ruled against Germany, and LaGrand was executed.\textsuperscript{153} \textit{LaGrand} led to much German criticism of the death penalty in the United States. In March 2004, the ICJ gave a judgment against the United States, deciding that the United States had violated the rights of 51 Mexican nationals.\textsuperscript{154}

The Catholic Church has also spoken out against the death

\textsuperscript{148} U.S. CONST. amend. V, XIV.
\textsuperscript{150} Meirik, \textit{supra} note 149.
\textsuperscript{152} Id.
\textsuperscript{153} Id.; \textit{See also} Federal Republic of Germany v. United States, 526 U.S. 111 (1999).
\textsuperscript{154} Avena and Other Mexican Nationals (Mexico v. United States), 2004 I.C.J 12 (Judgment of Mar. 13).
penalty. Pope John Paul II first spoke out against the death penalty in 1983, becoming the first pope to publicly oppose the death penalty. He subsequently pleaded for the life of several death row prisoners in the United States, and at times won temporary stays or commutations to life sentences for defendants. In 1995, the Pope released *Evangelium Vitae*, an encyclical letter that includes strong anti-death penalty language. In response to the Pope’s statements, Church leaders in the United States have called for ending the death penalty.

The movement against the death penalty within this country has also been steadily increasing. The American Bar Association (ABA) has called for a nationwide moratorium on the death penalty until it can be more fairly applied, and the application against the mentally retarded and juvenile offenders is abolished. The ABA is particularly concerned with the application of the death penalty against the innocent, and cites the large number of death penalty convictions that have been overturned as evidence that there are not sufficient safeguards to

---

155 If nothing else, this means that no longer can anyone argue, as Mayor Ed Koch of New York City once did, that the Pope, the Supreme Court, and the Bible are for the death penalty, “and to me that’s good government.” See Clyde Haberman, *The Koch Method for Winning Audiences and Influencing Voters*, N.Y. TIMES Apr. 20, 1981, at B1.
Death Qualified Juries

protect the innocent.\textsuperscript{162}

The American Psychological Association (APA) has also called for a moratorium until policies and procedures are implemented "that can be shown through psychological and other social science research to ameliorate . . . deficiencies."\textsuperscript{163} Among its various objections to the death penalty, the APA includes the fact that psychological studies have shown that death-qualified juries are more conviction prone.\textsuperscript{164} The APA cites to one of the studies that is rejected in Lockhart v. McCree;\textsuperscript{165} apparently this social science is convincing to social scientists, but not to the Court.

Nebraska’s Republican-controlled legislature voted in 1999 (overriding the Governor’s veto) for a moratorium on the death penalty in order to study fairness issues.\textsuperscript{166} Illinois Republican Governor George Ryan put a moratorium in place in 2001, partly in response to a much-publicized case where a death-sentenced inmate was found to be innocent, and partly in response to a series of critical articles in the Chicago Tribune.\textsuperscript{167}

\begin{thebibliography}{99}


\bibitem{164} \textit{Id.} ("[R]esearch on the process of qualifying jurors for service on death penalty cases shows that jurors who survive the qualification process . . . are more conviction-prone than jurors who have reservations about the death penalty.").


\bibitem{167} \textit{Id.} at 740.
\end{thebibliography}
Many traditional death penalty supporters have changed their positions in recent years. Retired Justice Powell (who upheld the death penalty in *Gregg*)\(^{168}\) in a 1991 interview said that he now wondered if the death penalty could ever be fairly applied, and that one of his greatest regrets was voting to uphold the death penalty in cases like *McCleskey v. Kemp.*\(^{169}\) Justice Blackmun, who voted to uphold the death penalty in *Gregg,* as well as dissenting in *Furman,*\(^{170}\) said in his dissent in *McFarland v. Scott:*

> When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing . . . . My 24 years of overseeing the imposition of the death penalty from this court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled.\(^{171}\)

It would seem clear that in the years following *Gregg,* the abolitionist (or at least moratorium-ist) viewpoint has greatly expanded. None of these factors are likely to convince the Supreme Court (or for that matter the legislative or executive branches) to abolish the death penalty. One needs look no further than "freedom fries"\(^{172}\) to know that the United States will not tolerate international interference. What these factors demonstrate, however, is that death penalty abolitionists have a lot of weight behind their opinion. Indeed, in light of the strong worldwide rejections of the death penalty, it hardly seems possible to argue

---


170 Although making it very clear that he personally objected to the death penalty. *See supra* notes 2-3, and accompanying text.


that abolitionists are not able to “conscientiously apply the law.”\textsuperscript{173} In fact, one begins to wonder if it is possible to conscientiously apply the death penalty.

VI. Lockhart v. McCree and the Rights of Jurors

In Lockhart, the Court stated that death qualification does not violate the rights of jurors,\textsuperscript{174} but this is not likely to be dispositive. These statements would seem to be only dicta, and they do not stand up well against a more thorough analysis of the jurors’ rights issue. As early as 1880, in \textit{Strauder v. West Virginia},\textsuperscript{175} the Supreme Court recognized that excluding African-Americans from jury service was a violation of the rights of the excluded jurors.\textsuperscript{176} The Court said the exclusion of African Americans:

\begin{quote}

denies the class of potential jurors the “privilege of participating equally . . . in the administration of justice,” and it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting “a brand upon them, affixed by law, an assertion of their inferiority.”\textsuperscript{177}
\end{quote}

Unlike the Eighth Amendment “cruel and unusual” argument seen in Furman, the Constitutional issue that is most commonly brought up in regards to death qualification is the Sixth Amendment.\textsuperscript{178} The Sixth Amendment states: “In all criminal

\begin{footnotesize}

\textsuperscript{174} Lockhart, 476 U.S. at 174.

\textsuperscript{175} 100 U.S. 303 (1880).

\textsuperscript{176} \textit{Id.} at 308-09.


\textsuperscript{178} See, e.g., Lockhart, 476 U.S. at 162.
\end{footnotesize}
prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."\(^{179}\) The right to an impartial jury has been interpreted to mean a "fair cross section" of the community.\(^{180}\) The Sixth Amendment right to a jury trial was extended to the states through the Fourteenth Amendment in *Duncan v. Louisiana*.\(^{181}\)

The Court in *Lockhart* held that death-qualified juries do not violate the Sixth and Fourteenth Amendments because the fair cross section analysis from *Duncan* applies only to jury panels or venires,\(^{182}\) not to petit juries.\(^{183}\) "We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."\(^{184}\) The problem the Court sees in applying the fair cross section doctrine to petit juries is that it is inconvenient to the point of "practical impossibility"\(^{185}\) to ensure that every jury is completely representative of the community. The weakness in this argument lies in the fact that the Court has not been asked to assure that juries are more representative. Rather, a challenge to death qualification is a challenge to an affirmative policy that makes juries less representative.

In reaching the issue of jurors' rights, the Court states that even if it considered fair-cross-section analysis as applicable to

---

\(^{179}\) U.S. CONST. amend. VI.

\(^{180}\) Taylor v. Louisiana, 419 U.S. 522, 526-27 (1975) ("Both in the course of exercising its supervisory powers over trials in federal courts and in the constitutional context, the Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross section of the community.").

\(^{181}\) Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("[W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which--were they to be tried in a federal court--would come within the Sixth Amendment's guarantee.").

\(^{182}\) The venire is the group of people from whom the final jury is chosen. See *BLACK'S LAW DICTIONARY* 1553 (7th ed. 1999).

\(^{183}\) The petit jury is the jury that sits for the actual case. See *Id.* at 861.


\(^{185}\) *Lockhart*, 476 U.S. at 174.
petit juries, abolitionists would still be excludable because they are not members of a "distinctive group." The Court says that groups defined only by attitudes that interfere with their ability to carry out their duties are not "distinctive." There is no clear definition of what makes a distinctive group for fair cross section purposes. Instead, Justice Rehnquist's opinion refers back to Taylor v. Louisiana, to find three purposes of the fair cross section requirement. Taylor states:

The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service

---

186 Id. (quoting Duren, 439 U.S. at 364 ("The essence of a 'fair-cross-section' claim is the systematic exclusion of 'a "distinctive" group in the community.'").)
187 Lockhart, 476 U.S. at 174.
188 Id.; see also John A. Wasleff, Note: Lockhart v. McCree: Death Qualification as a Determinant of the Impartiality and Representativeness of a Jury in Death Penalty Cases, 72 CORNELL L. REV. 1075, 1080-83 (1987) ("Unfortunately, the Court failed to define the term 'distinctive group,' presumably intending in future cases to develop the term's meaning based on the objectives of the cross-section requirement.").
189 Taylor v. Louisiana, 419 U.S. 522 (1975). Rehnquist was alone in dissenting in Taylor. It is also important to note that nowhere in Taylor is there a reference to "immutable" characteristics or "historical disadvantage" as defining distinct groups. Id.
to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case... [The] broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."\textsuperscript{190}

This is a broad definition of the "purpose of a jury," which would seem to underscore the importance of the right to serve on a jury. But from this statement Rehnquist narrows and distills the three purposes of the fair cross section requirement:

1. "[guarding] 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."\textsuperscript{191}

The Court then explains that groups such as women,\textsuperscript{192} African-Americans,\textsuperscript{193} and Mexican-Americans\textsuperscript{194} fit these purposes better than abolitionist jurors.\textsuperscript{195} Discrimination against these groups is based on "reasons completely unrelated to the ability of members

\textsuperscript{190} Id. at 530-31 (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968); quoting Thiel v. So. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).
\textsuperscript{191} Lockhart, 476 U.S. at 174-75.
\textsuperscript{192} Id. at 175 (citing Taylor, 419 U.S. 522).
\textsuperscript{193} Id. (citing Peters v. Kiff, 407 U.S. 493 (1972)).
\textsuperscript{194} Id. (citing Castaneda v. Partida, 430 U.S. 482 (1977)).
\textsuperscript{195} Lockhart, 476 U.S. at 175.
of the group to serve as jurors in a particular case." ¹⁹⁶ This discrimination is based on "immutable characteristics," thus lending the appearance of unfairness. ¹⁹⁷ Finally, discrimination against these others deprives members of "historically disadvantaged" groups of their "rights as citizens to serve on juries in criminal cases." ¹⁹⁸

These statements in Lockhart do not preclude further discussion of the issue of jurors' rights. While the holding is that there is no violation of the fair cross section requirement, jurors’ rights are not based on Sixth Amendment fair cross section principles, but rather on the equal protection clause of the Fifth and Fourteenth Amendments, or even possibly the voting rights amendments.¹⁹⁹ The Court in Taylor made it clear that a jury must be drawn from a fair cross-section of the community,²⁰⁰ citing the

¹⁹⁶ Id.
¹⁹⁷ Id.
¹⁹⁸ Id.
¹⁹⁹ See Amar, supra note 11, at 204 (arguing that the Fourteenth Amendment is meant to cover only civil rights, and that jury service is a political right which should fall under the Voting Amendments, the Fifteenth through the Twenty-sixth).
²⁰⁰ Taylor v. Louisiana, 419 U.S. 522, 527-28 (1975) (citing Smith v. Texas, 311 U.S. 128, 130 (1940) ("[I]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."); Glasser v. United States, 315 U.S. 60, 85-86 (1942) ("[O]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic system and representative government"); Ballard v. United States, 329 U.S. 187 (1946) (explaining that federal law is "design[ed] to make the jury 'a cross-section of the community' . . ."); Brown v. Allen, 344 U.S. 443, 474 (1953), ([O]ur duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty."); Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970) (observing that the exclusion of African-Americans from jury service "contravenes the very idea of a jury--'a body truly representative of the community.'"); Williams v. Florida, 399 U.S. 78 (1970) (holding that a six person jury is allowable as long as the jury is "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative
Federal Jury Selection and Service Act of 1968:

It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.201

The committee reports of both houses of Congress show that this Act was intended to mean that "the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice."202

In regards to "historical disadvantages,"203 the specific group of death penalty abolitionists probably have none. However, if the boundaries of the group are expanded, their disadvantage becomes clearer. Abolitionist jurors are disadvantaged in the same way as any reasonable political minority that is excluded from debate on an issue of importance to them. While the founders did not recognize the disadvantages of African Americans or women, they took the idea of political minority very seriously.204 Death-opposed jurors may be considered as historically disadvantaged if they are considered as part of the group of all people excluded

---

202 Taylor, 419 U.S. at 529-30.
203 Lockhart, 476 U.S. at 175.
204 See discussion infra, Part IX, The Problem of Tyranny.
from jury service.

In the Lockhart opinion, the idea that abolitionist jurors are not a distinctive group is stated after the holding that the Sixth Amendment's "fair cross-section of the community" standard does not apply to petit juries. In this textual position, it would seem to be only dicta. Given the Court's summary treatment of Witherspoon's dicta in Wainright v. Witt, these brief statements about the rights of jurors are not likely to be binding. Witt involved a challenge for cause to a potential juror who was not absolutely certain that she would automatically vote against the death penalty. Footnote 21 of Witherspoon states that jurors could be excluded if they made it "unmistakably clear . . . that they would automatically vote against capital punishment" (emphasis in original). The Court argued that even though lower courts may have relied on footnote 21, its own cases "demonstrate[d] no ritualistic adherence" to the "unmistakably clear" principle. By this same reasoning, the principle that death-qualification does not violate jurors' rights, which has not since been used in any meaningful way by the Supreme Court, could be rejected as dicta.

The Court's statements in regard to the lack of juror rights are also not likely to be binding on state courts. In Greene v. Georgia, the court stated that a state supreme court was not bound to defer to the trial court as required in Witt, because that

---

205 Lockhart, 476 U.S. at 173.
207 Id. at 415-16.
208 Id. at 416 (quoting Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968)).
209 Id. at 419-22 (citing, e.g., Lockett v. Ohio, 438 U.S. 586, 595-96 (1978); Adams v. Texas, 448 U.S. 38 (1980)).
210 But see Buchanan v. Kentucky, 483 U.S. 402, 416 (1987), which does briefly refer to the distinctive group/substantial rights as citizens language from Lockhart. This reference is very brief, and would not seem to be central to the holding.
standard referred to federal habeas corpus.\textsuperscript{212} The states are bound by Supreme Court decisions in regards to "federal constitutional challenges."\textsuperscript{213} States may, however, come to a different conclusion about the rights of jurors, or the death penalty as a whole, under their own constitutions and laws.\textsuperscript{214} This means that a Supreme Court decision overruling death qualification would bind the states, but the Supreme Court cannot force the exclusion of any jurors except those who would violate defendants' constitutional rights. States cannot be required to exclude jurors who are opposed to the death penalty, because no rights are violated by this exclusion.

The process of death qualification is obviously tilted against the viewpoints of death penalty abolitionists. The Court states in \textit{Lockhart} that the process of death qualification is instituted to uphold states' "legitimate interest" in having a single jury decide both the guilt and penalty phases of a trial.\textsuperscript{215}"There is very little danger therefore . . . that 'death qualification' was instituted as a means to skew the composition of capital-case juries."\textsuperscript{216} Taken as a reference to skewing against the defendant, this is arguably true, but there is a clear slant against the anti-death juror. The state is asking the individual juror to be complicit in what she believes is tantamount to murder. Failing willingness to act in this way, the only other choice given is to turn her back. Jurors may serve as long as "they are willing to temporarily set aside their own beliefs in deference to the rule of law."\textsuperscript{217} It is deceptive to speak of temporarily setting aside beliefs in this instance. Given that it is unlikely that the individual will have a

\textsuperscript{212} Id.

\textsuperscript{213} Id. at 146, ("Witt is 'the controlling authority as to the death-penalty qualification of prospective jurors....'") (quoting the Georgia Supreme Court below, 469 S.E.2d 129, 134 (1996)).

\textsuperscript{214} Furman v. Georgia, 408 U.S. 238, 298 n.52 (1972) (citing People v. Anderson, 493 P.2d 880 (Cal. 1972)), in which the California Supreme Court overruled the death penalty based on the state constitution equivalent of the Cruel and Unusual Punishments Clause).


\textsuperscript{216} Id. at 176.

\textsuperscript{217} Id.
meaningful opportunity to politically overrule the death penalty,\textsuperscript{218} when will the juror’s belief ever have real meaning or value outside of the jury situation? The Court also states that abolitionists may serve as jurors in other criminal cases, and so are not deprived of their “basic rights of citizenship.”\textsuperscript{219} This is again a false hope. The juror should be able to add her strongly held beliefs to the debate in a case where it is meaningful. The beliefs that exclude her have no value in other criminal cases.

Although the creation of a more conviction-prone jury would be of obvious concern to the defendant -- and has been heard and rejected by the Supreme Court as a concern to the defendant --\textsuperscript{220} it is also an issue of concern to the rejected juror. The Court equates an abolitionist viewpoint with the serious societal wrongs of being unable to follow the law or the jurors’ oath. This in turn puts a certain amount of stigma on the abolitionist juror. Essentially the Court is saying that to have a different opinion about what is in the best interest of the State is tantamount to being a lawbreaker. This unnecessary criticism not only affects the rights of the individual juror, but it also weakens the position of the group in regards to action outside the courts. It is difficult to win a political battle as a group that is branded as unable to follow the law. Legislatures and executives have the backing of the highest court in the land whenever they uphold the death penalty or death-qualified juries.

\textsuperscript{218} See, \textit{e.g.}, The 2000 Campaign: Other Issues; From Social Security to Environment, the Candidates’ Positions, N.Y. TIMES, Nov. 5, 2000, § 1, at 45 (explaining that in the 2000 presidential elections both George W. Bush and Al Gore supported the death penalty).

\textsuperscript{219} \textit{Lockhart}, 476 U.S. at 176.

\textsuperscript{220} \textit{Id.} at 170 n.7.
VII. RULE OF LAW

While the above discussion shows that the death penalty may be precluded by the international rule of law, there is also room to doubt whether the death penalty still fits within this country’s own rule of law. “While [capital punishment] may weaken both democracy and the rule of law, and while it may distract us from confronting the fragility and contingency of basic cultural categories, the machinery of death does its work at an ever escalating pace.” While the rule of law in the past allowed the death penalty, and may even have relied on the death penalty, the penalty’s time of value has ended. The death penalty in law assumes that the punishing of a criminal with death will slow the pace of “private vengeance.” Under this theory, State ‘murder’ is allowed because it will eventually lead to fewer deaths by precluding small private wars or ‘family feuds.’ This limited revenge theory may be a more important justification for the death penalty, especially at the time of the country’s founding, than either deterrence or retribution. However, under the limited revenge justification for the death penalty, it has lost its value not because of society’s changing values, but rather because of the changing facts of everyday life. The average person will not start a protracted violent vendetta based on a crime committed against them. Those who will take the law into their own hands are no more likely to be deterred by the threat of the death penalty than they would be deterred by any other punishment under law.

While a person may set aside their personal beliefs to

---

223 See, e.g., Trammel v. United States, 445 U.S. 40, 48 (1980) (“[W]e cannot escape the reality that the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggest the need for change.”).
224 Sarat, supra note 222.
follow what they believe is the rule of law,\textsuperscript{225} there is a serious issue of whether it is right for the State to ask jurors to give up certain beliefs. \textit{Lockhart} explains that unlike immutable characteristics, belief that the death penalty is wrong is "within the individual's control."\textsuperscript{226} Jurors may serve provided that they temporarily set aside their beliefs.\textsuperscript{227} However, like religion or acceptable cultural practices, a belief that the death penalty is wrong goes to the heart of an individual's identity. The State should not attempt to damage, lessen, or strip away these beliefs.\textsuperscript{228}

According to the Supreme Court, an "automatic" vote against the death penalty runs counter to the rule of law.\textsuperscript{229} It is important in the death penalty debate to pinpoint the meaning and the boundaries of the rule of law. As one scholar wrote, "[w]e have a pretty good idea of what we mean by 'free markets' and 'democratic elections.' But legality and the 'rule of law' are ideals that are opaque even to legal philosophers."\textsuperscript{230} In order to decide what the rule of law has to say about the death penalty, we must

\textsuperscript{225} See, e.g., Justice Blackmun's dissent in \textit{Furman}, supra notes 2-3 and accompanying text.


\textsuperscript{227} Id.

\textsuperscript{228} Immutable is defined as "never changing or varying; unchangeable." \textsc{Webster's New World College Dictionary} 714 (4\textsuperscript{th} ed. 2001). There are two different ways to think of "unchangeable:" that which cannot be changed, and that which should not be changed at the will of the state.


\textsuperscript{230} George P. Fletcher, \textit{Searching for the Rule of Law in the Wake of Communism}, 1992 B.Y.U. L. Rev. 145, 145 (1992) (detailing a case in which the Hungarian Constitutional Court held that the death penalty was per se invalid):

It cannot be the case that at all times, in all places, the rule of law demands only that judges apply statutes or their constitution precisely as written. As Romanian Professor Valeriu Stoica argued recently in Bucharest, the independence of judges does not require that they be reduced to the servants of the written word.

\textit{Id.} at 161.
first understand what is meant by rule of law.  
Black’s Law Dictionary gives five definitions of “rule of law,” including, most importantly:

(1) A substantive legal principle . . .
(2) The supremacy of regular as opposed to arbitrary power . . .
(3) The doctrine that every person is subject to the ordinary law within the jurisdiction . . .
(4) The doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts . . .

In Lockhart, the court is most likely referring to a concept similar to that seen in definitions three and four; the ‘ordinary laws’ as written in many state jurisdictions obviously uphold the death penalty. The current dominant interpretation by the Supreme Court of constitutional rights also supports the death penalty. Probably the strongest arguments against the death penalty can come from the second definition. In upholding the death penalty, courts and legislatures ignore the balance of both fairness and reason. Their power, therefore, is more arbitrary than regular. Arguing to the law in jurisdictions or the law as interpreted by courts leads to a sort of circular reasoning. This argument says that the rule of law is what courts say it is because courts have told us that that is the rule of law. This places legal traditions above the rights of persons. It is in the substantive and non-arbitrary law from the first two definitions that rights, freedoms, and protections are found, and these benefits are the reason that we want to follow the rule of law. After all, if the rule of law does not uphold that which is right, or good, or equitable, there is seemingly no purpose for it. In the example of the death-qualified jury, the policy that is claimed to be upheld by the rule of law is not substantially supported by either the rights of

---

231 It is also worth considering whether the rule of law is limited to the laws of the United States, or if the decisions and opinions of other nations are important to this concept.

individuals or the greatest good of the population.

It can be seen through Supreme Court decisions that the rule of law is not clearly on the side of death penalty supporters. In *McGautha v. California*, the Supreme Court held that death sentences could be left entirely to jury discretion, and that the same jury could be used for sentencing and guilt decisions in a case. Justice Brennan’s dissent in *McGautha* demonstrates an important concern that upholding the death penalty actually weakens the rule of law. Brennan states, “the Court is led to conclude that the rule of law and the power of the States to kill are in irreconcilable conflict. This conflict the Court resolves in favor of the States' power to kill.”

Brennan’s argument is based on the idea that states should not be able to simply “abdicate” their responsibility to come up with laws that specify when the death penalty should be applied. In leaving the jury with full discretion to decide the punishment this abdication is exactly what has taken place. This means that the State allows (or requires) the death penalty to be applied in arbitrary and capricious ways, rather than developing a legitimate rule of law by which the penalty should be applied. This “unguided, unbridled, unreviewable exercise of naked power” goes directly against the Fifth and Fourteenth Amendments’ protections of due process in law.

---

234 Id. at 207-08. See supra notes 48-50 and accompanying text.
238 Id. at 251-252.
239 Id. at 252 (“Almost a century ago, we found an almost identical California procedure constitutionally inadequate to license a laundry. *Yick Wo v. Hopkins*, 118 U.S. 356, 366-367, 369-370 (1886). Today we hold it adequate to license a life.”).
240 Id.
Brennan’s dissenting view in *McGautha* became important a year later when he voted with the majority in *Furman v. Georgia*, but *Furman* did not lead to the overruling of the death penalty that Brennan had hoped for.\(^{241}\) It therefore came about that 20 years later, Justice Marshall (another justice who voted to overrule the death penalty in *Furman*),\(^{242}\) was again in the dissenting minority when making an argument similar to Brennan’s.\(^{243}\) Marshall’s dissent in *Payne v. Tennessee* argues that the Court is guilty of ignoring the rule of law in overruling previous cases that had put greater restrictions on the death penalty.\(^{244}\) Marshall is arguing here that death penalty supporters, not abolitionists, stand counter to the rule of law. Marshall points out that, according to the rule of law, Supreme Court precedent should be overruled only when

\(^{241}\) *Furman v. Georgia*, 408 U.S. 238, 291 (1972):

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a “cruel and unusual” punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle -- that the State may not arbitrarily inflict an unusually severe punishment.

*Id.* (Brennan J., concurring in the judgment).

\(^{242}\) In *Furman*, the five Justices in the majority each wrote separate opinions. Brennan and Marshall expressed the opinion that the death penalty in any form violated the Constitution as a cruel and unusual punishment. The other Justices in the majority held only that the death penalty was arbitrary as applied at that time. Because the death penalty still exists, it is clear that the less far reaching opinions came to be the dominant view of *Furman*. See generally 408 U.S. 238.

\(^{243}\) SARAT, supra note 236 at 288 n. 18 (citing *Payne v. Tennessee*, 501 U.S. 809, 844 (1991)).

there exists some "special justification."\textsuperscript{245} Such justifications include the advent of "subsequent changes or development in the law" that undermine a decision's rationale,\textsuperscript{246} the need "to bring [a decision] into agreement with experience and with facts newly ascertained,"\textsuperscript{247} and a showing that a particular precedent has become a "detriment to coherence and consistency in the law . . . ."\textsuperscript{248} The majority cannot seriously claim that \textit{any} of these traditional bases for overruling a precedent applies to \textit{Booth} or \textit{Gathers}.\textsuperscript{249}

Marshall goes on to argue that the only change that led to the overruling of precedent was a change in "this Court's own personnel."\textsuperscript{250} A simple change in judges has traditionally been held insufficient to overrule stare decisis or the existing rule of law.\textsuperscript{251}

As a general rule, dissenting opinions do not make strong legal arguments, but the majority in \textit{Payne} lends power to Marshall's and Brennan's dissents by arguing that two anti-death cases could be overruled, due in part to strong dissents when the cases were decided.\textsuperscript{252} \textit{"Booth} and \textit{Gathers} were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by

\begin{itemize}
\item \textsuperscript{245} \textit{Payne}, 501 U.S. at 849 (Marshall, J., dissenting) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).
\item \textsuperscript{246} \textit{Id.} (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).
\item \textsuperscript{247} \textit{Id.} (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)).
\item \textsuperscript{248} \textit{Id.} (quoting Patterson, 491 U.S. at 173.
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Id. at} 850.
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{Id. at} 828-30.
\end{itemize}
Members of the Court in later decisions and have defied consistent application by the lower courts. By this same rationale, the holdings in *Lockhart v. McCree* or *McCleskey v. Kemp* could be similarly challenged, and eventually overturned. *McCleskey* was decided by a 5 to 4 court, as was *Booth*. While *Lockhart* was decided by a larger margin (6 to 3), two of the judges in the majority later changed their opinions about death penalty cases. After retiring, Justice Powell questioned whether the death penalty could ever be fairly applied, and stated his regret for cases in which he had upheld the death penalty. Justice Blackmun switched positions, concurring in *Lockhart*, while dissenting in *McCleskey*. Blackmun also said that his years of experience had led him to believe that the death penalty was not usually fairly applied. Clearly, although the margin in *Lockhart* may not have been so narrow, there has been subsequent criticism by members of the court.

The court in *Lockhart* may be correct in saying that some jurors are "unable to follow the law" when it comes to the death penalty, but this does not mean that these jurors should be rejected from service. While the Court seems to say that these jurors are unable to follow the law because they place their own values above the rule of law, it could be argued that they are unable to follow the law because the law is impossible to follow. To apply the death penalty would show an inability to follow the rule of law, while to

---

253 *Id.*


256 In *McCleskey*, Justices Powell, Rehnquist, White, O'Connor and Scalia were in the majority, while Brennan, Marshall, Blackmun and Stevens dissented. *Id.*


259 *See supra* notes 168-69 and accompanying text.

260 *See supra* notes 170-71 and accompanying text.

261 *Lockhart*, 476 U.S. at 176.
refuse to apply it shows inability to follow the law as stated in some states. The juror is unable to follow the law because of a defect or a "detriment to coherence and consistency in the law[]." 262

VIII. ECONOMICS AND DEVELOPMENT

It may seem crass to make any economic argument in such a clear-cut issue of life and death, but there are in fact several important economic issues involved in the death penalty. Anyone who is opposed to the death penalty cannot ignore economic arguments because death penalty supporters so frequently make them. The idea of replacing the death penalty with life in prison without chance of parole faces the retribution-based argument that a murderer does not deserve to live out his life at the expense of the State. 263 This argument is made in spite of the fact that it has been shown to be more expensive to execute a prisoner than to pay for life imprisonment. 264 Death supporters generally attribute the huge costs of the death penalty to drawn out and 'unnecessary' appeals. It is also important to note that the death penalty is not the only issue of life and death that comes under economic analysis.


263 See, e.g., Antonin Scalia, God's Justice and Ours, First Things, May 2002, at 17, http://www.firstthings.com/ftissues/ft0205/articles/scalia.html ("One might think that commitment to a really horrible penal system . . . might be almost as bad as death. But nice clean cells with television sets, exercise rooms, meals designed by nutritionists, and conjugal visits? That would seem to render the death penalty more, rather than less, necessary.")

Issues of environmental pollution and health care are some of the other life and death situations where economic factors play an important role.265

It is generally accepted that poor people are executed more often than the economically privileged.266 In fact, Justice Powell wrote in his dissent to Furman:

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms.267

This argument seems to assume that unfairness in prison statistics, and economic unfairness in general, excuse unfair application of the death penalty. Since "death is different"268 as a punishment, however, it should lead the way in fair application. If we cannot enforce fairness in employment, health care, imprisonment,

265 Even intellectual property can be a matter of life and death. American Drug companies fought to keep prohibitively high patent-based prices on AIDS drugs, while millions in third world countries were dying. See, e.g., Michael Wines, Agreement Expands Generic Drugs in South Africa to Fight AIDS, N.Y. TIMES, Dec. 11, 2003, at A24.


267 Furman, 408 U.S. at 447.

268 Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice.").
minimum standards of living, education, or access to justice, we should at least require fairness when we directly and actively take lives. There is also a dangerous cycle involved here: the "minorities and the poor" are seen as committing more crimes. Simultaneously, the idea that certain groups commit more crime leads to more segregation, social disadvantage, and poverty.

The O.J. Simpson case, to draw on relatively recent cultural history, demonstrates the economic disparities of murder and law. Mr. Simpson was found not guilty in a situation where another person of his color of lower economic means would almost certainly have been found guilty. For the purpose of this illustration, it is not important whether Simpson actually committed the murders of which he was accused. It is only important to see that money bought him a brilliant defense that would not be available to a poor person in the same situation. In fact, the injustice of the situation is clarified by assuming that he is not guilty of the crime, as is true for legal purposes. In comparison, it can be seen just how easy it would be for a poor person to be found guilty of a crime she did not commit.

It is illustrative to compare statistics about those who are excludable from death-qualified juries to those who are executed. Death penalty opponents are more likely to be from lower economic classes. Also, African Americans tend to oppose the death penalty more than Caucasians, and women are more likely to be opposed than men. All of these groups may be seen as socially disadvantaged. Taken together, the unequal numbers in executions, and in excludable death penalty beliefs, mean that the most powerful members of society are deciding whether the death

269 Furman, 408 U.S. at 447.
270 The Rodney King case from the same time period shows related values; police officers were found not guilty of using excessive force despite being caught on videotape violently beating an African American male.
272 Id.
penalty should be allowed, who should be executed, and who should be allowed to participate in the decision process. Those who are opposed to the death penalty are not only in a minority group by belief, but in the power to effect change in society. They are deprived of the legislative means to end the death penalty due to social weakness, and then also deprived of access to the jury, the last forum which could be of use to them.

Amartya Sen, in his book *Development as Freedom*, has advanced the idea that freedom and development are correlative. The upholding of essential rights can have important effects on the development of a country. For example, no free country that upholds essential political rights has ever experienced a significant famine.\(^{273}\) The continued use of the death penalty with only arbitrary reasons to back it up can be read as a sign of loss of power.\(^{274}\) The United States has long intertwined the positions of moral leadership with economic leadership.\(^{275}\) It has frequently argued in the international arena that civil and political rights should be placed above economic and social rights. In the case of the death penalty, the United States subjects itself to significant criticism by refusing to live up to the accepted laws of the international community.\(^{276}\) The death-qualified jury goes one step further by violating the civil and political rights that the United States claims to have prioritized.\(^{277}\)

New sociological studies have placed the United States as a less modern, or less developed country than nations in Western Europe which have a greater emphasis on freedom and secular “non traditional” thought.\(^{278}\) One new modernization study

\(^{275}\) Id. at 1221-22
\(^{276}\) Id.
\(^{277}\) Id.
\(^{278}\) Rodger Doyle, *Measuring Modernity: The U.S. is Not Number One*, Sci. Am., Dec. 2003, at 40. It seems that, regarding the death penalty, some Supreme Court justices are actively seeking this “un-modern” position. See, e.g., Scalia, *God's Justice and Ours*, supra note 263 (“[I]t is no accident, I think, that the modern view that the death penalty is immoral is centered in the West . . . . [I]t
measures nations on a scale of "Self-Expression v. Survival/Security," as well as a "Traditional v. Secular/Rational" scale. The United States ranks relatively well on the self-expression scale, but relatively poorly on the traditional v. secular scale. Countries like Sweden, Norway, and the Netherlands rank as the most modern, beating the United States on both scales. Clearly the death penalty, which is often supported for traditional religious reasons, is a strong factor in making the United States appear less modern.

Clinging to the death penalty could also cause economic harm. Other nations could bring formal sanctions against the United States through exceptions to the General Agreement on Tariffs and Trade. Article XX of GATT allows trade restrictions when necessary to protect public morals and human life. But formal sanctions are not the only way the economy could be harmed. Individual consumers or corporate shareholders could demonstrate that they were offended by seeking goods and services elsewhere. Because the United States continues to execute foreign nationals, some may restrict their travel here. Our continued embrace of the death penalty may hinder our efforts to

---

279 The desire to self-express demonstrates a freedom from physical need. Doyle, supra note 278.
280 Id.
281 On the Traditional v. Secular scale, the United States ranks at about the same level as Turkey and India. Id.
282 "The Lower position of the English-speaking countries is a function of, among other influences, their higher religious commitment, particularly in the U.S." Id.
283 Id.
fight terrorism by alienating our allies. It is even arguable that this continued moral isolationism could indirectly lead to increases in terrorism. Of course, the United States can weather a substantial amount of foreign trade pressure, but it is doubtful whether we should fight international pressure in support of a policy that doesn’t do a substantial amount of good. To make a brief tangential comparison we can look at the Kyoto Protocol, which is an agreement to reduce carbon dioxide emissions. The United States has signed the protocol, but refused to put it into effect, and has been much criticized for this policy. Reducing carbon dioxide would subject the United States to huge costs, with little direct economic benefit. Therefore, a calculation can be made that it is more profitable to weather any economic sanctions, up to the point where the sanctions reach an equal level with the costs of reducing emissions. In contrast, the death penalty seemingly brings no economic value to this country, and so in the face of negative economic consequences, it could be seen as an unnecessary externality.

By the “development as freedom” argument, the death penalty is moving the United States backwards in two ways at once. The political restriction of jurors’ rights is a restriction of freedom, and therefore damages development. The use of the death penalty makes us look less developed to other nations, causing them to cool their economic relationships. This damage to economic development restricts freedom. Both the political and economic harms arguably are most strongly felt by the already disadvantaged groups that are excluded by death qualification. This sets up another dangerous cycle; the death penalty’s economic

286 Id. at 1224 (“Diplomatic isolation is not something the United States can afford at a time when it needs foreign cooperation and support to conduct its War on Terrorism.”).
289 Bishop, supra note 274, at 1220.
290 See generally SEN, supra note 273.
harm to a group that is already politically and economically disadvantaged. At the same time, the political harm caused by exclusion from jury service causes further economic harm to the same group.

IX. The Problem of Tyranny.

There is a serious problem of tyranny involved in precluding death penalty abolitionists from capital jury service. To clarify the problem all we need to do is imagine the same system applied to actual voting. After all, the death penalty is often considered to be a political idea that should be left up to legislatures. We can re-imagine the situation as consisting of three different political parties: those who could never vote for the death penalty (Witherspoon-excludables), those who would always vote for the death penalty (Morgan-excludables) and those who would consider the death penalty (Witherspoon/Morgan-includables, or non-excludables). We can take it from the current law, both in the majority of state statutes, and in Supreme Court cases, that the non-excludable side is the majority; they are analogous to the side that has won the election or referendum. The process of death-qualifying juries is akin to the winning side making a law that precludes the losers from voting in future elections. Clearly this would not be allowed to stand. It is a foundational tenet of our constitutional system that the minority must be able to add its views to the debate.

---

291 See, e.g., Amar, supra note 11.
292 See, e.g., Furman v. Georgia, 408 U.S. 238, 375 (1972) (Burger, C.J., dissenting) (“If we were possessed of legislative power, I would either join with [the Justices voting against the death penalty] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes.”).
293 For example, the Constitution creates the Senate, which entails important protections for states with smaller populations. U.S. CONST. art. I, § 3. The Judicial branch is led by justices with lifetime tenure, freeing them from the pressure to make popular decisions. U.S. CONST. art. III, § 1. Constitutional
The very fact that death qualification exists demonstrates that death penalty abolitionism is not a narrowly held view. If one in a hundred or one in a thousand, or for that matter even one in ten potential jurors would refuse to apply the death penalty, the chances of these individuals being picked from the jury wheel for a death penalty case would be sufficiently low, and prosecutors could use their peremptory strikes to weed out the rare abolitionist who did get through. The development of a whole set of laws just to deal with the problems caused by anti-death jurors demonstrates that this view is not narrowly held.

Jury service is a duty, but it is also an important political right. Juries give an opportunity to debate and take meaningful action on an issue that may be years away from being legislatively changed. Because there will be a certain amount of inertia involved in any legislative change (things will tend to stay as they are; new laws tend to be made slowly), juries may be the only place where meaningful debate can occur for many years to come.

It could also be argued that opinions against the death penalty are pre-considered mitigating factors. Rather than 'automatically' choosing to vote against the death penalty, the abolitionist juror has simply made a well-considered choice before coming to the case. This is acceptable because there are many death penalty factors that have nothing to do with any specific case. For example, the Court assumed in McCleskey v. Kemp that amendments must be ratified by three-fourths of the states before going into effect, and "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V. See also U.S. CONST. amend I (protecting free speech) and U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .").

Cf. Witherspoon v. Illinois, 391 U.S. 510, 14 (1868) (where 47 jury members were struck from the panel during the death qualification process).

See, e.g., Amar, supra note 11; Taylor v. Louisiana, 419 U.S. 522, 530-31 (1975) ("Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."); Federal Jury Selection and Service Act, 28 U.S.C. § 1861 (1968) ("It is . . . the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.").
the death penalty was applied unfairly to racial minorities (even though this was not considered a constitutional violation). Under this rationale, it is possible to see the race of the defendant, or the fact that it is statistically likely that some innocent defendants have been executed, as mitigating factors. A juror who would consider voting for the death penalty has either never really thought about the issue, or has made certain pre-considerations that the death penalty is acceptable. If pro-death jurors' pre-considered ideas are allowed into the jury, abolitionists' ideas should also be allowed.

In *Wainwright v. Witt*, the court explained that it is not desirable either to allow in those who are so "biased" that they can't follow the law, or exclude those whose philosophical views "have no bearing" on the case. Arguably, the juror's opinions on the death penalty do not have any bearing on the case; they have nothing to do with the issue of guilt or innocence, or whether the crime should be punished. The excludable jurors merely have a different political view about what the punishment should be. Beyond the reasonableness of the life view, there lies the idea of a balance of rights. No rights are violated when a person is not put to death. The victim's family may have a right to see the criminal punished, but they do not have the right to choose death any more than an abolitionist family would have the right to choose life.

It could be argued that a choice of life violates the rights of the public by lessening the deterrence value of the death penalty,

---

296 *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987) (explaining that even though a statistical study showed some racial disparities, these disparities did not demonstrate a constitutional violation).


298 Although a victim's family may be consulted, the decision on what penalty to seek is ultimately left to the prosecutor. *See* Peter Hodgkinson, *Europe--A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 Ohio N.U.L.Rev. 625, 649(2000) ("One simply cannot have a prosecution policy based on the wishes of the families and friends of homicide victims, when some are for and some against capital punishment."); Murder Victims' Families for Reconciliation, [http://www.mvfr.org](http://www.mvfr.org) (last modified Jan. 23, 2006).
but, aside from the fact that there is no proven deterrence value to the death penalty, the inclusion of abolitionist jurors would only make an extremely rare punishment slightly more rare. In 2002, there were an estimated 16,137 murders in the United States\(^{299}\) and 59 executions.\(^{300}\) Presumably then, any actual deterrence does not rely on the percentage of murderers executed, since this percentage would work out to less than one half of one percent.

One of the strongest deterrence arguments offered in support of the death penalty is "if life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer."\(^{301}\) In Furman, Justice Marshall responds to this by stating that most murderers do not usually commit further murders while in prison, and that "the existence of the death penalty has virtually no effect on the homicide rate in prisons."\(^{302}\) Any murderer who is in prison in a death penalty state was obviously not deterred by the possibility of facing the death penalty. He could only be deterred in prison by mandatory death sentences, meaning that an in-prison murder carried a much greater statistical chance of death as punishment, but mandatory death sentences are prohibited.\(^{303}\)

Additionally, there are other punishments within prison systems, such as loss of privileges or solitary confinement. Prisoners who are on death row are also in prison, and have less to lose than even those who are sentenced to life without parole. Death-row inmates are subjected to a greater level of control than the rest of the prison population, but there is no reason that life-


\(^{302}\) Id. at 352.

without-parole prisoners could not similarly be subjected to more careful control.\textsuperscript{304} Overcrowding also may lead to higher prison murder rates, but this is not an issue that can be dealt with by the death penalty at its current pace, or even if executions were drastically sped up. The prison population at the end of 2004 was 2,135,901.\textsuperscript{305} At the end of 2002, state prisons ranged from one percent to 16 percent over capacity, with federal prisons at 33 percent over capacity.\textsuperscript{306} At the end of 2004, the population of death row was 3,314.\textsuperscript{307} Even if every prisoner on death row were executed tomorrow, the total inmate population would decrease by less than two-tenths of one percent.

The rights of the State itself should also be considered, including the right to retributively punish criminals, but the individual rights of jurors should easily overcome this. The states have been unable to demonstrate that the death penalty has any real value. Although they may have enough evidence to overcome the rights of a convicted criminal, the rights of innocent jurors are more difficult to overcome.

While it is frequently argued that the death penalty must be upheld as a form of retribution for murder,\textsuperscript{308} a death penalty

\textsuperscript{304} It would cost more to better control prisoners, but it would probably not cost enough to exceed the huge expenditures made by states in prosecuting death penalty cases. See, e.g., Tabak, supra note 264.

\textsuperscript{305} See Bureau of Justice Statistics, Prison Statistics, available at http://www.ojp.usdoj.gov/bjs/prisons.htm (last updated, Dec. 7, 2005). See also, Richard Willing, Inmates Number over 2 Million, a Record for USA, USA TODAY, Apr. 7, 2003, at A13 (The United States has the world's highest incarceration rate, at 702 prisoners per 100,000 citizens).


\textsuperscript{308} See, e.g., Furman v. Georgia, 408 U.S. 238, 394-95 (1972) (Burger, C.J., dissenting) ("It would be reading a great deal into the Eighth Amendment to
abolitionist is not necessarily opposed to the idea of retribution. It could even be argued that death is less effective as a form of retribution than life imprisonment. Consider the example of a 'suicide bomber'; a person who wants to die for a cause is arguably not adequately punished by the death penalty. The death penalty is also ineffective as retribution because it generates sympathy for the accused. While life imprisonment is likely to generate protest only from those who believe the convict is innocent, almost any imposition of the death penalty is going to generate some protest, and this protest can be seen as sympathy, whether or not it actually is.\(^{309}\)

Death qualification gives a "special advantage" to the prosecutor, while hiding behind the argument that it is impractical to ensure unbiased juries.\(^{310}\) There is significant evidence that death qualification makes a jury more likely to convict a defendant, even in cases where the state decides not to follow through with its decision to seek death.\(^{311}\) While the Court in *Lockhart* raises serious questions about this evidence,\(^{312}\) it is interesting to note that the tactical advantage, even if only perceived, means that death will be sought more frequently, if only to try to get a 'better' jury. The prosecution may have no interest in the death or life of prisoners, as long as they are convicted. A

---

\(^{309}\) See, e.g., New Mexico Coalition to Repeal the Death Penalty, *available at* http://nmrepeal.org/MVFR.htm:

Most criticism of the death penalty focuses on how it affects the person on death row. Our concern is how the death penalty affects the rest of us in society. Our opposition to the death penalty is rooted in our direct experience of loss and our refusal to respond to that loss with a quest for more killing. Executions are not what will help us heal.

*Id.* See also Murder Victims' Families for Reconciliation, *supra* note 298.


\(^{311}\) See, e.g., *id.* at 169-70, n.4-n.6 (listing various authorities which the petitioner and the court below gave as evidence that death qualification creates more conviction-prone juries).

\(^{312}\) *Id.* at 168-73.
perceived tactical advantage gives prosecutors a reason to seek the death penalty that is entirely unrelated to the case. Ironically, a perceived tactical advantage could lead to use of the death penalty in weaker cases. If a prosecutor has a rock solid case in which she is very confident, she will only seek the death penalty if she feels it is absolutely warranted. If the case is weaker, the prosecution may take advantage of every opportunity possible to improve results.

Ending the death-qualification process would not significantly erode prosecutors’ ability to use the death penalty to gain tactical advantage in pleas or confessions. It is already considered unconstitutional to use the threat of death to get a guilty plea in a way that precludes the defendants’ rights to a jury trial.313 Furthermore, prosecutors would still be able to seek the death penalty. The defendant will not know what the jury will be like; through chance the jury may still be fully willing to pass a death sentence. A truly worried defendant who does not have a strong case will still do well to plead guilty and cooperate before the jury is even drawn.

The above factors demonstrate that no one really has the right to have the death penalty applied. In this situation, it is only the tyranny of the majority which keeps the death penalty in place. Death-qualified juries also show something of the tyranny of tradition; the laws struggle to keep in place that which has always been done, at the cost of the rights of minority opinion and the individual. There are also serious costs to the State of complexity and inconvenience in law to be considered. Tradition would have us sacrifice rights for convenience sake (it is more convenient to have one jury than to have two),314 while ignoring the option that is

313 See Furman, 408 U.S. at 355-56.
314 Lockhart v. McCree, 476 U.S. 162, 174 (explaining “the practical impossibility of providing each criminal defendant with a truly ‘representative’ petit jury . . . .”); id. at 175-76 (explaining that the state has a “legitimate interest” in having the guilt and penalty phases decided by a single jury); Wainwright v. Witt, 469 U.S. 412, 430 (1985) (arguing that a judge should not
most convenient (abolition of the death penalty) because it is not
traditional. This is not to say that convenience to the courts is not a
meaningful argument, but it is pointless to argue about
convenience if all the options are not considered. Abolition could
uphold convenience, human rights and jurors' rights
simultaneously. Having a single jury for guilt and sentencing does
not do this. Whether or not the founders intended tradition to
override evolving standards of decency is immaterial. They clearly
intended to avoid tyranny, and this desire precludes their ability to
be tyrants from beyond the grave. A “faction” based on the past is
just as destructive as a newly-created one.315

Upholding the death-qualification process because of
tradition and the intentions of the Founding Fathers316 is somewhat
incompatible with the basic idea of the fair cross section
requirement seen in Taylor v. Louisiana.317 It is clear that women
or African Americans were not intended to serve on juries at the
time that the Sixth Amendment was written, but ideas have
changed as societal views have changed.318 “Women are
sufficiently numerous and distinct from men that if they are
systematically eliminated from jury panels, the Sixth Amendment’s
fair-cross-section requirement cannot be satisfied.”319 It is in fact
the difference in ‘attitudes’ that requires the inclusion of groups
like women and African-Americans under Sixth Amendment fair
cross section analysis.320 If women would hold in exactly the same
way as men, then any given defendant would not care if women
were left out of the jury. Diverse groups lend “a flavor, a distinct
quality” to jury debate.321 This ‘distinct quality’ is the very reason
that abolitionist jurors are excluded. At the same time it is an
essential reason that they should not be excluded.

have to write out reasons for exclusion of specific jurors because “[a] trial
judge’s job is difficult enough without senseless make-work.”).
315 See THE FEDERALIST NO. 51 (James Madison).
316 See, e.g., Scalia, God’s Justice and Ours, supra note 263.
318 Id.
319 Id. at 531.
320 Id. at 531-32 (citing Ballard v. United States, 329 U.S. 187, 193-94 (1946)).
321 Id. at 532, (citing Ballard, 329 U.S. 192-93).
X. COMPLICITY

When a democratic society takes an action, all of its citizens bear some responsibility for that action. "A death penalty democratically administered implicates us all as agents of state killing."\(^{322}\) This is simple democratic common sense. Society does not want to apply special guilt to judges, lawyers, lawmakers or jurors because they are doing a job that we told them to do, and need them to do. The fact that they are government officials\(^{323}\) or "following orders" does not excuse these actors from guilt if a human rights violation takes place.\(^{324}\) On the other hand, to put special guilt on these persons would deter them from doing their important jobs. If there is any guilt, it must be distributed evenly throughout the State, in the same way that power is supposed to be distributed evenly in a democracy. A comparison can be made to executive action during a war, or intervention in an international human rights violation. In those instances we want the executive to have power to act expediently, but with that power there should be a heightened level of responsibility.\(^{325}\) The death penalty, on the other hand, is a long, drawn out situation in which no individual

---

\(^{322}\) SARAT, supra note 236, at 17.


\(^{324}\) Id. at art. 7(3) ("The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.").

\(^{325}\) See, e.g., Korematsu v. United States, 323 U.S. 214 (1944). It is useful also to consider the "humanitarian" actions in Yugoslavia, Rwanda, and Iraq.
Buffalo Public Interest Law Journal

Vol. XXIV

has a heightened level of power\textsuperscript{326} and so the responsibility is also shared.

For the death penalty to exist in a democratic society, the citizens of that society must be complicit with it. Other nations have recognized participation in the death penalty as complicity in a human rights violation.\textsuperscript{327} The process of death qualification is especially pernicious as regarding this complicity because it 'forces' citizens to take part in the death penalty process without a meaningful opportunity to object. Those that object to the death penalty are precluded from service when service may be the only meaningful forum for their objections.

Proponents of the death penalty argue that the death penalty gives certain benefits to society, but these benefits are bought at the cost of human life. Anyone who silently accepts these benefits is therefore guilty of some degree of complicity with the death penalty. It can be argued that the death penalty exists because it allows society to "demonize" and dehumanize murderers, and thus ignore the societal conditions that often lead to murder.\textsuperscript{328} Much pro-death rhetoric focuses on the rights of victims, because we all fear becoming a victim. But the death penalty simultaneously makes us all both murderers and potential victims. The majority populations are less likely to be death penalty victims than murder victims; racial inequity repays the demonized supposed criminal

\textsuperscript{326} Although some individuals have heightened power to grant clemency, this is a power exercised to stop an execution; it is essentially an exception to the laws, in situations which require expediency, similar to war situations. There are rules and laws which structure clemency however, and these are created by the society as a whole. Clemency power is also power to save a life, and failing to exercise clemency power is arguably different than affirmatively exercising power to kill.

\textsuperscript{327} See, e.g., Dina Maslow, Extradition from Israel: The Samuel Sheinbein Case, 7 CARDOZO J. INT'L & COMP. L. 387, 407 ("Under no hypothesis and for no type of crime is complicity by the Italian state allowed in the seeking or carrying out of the death penalty." (quoting Italy Rules Against Return of Slaying Suspect to the U.S.; Court Says Extradition Treaty Doesn't Guarantee Death Penalty Protection, ROCKY MOUNTAIN NEWS, June 28, 1996, at 56A).

\textsuperscript{328} SARAT, supra note 236 at 18, 24-25 ("Capital punishment also has been crucial in the processes of demonizing young, black males and using them in the pantheon of public enemies to replace the Soviet 'evil empire.' ").
elements for their perceived harm to society by making them the victims, and the majority the murderer.\textsuperscript{329}

As members of a democratic society, who bear responsibility for the laws we make and uphold, we should constantly be aware of the benefits that the laws give to us, as well as the costs that the laws place upon us. When looking at the death penalty, it is important to see not only what "it does . . . for us," but "what it does to us."\textsuperscript{330} The benefits are especially weak when it comes to death qualification. In the first place, death qualification gives benefits only insofar as the death penalty itself gives benefits. This means that death qualification is subject to all the same arguments that are made against the death penalty, including arbitrariness, international rejection, and racial and economic unfairness. The benefits of death qualification are also weaker than the benefits of the death penalty because it is not clear that ending the juror exclusion would actually end the death penalty. Some jurisdictions will always find it easier to convene a pro-death jury, and these are likely to be the most killing jurisdictions anyway. Also, death qualification is weaker than the death penalty because it makes a further violation of rights, and violates the rights of more people.

Determining the wrongness of the death penalty would depend on an acceptance of the rule of international law. If the government and the majority of the people accept an action as allowable, then the nation itself accepts this action. The actions of a nation can best be seen as wrong through comparison to other nations, because nations are each other’s peers. A nation cannot find itself guilty of a crime due to the same reasoning that bars an individual from being judge in her own case. The problem, as seen above, is that the United States is extremely resistant to accepting international law. One important example using the lens of international law to focus on the death penalty comes from the

\textsuperscript{329} Id.

\textsuperscript{330} Id.
South African *Makwanyane* case.\(^{331}\) This case stands in sharp contrast to the typical attitude seen in the United States. The *Makwanyane* opinion refers to and depends on the decisions of other nations.\(^{332}\) Ironically, if not unexpectedly, the entire United States federal court system has referred to *Makwanyane* only three times and then only briefly: in a footnote to a dissent;\(^{333}\) in a Ninth Circuit case which, in part, upheld the validity of hanging as a method of execution;\(^{334}\) and in one district court opinion.\(^{335}\)

Whether the death penalty is actually a crime or wrong that society is complicit in remains largely to be determined, both through international law, and the United States' interaction with it. There is, however, another element of complicity to be dealt with: Do citizens have a culpable mental state in regards to the death penalty? The most common defense of the death penalty currently is that it is not a wrongful act. If somehow the death penalty were determined to the satisfaction of the majority to be a human rights violation, the next likely defense would be to claim ignorance. The issue of the mental state required for complicity stands aside from the issue of the wrongfulness of the death penalty. Can citizens claim ignorance about the wrongness of the death penalty? It is in part the process of death qualification that insures that they cannot. The abolitionist jurors' rejection from service demonstrates a certain consciousness that all is not right with the death penalty. Justice Marshall wrote in *Furman*, "[a]t times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act . . . [b]ut the Eighth Amendment is our insulation from our baser selves."\(^{336}\) Death abolitionists are the advance guard of "the conscience of the community."\(^{337}\) Like the Eighth Amendment, they are attempting to protect society from its own destructive desire for vengeance. "Assuming knowledge of all

\(^{331}\) See supra notes 140-148, and accompanying text.

\(^{332}\) Id.

\(^{333}\) See Gomez v. Fierro, 519 U.S. 918, 919 n.3 (1996) (Stevens, J., dissenting).

\(^{334}\) See Langford v. Day, 110 F.3d 1380, 1393 (9th Cir. 1996).


the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice.\textsuperscript{338} The fact that death qualification excludes jurors only based on their death penalty beliefs shows that they are in all other ways "average citizens." They do not have any access to information that any potential juror could not also access. Rejecting these jurors shows a conscious blindness to certain types of information. This is information that is not prejudicial to the finding of guilt in a case, the punishment of the criminal, or the protection of society from violence. As a civilized society we cannot simultaneously decide to ignore information, and claim our ignorance as a defense.\textsuperscript{339} We cannot claim innocence by refusing to know what may easily be known. Ignoring the abolitionist message only makes the complicity of the majority worse.

If we look back to the statements of Justice Blackmun,\textsuperscript{340} expressing his strong personal opposition to the death penalty, while simultaneously voting to uphold it, we can see that this is a terrible and sad position for any person to be in; to feel that the death penalty is wrong, and should be abolished, but to be powerless to act against it. How much worse is this dilemma for a jury member than for a judge? If a person can't apply laws she doesn't like, she probably should not become a judge, but where does that leave a juror? Jury service is an essential right, as well as an essential duty of citizenship. If a person doesn't like the law, should she not be a citizen? The death penalty also is essentially different from other punishments. This is not simply a law that one disagrees with; rather, it is a law that is morally abhorrent to those who oppose it. It is also substantially reasonable to be opposed to the death penalty. Citizens should not be coerced to apply it, nor

\begin{itemize}
  \item \textsuperscript{338} \textit{Furman}, 408 U.S. at 369 (Marshall, J., concurring).
  \item \textsuperscript{339} \textit{See, e.g., In re Aimster Copyright Litig.}, 334 F.3d 643, 650 ("Willful blindness is knowledge . . . ")
  \item \textsuperscript{340} \textit{See supra} notes 2-3, and accompanying text.
\end{itemize}
forced to walk away from it. Rather, they should be allowed to participate in the debate in what is the only meaningful forum available to them. Although the Court has said that this is an issue that should be left up to the majority, and discussed only through legislative means, the death penalty does not grab sufficient attention to be an important election issue, and many elections may offer no "pro-life" choices from the major parties.\footnote{See supra note 218. See also Furman, 408 U.S. at 361 n.145 (Marshall, J., concurring) ("So few people have been executed in the past decade that capital punishment is a subject only rarely brought to the attention of the average American.").}

In international law, a person is not excused from a human rights crime on the basis that they were acting on behalf of the government, nor are they excused because they were following orders.\footnote{See supra notes 323-24 and accompanying text.} A juror may "temporarily set aside their beliefs"\footnote{Lockhart v. McCree, 476 U.S. 162, 176 (1986).} because they were told to do so by a court or by this country's laws. However, if the death penalty truly is a human rights violation, as so many around the world have said it is, jurors may not be able set aside their guilt, even if it is only a personal feeling of guilt, for this violation. It could be argued that death qualification is tailor-made for this situation; jurors have the opportunity to walk away from the case, but this is where other problems come into play. In the first place, persons with strong beliefs in the value of human life are unlikely to have their feeling of complicity assuaged because they turned their backs. They rather are likely to feel as if they had an opportunity to act positively, and they gave up that opportunity by vocalizing their beliefs. This encourages jurors to say they could consider the death penalty when in fact they could not.\footnote{One problem with opinion polls relating to the death penalty is that a polled individual can easily say she believes in the death penalty, but she may find it more difficult when facing an actual defendant. See e.g., Furman, 408 U.S. at 361 (Marshall, J., concurring) ("[W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience ... of the people' ... but on whether people who were fully informed ... would find the penalty shocking.")} This 'lie' could be near
impossible to filter out if jurors believe (or convince themselves) that they can apply the death penalty. All a juror need do is imagine the worst possible sort of criminal, the kind of criminal that will be very unlikely to be in their courtroom, someone guilty of or responsible for the killing of hundreds or thousands of people, for example. All but the staunchest life advocates could probably convince themselves of some situation in which they could vote for the death penalty if the crime was horrible enough, and the evidence was strong enough. Once they have actually reached the point of sentencing, however, the doubts creep back in, and they may in fact be unable to apply the death penalty.

Of course, the courts should not pander to potential liars; it does not make sense to run a legal system based on what some people may ingenuously do. The problem with death qualification is that it actually encourages lying. It creates a system where a moral person has a choice between lying to the court (and herself) or allowing a human being to die through inaction. For anyone with a strong belief in the value of human life, the choice to lie in an effort to save a life would be simply and easily made.

XI. SUGGESTED SOLUTIONS

Jurors stand apart from other creators, enforcers, and interpreters of the law. Some judges are elected and others are appointed by elected officials based on their views on certain issues, meaning that the jury is the only safe haven for randomly selected opinions. This randomness is of central importance to the jury process. The Supreme Court affirms this when it states that a fair cross section cannot be insured in petit juries. Death qualification tampers with this important randomness.

What is an acceptable substitute for the death-qualified

346 Lockhart, 476 U.S. at 173-74.
jury? One option is that the states can impanel two separate juries, one for the guilt phase and one for the trial. However there are some serious problems with this option. It entails enough cost and complexity that the Court has said the state has a significant interest in maintaining only one jury. On the other hand, as stated earlier, it makes little sense for a state to argue that it must have a unified jury because of cost and convenience when it is arguably much cheaper and more convenient to dispense with the death penalty and its lengthy appeals process altogether. Another reason that two separate juries should not be used is that it leads the states back into the problem of nullification. An abolitionist on the guilt phase jury may vote to acquit or convict of a lesser offense rather than send the defendant to face a death-qualified jury in the sentencing phase.

A sentence passed by the judge also runs into the problem of nullification, although if the judge has discretion, the juror can simply find the facts, and feel less of a sense of complicity, knowing that the final decision was left to the judge. There are limits, however, on the amount of discretion that a judge can exercise. A sentence by the judge must stay clear of the appearance of a mandatory sentence, which has been disallowed. A judge also may not determine any additional facts that were not found by the jury in order to impose a sentence.

The more acceptable solution is for states to carry on (if they must carry on with the death penalty) with unified, non-death-qualified juries. This will certainly lead to some situations when the death penalty cannot be applied. The state must face this "luck of the draw" issue, and it in fact seems unfair to argue that the

347 Id. at 175-76 ("Death qualification' . . . is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.").
348 See supra note 264.
351 Lockhart, 476 U.S. 162, 178 (stating that the defendant cannot challenge the jury in his case because he could have ended up with exactly the same jury through "luck of the draw.").
defendant must face luck of the draw while prosecutors must not. The prosecution must simply accept that as long as significant numbers of people are opposed to death sentences, there will be some cases when they cannot get the death penalty.

A common reaction to a proposal to end death qualification is to say that the end of the death qualification process would mean the end of the death penalty altogether, but this is not necessarily true. There will always be some communities where it will be easier to empanel a pro-death jury. Prosecutors could still rely on their peremptory challenges to exclude those whom they thought would not give the result they want. If the end of death qualification did effectively end the death penalty, it would only be in an indirect way. For example, the end of death qualification could mean that the death penalty would be applied less often, thus making its application more "wanton" and "freakish" in cases where it was used. This decreased use brings up the Eighth Amendment issue of cruel and unusual punishment. By this rationale, the less the death penalty is applied, the more it becomes unfair for those to whom it is applied.

It has been argued that abolition of the death penalty should be left up to the state and federal legislatures. Abolition will arguably be much better secured if it comes in the form of popularly-mandated legislation. Legislatures embody the demands and beliefs of the majority, and laws are not open to the same criticism as "activist courts." On the other hand, the process of

---

352 Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.").

353 Id.

354 Id.

355 See, e.g., Chief Justice Burger’s dissent in Furman, supra note 13.

empanelling jurors would seem to be particularly within the realm of the courts' powers. The Supreme Court stands as the ultimate head of legal interpretation, and although many court rules are based on legislation, legislatures cannot be allowed to interfere with substantial common law or constitutional rights. In Atkins, the Court overruled the death penalty for mentally retarded persons based on recognition of the evolution of the community conscience. In Ring, the court stated, "[a]lthough the doctrine of stare decisis is of fundamental importance to the rule of law . . . we have overruled prior decisions where the necessity and propriety of doing so has been established." Although courts may not be able to abolish the death penalty, they need not actively or passively make it easier to apply.

marriage by court order. . .


In dissenting in a case which upheld the military detention of Japanese citizens during WWII, Justice Jackson stated:

[A] judicial construction of the due process clause that will sustain [a military order] is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.
XII. CONCLUSION

If a belief interferes with the application of the law by jurors, does it in fact go against the public good? The answer to this question is that the excluded jurors do not stand opposed to the public good. A prosecutor and a defendant arguably have directly opposed interests in mind; the prosecutor is acting in the interest of the state or the public, while the defendant acts in his own interest. The excluded juror on the other hand can lay claim to a state or public interest that is just as valid as the prosecutor’s. The excludable juror can claim that from their point of view it simply is not good for the public or the State for the death penalty to be applied. Abolitionist jurors are not fighting against the State; they are arguably fighting for it.

Abolitionists can argue that the death penalty is “no longer consistent with our own self respect.” Death qualification simply excludes the losing side in an unsettled debate about what is in fact best for society. If the belief were in some way more harmful to society, like a belief that there should be no punishment of criminals, or a belief in complete anarchy, it would be easy to argue that these jurors should be excluded for putting their own beliefs ahead of what the law states. In the case of the death penalty, however, a strong case can be made that the abolitionist has the best interest of the State and the legal system in mind. A clearly guilty murderer is not a very sympathetic character, and a juror opposed to death can easily be argued to be concerned with the problems of the State rather than the criminal. Many who are opposed to the death penalty are concerned with innocents being put to death, or unfair application by race or class. These are the

---


State's problems, and they serve to erode "public confidence in the fairness of the criminal justice system."\textsuperscript{362} A State is more harmed if it wrongly or unfairly applies the death penalty than if it does not apply the death penalty at all.\textsuperscript{363}

In the face of fairness, justice, and economic concerns, supporters of the death penalty in the United States often fall back on religious arguments to argue that the death penalty should be upheld.\textsuperscript{364} It is absolutely essential that the rule of law trump any specific religion or specific interpretation of a religion. Neither the majority, nor the ghosts of the past should be allowed to interfere with the rights of individuals. Although the United States may have been founded on many Christian ideas, in no way is it constitutional to force the majority to continue to be Christians. If Christianity were to disappear from the country, it would be absurd to require punishments to still be meted out based on Christian principles. There are two fatal flaws in any religious arguments that can be made in support of the death penalty. The first is that Christianity, like any religion, is subject to varying interpretations. Death penalty support could be seen as a misinterpretation of Christianity,\textsuperscript{365} and at its best is a divergent interpretation. The

\begin{itemize}
\item \textsuperscript{363} See \textit{Furman}, 408 U.S. at 371 (Marshall, J., concurring) ("In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it.").
\item \textsuperscript{364} See, e.g., Scalia, \textit{God's Justice and Ours}, supra note 263:
\begin{quote}
The death penalty is undoubtedly wrong unless one accords to the state a scope of moral action that goes beyond what is permitted to the individual. In my view, the major impetus behind modern aversion to the death penalty is the equation of private morality with governmental morality. This is a predictable (though I believe erroneous and regrettable) reaction to modern, democratic self-government.
\end{quote}
\item \textsuperscript{365} Although the Bible does contain various calls for the death penalty, the best reference to my mind comes directly from the namesake of the religion. When
\end{itemize}
second and more substantial problem with religious arguments that support the death penalty is that it makes an assumption that the 'rule of law' can be based on any one specific religion. Although many of the founding fathers were Christians, they also built into the Constitution important protections against the interference of religion with law.\textsuperscript{366} It flies in the face of religious freedom to say that one religion's idea of the death penalty should be upheld, as opposed to other interpretations or other religions that argue for abolition. Under the death qualification system, those whose religion and morals are opposed to the death penalty are excluded from jury service based on their religion and morals.

It is clear that potential jurors are reasonable if they are opposed to the death penalty. A reasonable juror is a good juror. The process of death qualification, in removing reasonable jurors for cause, violates the rights of \textit{all persons}, even those who support the death penalty. Sometimes innocent people are tried for death penalty crimes, and these people have the right not to the best individual jury possible, but to the best possible process of drawing a jury. Death qualification interferes with this right. Furthermore, death qualification removes jurors from death penalty cases based on issues that have nothing to do with the facts of the cases. In allowing this, we run the risk that the same policy could be extended to other cases, thus making all jury formation processes less fair. This would directly counter the Sixth Amendment guarantee of trial by "an impartial jury."\textsuperscript{367}

In conclusion, it is clear that the rule of law, both internationally, and internally, cannot be said to clearly support the continuation of the death penalty. All citizens are complicit with

\textsuperscript{366} U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .")

\textsuperscript{367} U.S. CONST. amend. VI.
the death penalty, and the majority should not force the minority to bear this complicity. Not only is the death penalty applied unfairly by race and class, but the very same groups that bear the greatest burden from execution are also often the most likely to be excluded by death qualification. The supporters of the death penalty impose economic, social, developmental and moral harm on the rest of the country in exchange for falsely perceived moral gains.