The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation

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I. INTRODUCTION

The executioner performs a profound task, incomparable to other punishments in significance and in permanence. A death sentence is "unusually severe . . ., unusual in its pain, in its finality, and in its enormity. . . . Death, in these respects, is in a class by itself." As a result, the state undertakes a heavy burden when it dons the executioner's mask. In addition to determining that both the crime and the condemned deserve death, the State must craft machinery that will make these determinations fairly.

Capital punishment abolitionists argue both that the death penalty is necessarily undeserved and that the system governing its administration is

Thus, states' discretion in this arena is not unlimited. See, e.g., id. at 592 (holding that the U.S. Constitution forbids a death sentence for the rape of an adult woman).
3. See, e.g., DEL. CODE ANN. tit. 11, § 4209(c)(3)(a)(2) (2001) (listing "character and propensities of the offender" as considerations in setting punishment for first-degree murder); OHIO REV. CODE ANN. § 2929.04(B) (West 1997 & Supp. 2006) (listing "history, character, and background of the offender" as considerations in imposing death penalty). Once again, it is the Supreme Court's interpretation of the Federal Constitution that ultimately guarantees this practice. "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (footnote and emphasis omitted). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") (citation omitted).
4. As Justice Douglas wrote in Furman v. Georgia:
The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.
408 U.S. at 256 (Douglas, J., concurring).
5. See, e.g., Bryan Stevenson, Close to Death: Reflections on Race and Capital Punishment in America, in DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? THE EXPERTS ON BOTH SIDES MAKE THEIR BEST CASE 76, 76 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) ("[E]ach of us is more than the worst thing we've ever done.").
inherently unfair. But even those who favor capital punishment—those principled executioners who advocate for the death penalty in good faith—surely would be appalled to discover a thumb on the scale of their machinery. And yet the practice of death-qualifying capital juries—the way in which we question prospective jurors to ensure that their views concerning the death penalty would not interfere with their ability to serve—lays just such a thumb on the prosecutor’s side of the scale. Long-suspected, later presumed, and recently reconfirmed, this practice of death qualification skews capital juries towards both guilt and death.

Recent efforts to ameliorate death qualification’s bias have been stymied, principally by statutory unitary jury requirements like the one found in the Federal Death Penalty Act (“FDPA”). Statutes like these, which require that the same jury that determined guilt also determine punishment, combine with prevalent death qualification practices to unconscionably disadvantage defendants.

This article calls on all principled executioners to insist on reform. Part II points to recent events, signaling strongly that now is the right time to bring increased fairness to existing capital punishment procedures. Part III explains the issues at stake, provides a brief primer on our current processes, and lays bare some of the mechanisms that unfairly disadvantage defendants.

6. Id. at 78 (“[C]apital punishment in America is a lottery . . . that is shaped by the constraints of poverty, race, geography, and local politics.”).

7. “[If] the juror’s views [on the death penalty] would ‘prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath,’” then that juror may be excused for cause. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

8. See infra Part III.B.1.


10. See infra Part III.B.3.

capital defendants. Part IV explores the unitary jury requirement, noting the double-bind in which it places defendants. Death-qualifying a unitary jury before the conviction stage asks jurors to presume the defendant is guilty before the trial has even begun. Waiting to death-qualify the unitary jury until after conviction, on the other hand, means that jurors will be asked about their willingness to impose death after having heard every grisly detail of the crime, but not a scrap of evidence in mitigation. Part IV then considers the arguments for and against the unitary jury's alternative of true bifurcation. Ultimately concluding that the only real barrier to the improved fairness true bifurcation offers is the unitary jury requirement itself, this article advocates for the requirement's repeal.

II. GATHERING FORCES

"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." The Court uttered this stirring assessment of the state of death qualification in 1968, and yet so very little has changed since then. As revealed by the Herculean research effort of the Capital Jury Project—interviewing approximately 1200 jurors who collectively served on over 350 capital trials in fourteen states—the death qualification process today still seats juries uncommonly willing to find guilt and uncommonly willing to mete out death.

Recent events, however, demonstrate that attention to the death penalty in general—and to the interaction of the unitary jury requirement with present death qualification procedures in particular—is rising. The Illinois moratorium in the year 2000 brought tremendous public attention to the horror of executing innocent persons. Shocked that his state had sentenced thirteen innocent people to death—and that journalism students proved one of these men to be innocent less than two days before the State would have killed him for a crime he did not commit—Illinois Governor George

14. See id. at 84–86.
16. Id.
Ryan declared a moratorium on executions in Illinois on January 31, 2000. The governor announced that he “cannot support a system . . . so fraught with error [that it] has come so close to the ultimate nightmare, the state’s taking of innocent life.” Numerous states initiated probes into their own death penalty schemes, while cries for DNA evidence and other protections flooded the country.

Undoubtedly affected by the tenor of the times, when Mitt Romney ran for Massachusetts Governor as a tough-on-crime conservative, he promised to bring capital punishment back to the Commonwealth, but in a “failsafe” form. Following his election, he appointed a blue-ribbon “Governor’s Council on Capital Punishment” (“Governor’s Council”) in 2003. Governor Romney charged this group with developing the promised law. Apparently unwilling to guarantee its recommendations completely failsafe, the Governor’s Council nevertheless was only slightly more modest: it declared its finished product “as infallible[] as humanly possible.”


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18. Id. In 1997, the American Bar Association recommended that every jurisdiction with a death penalty declare a moratorium “until the jurisdiction implements policies and procedures . . . intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.” AM. BAR. ASS’N, MORATORIUM RESOLUTION, DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT (1997), available at http://www.abanet.org/moratorium/resolution.html.


23. Id.


25. Id.

26. The 4th Annual Year in Ideas, N.Y. TIMES, Dec. 12, 2004 § 6 (Magazine), at 49. In an entry entitled The Foolproof Death Penalty, author Emily Bazelon summarizes the Report’s provisions:

[E]xecute only the “worst of the worst.” . . . Pay for top-notch defense lawyers. Caution juries about the questionable value of confessions, eyewitness identifications and testimony by jailhouse snitches. Require scientific evidence to corroborate guilt, with DNA matches as the benchmark. Set up an independent panel to watch out for crime-lab errors.
and Indiana University Law School hosted a symposium dedicated to discussing its suggestions. Among the provisions of this intended "national model," which Governor Romney filed with the Massachusetts Legislature in the spring of 2005, were proposed changes to the current system's unitary, death-qualified jury. Although the Massachusetts House ultimately rejected the bill, the spotlight on unitary, death-qualified juries continued to grow across the country in 2005. In that year, three circuit courts ruled on their respective trial judges' bifurcation of capital juries into (1) non-death-qualified, guilt-phase juries and (2) death-qualified, sentencing-phase juries. During this same timeframe, as illustrious a person as U.S. Supreme Court Justice John Paul Stevens invoked the name of Thurgood Marshall at an American Bar Association awards dinner where he publicly condemned the nefarious effects of a unitary, death-qualified jury.

Create a death-penalty-review commission. And base death sentences on a "no doubt" standard of proof.

Id. at 73. Arguing that with such copious protections, the statute must be "solely symbolic," Professor Franklin Zimring opined, "We have entered the postmodern era of death-penalty discourse." Id. at 27.

Symposium: Toward a Model Death Penalty Code: The Massachusetts Governor's Council Report, 80 IND. L.J. 1 (2005). The Conference was held in Bloomington on September 10-11, 2004. Id. at i.

Helman, supra note 22.


Legislators voted against the bill by an almost two-to-one margin (defeated 100 to 53). Helman, supra note 22. Representatives were quoted as voting against the bill because capital punishment necessarily carries the risk of mistakenly putting an innocent person to death. See id. "[T]here never can be certainty." Id. (quoting Rep. Eugene L. O'Flaherty). "Nothing in life is foolproof." Id. (quoting Rep. Daniel E. Bosley). Perhaps trying to minimize a foreseeably negative outcome for his initiative, the day before the vote it was said of Governor Romney that:

although he still believes that reinstating the death penalty is important, he does not consider it as critical as making strides in healthcare, education, job creation, and auto insurance reform. "The death penalty is not at the highest level," he told reporters after testifying on auto insurance before a legislative committee.

Id.


Finally, the U.S. Supreme Court in its spring 2006 term dashed the hopes of capital defendants who would have claimed a federal constitutional right to present additional residual doubt evidence at sentencing with its ruling in Oregon v. Guzek.34 Residual doubt, or the jurors’ lingering fear that the defendant may not be guilty after all, is the most potent mitigator in capital cases,35 and therefore has held sway as one of the most powerful considerations in the unitary jury debate. Although the Court rejected Guzek’s claim, it left the door to a very limited federal constitutional right to present residual doubt evidence open just a crack.36 Whether future cases close the door completely or not, however, residual doubt will continue to exert its powerful influence in those states that choose to permit defendants to argue it at sentencing. In any event, Guzek’s high profile provides yet another reason this is a propitious time to advocate repeal of the unitary jury requirement.

The time is right for action. While abolition may be out of reach in the current political climate,37 principled executioners should be rushing to lighten the thumb that the unitary, death-qualified jury lays on Lady Justice’s scales.

III. THE ISSUES AT STAKE

A. Death Qualification’s Ostensible Function

Some people oppose the death penalty so fervently that they would go to almost any length to avoid contributing to a death sentence. If their opposition is so strong that they are unwilling to risk any possibility that

35. Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1563 (1998) (“[T]he best thing a capital defendant can do to improve his chances of receiving a life sentence... is to raise doubt about his guilt.”).
36. Guzek, 126 S. Ct. at 1232–33; See also id. at 1233–34 (Scalia, J., concurring) (objecting to the fact that the court left this open).
37. Whether an accomplishable improvement in fairness to capital defendants helps or hurts the long-term goal of abolition is debatable: the more fair the system becomes, the more palatable capital punishment becomes as a concept, and therefore the less likely it is to be abolished. However, even an incremental increase in fairness could save lives, and the goal of abolition seems very far away regardless of how fairly the system is administered. Fundamentally, though, abolition is embraced by “principles that would be controlling even if error never infected the criminal process.” Justice John Paul Stevens, supra note 33. For more information on capital punishment, see, for example, Cornell Death Penalty Project, Defense Resources, http://www.lawschool.cornell.edu/library/death/links.html, and Death Penalty Information Center, http://www.deathpenaltyinfo.org.
someone may be sentenced to death, they are what are known as “nullifiers.” These are individuals who would refuse to convict of a death-eligible crime despite evidence at trial convincing them beyond a reasonable doubt of the defendant’s guilt on that score.

Professor Hans Zeisel encapsulates the “long and distinguished history” of jury nullification by recounting: “When English law still had the death penalty for such crimes as stealing 40 shillings or more from a dwelling house, the jury would often convict of stealing 39 shillings even if what was stolen was a five pound note.”

A guilty verdict on the crime actually committed would make the death penalty a possibility. If the verdict for that crime is “not guilty,” on the other hand, then there can be no question of a death sentence. For nullifiers, removing any possibility of a death sentence is the most important thing.

Though certainly effective at avoiding death sentences, jury nullification is plainly a less-than-ideal mechanism for achieving justice in the broader context of crime and punishment. The more common jury nullification becomes, the more it undermines society’s confidence in the criminal justice system as a whole.

For this reason, most death penalty opponents prefer accurate convictions, but simply reject death as an available punishment option. If convinced beyond a reasonable doubt that the defendant were guilty of a death-eligible crime, these individuals would vote to convict. What they would not do is consider death as a potential sentence. Instead, these jurors would impose a life sentence automatically.

For them, there would be no alternative to consider. To distinguish these jurors from those who would refuse to convict of a death-eligible crime in the first place, this second kind of juror is known not as a “nullifier,” but as an “excludable.”

Prosecutors for the government long ago succeeded in convincing the United States Supreme Court that they were entitled to a jury free of both nullifiers and excludables. Seating jurors who would refuse either to convict

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38. HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 3 (1968) (citing LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 154 (1948)).

39. See, e.g., Nancy S. Marder, The Myth of the Nullifying Jury, 93 NW. U. L. REV. 877, 907 (1999) (explaining the conventional wisdom that “nullification is a threat...to the premise of the judicial system, which is that laws should be applied uniformly”). But see id. at 958–59, for Marder’s critique of this conventional view.

40. For ease of reference, this article limits discussion of possible sentences to life and death, but naturally states may craft alternative sentences if they so choose. See, e.g., Spaziano v. Florida, 468 U.S. 447, 464 (1984) (noting that there is not “any one right way for a State to set up its capital sentencing scheme”).
of a death-qualified crime or to consider death as a possible punishment subverts the system. The State may demand that each juror “be willing to consider all of the penalties provided by state law.” Death qualification was born.

These same considerations govern what is known as “life qualification,” wherein prospective jurors are questioned to be sure they are willing to consider a life sentence. Just as a juror who will refuse to consider the evidence for a death sentence “is not an impartial juror and must be removed for cause,” so too is a juror who will refuse to consider the evidence for a life sentence. Hence, prospective jurors in capital cases are asked about these matters. If their feelings—in either direction—would interfere with their ability to follow their instructions and consider the evidence, then they should not sit, and are removed for cause.

B. “The Pink Elephant in the Room”: Capital Juries’ Bias in Favor of Guilt and Death

This much is all very sensible, and the principled executioner may rest comfortably, secure in the knowledge that the mechanisms for achieving justice are well-oiled and operating as intended. After all, who would argue with the idea that jurors in capital cases, like jurors in all cases, should be composed solely of those who will follow their instructions and the law, and who will consider all of the evidence presented throughout the trial? The difficulty lies in the execution: “A lot of the fighting over death qualification is related to the pink elephant in the room, which is that death qualification helps the prosecution win the case. It just does. They like it. I understand. I prefer winning, too. But that’s not supposed to be their function.”

One might hesitate to believe that prosecutors would put aside their ethical obligation to seek justice under the siren song of a winning trial.

41. Lockhart v. McCree, 476 U.S. 162, 172 (1986) ("[N]ullifiers' may properly be excluded from the guilt-phase jury. . .").
42. Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (excluding those who "would not even consider" death penalty would have been permissible).
43. Id. at 522 n.21.
45. Id. at 728.
46. Id. at 729.
record. Surely to the extent that most prosecutors would be affected at all, they would be affected only at an unconscious level. Or at the very least, they would be motivated by a genuine belief that the defendant is guilty and deserves death, and that therefore there is no conflict between seeking justice and winning.

Unfortunately, though, every barrel has its bad apples. A now-infamous training tape by one Philadelphia homicide prosecutor brings this point home starkly. In that tape, Jack McMahon explains, “The case law says that the object of getting a jury is to get . . . a competent, fair, and impartial jury. Well, that’s ridiculous. . . . [You want] to get jurors that are as unfair, and more likely to convict than anybody else in that room.”

Even leaving such rhetoric aside and presuming the good will of those who instituted death qualification, the ostensible function of the process has been overshadowed by its practical effects. Death qualification in fact does skew juries in favor of the prosecution, toward both guilt and death. Fifty years after these odious effects of death qualification became well-known, the time has come to face them.

1. Early Studies

Professor Zeisel’s 1957 “Confidential First Draft” entitled “Some Insights into the Operation of Criminal Juries” reported data on the guilt bias of death-qualified capital juries. “[I]nformal circulation” led to his data’s inclusion in “a number of [death penalty] appeals.” Among these was the Supreme Court decision Witherspoon v. Illinois. Petitioner Witherspoon pointed to Zeisel’s work, together with some other studies from the late 1950s and early 1960s, to illustrate the prosecution-proneness of death-qualified jurors. As the Court represented Witherspoon’s argument:

The petitioner contends that a State cannot confer upon a jury selected in this manner the power to determine guilt. He maintains that such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the

51. Zeisel, supra note 38, at 24 n.19.
52. Id.
54. Id. at 517 n.10.
prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant’s innocence, accept the prosecution’s version of the facts, and return a verdict of guilt.⁵⁵

The majority of the Court, however, was not convinced. It declared petitioner’s data “too tentative and fragmentary” to serve as the basis for constitutional judgment.⁶⁶

After Witherspoon, social scientists continued their studies. The bulk of that “tentative and fragmentary” data was published⁵⁷ and the experiments continued. Professor Welsh S. White surveyed additional post-Witherspoon work in 1973,⁵⁸ concluding that “[t]he new data provide relatively clear and reliable information” to support the prosecution-proneness argument made in vain in Witherspoon.⁵⁹

Among other things, those studies demonstrated that excluding jurors who oppose the death penalty strips almost a quarter of prospective jurors from the pool.⁶⁰ They showed that the near quarter in question comes disproportionately from the ranks of blacks and women.⁶¹ And they brought to light the fact that the jurors who remain are more likely to harbor impermissible, pro-prosecution beliefs such as: “If the police have arrested an individual and the district attorney has brought him to trial, there is good reason to believe that the man on trial is guilty,” and “If the person on trial does not testify at his trial, there is good reason to believe that he is concealing guilt.”⁶²

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⁵⁵. Id. at 516–17.
⁵⁶. Id. at 517.
⁵⁹. Id. at 1187–88.
⁶⁰. Id. at 1187.
⁶¹. Id.
⁶². Id. at 1184 n.46 (quoting Bronson, supra note 57, at 7–9). See also id. at 1186 & n.54 (citing Louis Harris et al., Study No. 2016, at 3d (1971) [hereinafter Harris Poll] (confirming
Throughout the 1970s and early 1980s, social scientists added more data to the growing collection. *Hovey v. Superior Court* recited in detail many additional studies; all once again confirmed these findings. In addition, *Hovey* discussed a further concern: death qualification’s homogenization of the jury decreases accuracy in fact-finding. Referring to “[t]estimony from the hearing below, as well as studies in social psychology,” the Court explained:

The members of a homogeneously composed jury are more likely to perceive evidence in a similar fashion. . . . [In addition,] diversity provides a corrective to the distortions which can occur when the evidence presented at trial is inconsistent with the preconceptions of some members of the jury. . . . [Finally,] particular behavior can have dramatically different meanings to members of different subcultures. A jury with diverse membership with [sic] recognize a fuller range of possible meanings or explanations for particular behavior, and, it will be able to evaluate those possible meanings in light of the diverse experiences of the panel members regarding values, norms, behavior, motivation, and psychology.

In other words, similar people tend to see evidence the same way, whereas people with different backgrounds and different world-views may see the same piece of evidence differently. There is a tendency to see what we expect to see, to understand our perceptions as congruent with the framework already entrenched in our own minds.

similar prosecution-prone attitudes more prevalent among the death-qualified). Details of the Harris Poll are reproduced in *Hovey*, 616 P.2d at 1321–23.

63. 616 P.2d 1301 (Cal. 1980).


66. *Id.* at 1312.

67. *Id.* at 1313.

Professor Cass Sunstein provides a pithy example of this phenomenon: "[P]eople may believe that gun ownership is not dangerous because their own experience, and that of their acquaintances, supports that belief; for such people, it will take a great deal of evidence to justify the conclusion that guns are not safe." Additional illustrations abound. For instance, a man raising a beer bottle over his head and hollering "bitch" at his wife is ambiguous by itself: is the bottle a weapon, upraised in imminent attack, or is it simply a request (less than charming, certainly, but not physically threatening) for another beer? Jurors' own experiences and backgrounds will make one explanation more intuitive than the other. The benefit of a jury composed of people from diverse backgrounds is that the chances for a full discussion of all possible explanations increases. With a homogenous jury, whichever explanation seems most intuitively likely to one will seem most intuitively likely to all, and the alternative—even if the alternative is the accurate explanation—may never even be considered, simply because no jurors were able to see it as a real possibility.

Thus, the known data to this point raised a number of very serious concerns: death qualification makes juries more conviction-prone, more death-prone, less representative, and less accurate in fact-finding. Nevertheless, social scientists harbored no illusions about the Supreme Court's likely reception to their data. When further surveys by Joseph E. Jacoby and Raymond Paternoster provided still more support for the skewing effects of death qualification, these professors summed up their work by saying:

[D]eath-qualification . . . appear[s] to produce juries biased towards both convictions and the death penalty and disproportionately exclude[s] blacks from serving on capital juries. When one considers how long it took the Supreme Court to recognize the more obvious forms of discrimination, the prospects for addressing the[se] more subtle forms are not good.

69. Id. at 1119 n.39.
72. Id. at 387.
2. *Lockhart v. McCree’s Challenge*

The landmark case of *Lockhart v. McCree*\(^{73}\) came along in 1986. The defendant, Ardia McCree, had been tried and convicted by a death-qualified jury of killing a convenience store owner during a robbery.\(^ {74}\) McCree filed a habeas corpus petition on the grounds that removing those prospective jurors who were not death-qualified created a jury partial to the prosecution; for this proposition, he relied on the much-expanded list of studies outlined in the prior section.\(^ {75}\) The resulting prosecutorial bias, he argued, had denied him his constitutional rights under the Sixth Amendment’s fair cross section requirement and his right to an impartial jury.\(^ {76}\)

By this time, the United States Supreme Court was willing to “assume” the validity of the social science studies.\(^ {77}\) Despite assuming “that the studies are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries [the Court held] nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”\(^ {78}\)

The Supreme Court’s declaration that death qualification is constitutionally permissible even if the studies are true should have rendered the studies’ validity moot. However, the Court raised a specter of hope—and ensured a vigorous response by the social science research community—when it nevertheless devoted more than four pages of its opinion to discrediting those underlying studies.\(^ {79}\)

First, the *McCree* Court declared all but six of the fifteen cited studies to be “at best, only marginally relevant,” dealing as they did with “generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system,” and “the effects on prospective jurors of *voir dire* questioning about their attitudes toward the death penalty.”\(^ {80}\) Why the relevance of these points is marginal is left unexplained.

The Court then proceeded to attack the remaining six studies:

Of the six . . . three were also before this Court when it decided *Witherspoon*. . . . It goes almost without saying that if these studies

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73. 476 U.S. 162 (1986).
74. *Id.* at 165–66.
75. *Id.* at 169–170 nn.4–6 (listing the studies on which McCree relied).
76. *Id.* at 167.
77. *Id.* at 173.
78. *Id.*
79. *Id.* at 168–173.
80. *Id.* at 169.
were “too tentative and fragmentary” to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.\textsuperscript{81}

This struck social scientists as an appallingly cavalier disregard for the worth of publication, peer review, and convergence on the same findings of multiple studies.\textsuperscript{82} As Professors Marla Sandys and Scott McClelland explained:

\begin{quote}
[T]he \textit{McCree} opinion reflects a fundamental misunderstanding of one of the basic concepts taught in every introductory research methods class: convergent validity. There is no such thing as a perfect study. Rather, knowledge is accumulated, and confidence in a finding established, when numerous different researchers, employing different methods and materials, produce a similar pattern of findings. That clearly was the case with the research presented to the Court in \textit{McCree}.\textsuperscript{83}
\end{quote}

Regardless, the Supreme Court thereby triandily reduced the number of studies propounding undesirable facts from fifteen to three, and so turned its attention to the three studies remaining. Unsurprisingly, it declared each of them flawed as well. Because the studies used random sampling techniques rather than “actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant,” the Court had “serious doubts about the value of these studies in predicting the behavior of actual jurors.”\textsuperscript{84} Combined with these studies’ general failures to “even attempt to simulate the process of jury deliberation”\textsuperscript{85} or to “identify and account for the presence of so-called ‘nullifiers,’”\textsuperscript{86} the Court declared these studies “fatally” and “fundamentally flawed.”\textsuperscript{87} In other words, three main failures motivated the Supreme Court’s dissatisfaction with these studies: (1) the failure to use actual jurors; (2) the failure to allow for the group-dynamic influence of jury deliberation; and (3) the failure to

\begin{footnotes}
81. \textit{Id.} at 170–71.
83. \textit{Id.}
84. \textit{McCree}, 476 U.S. at 171.
85. \textit{Id.}
86. \textit{Id.} at 172.
87. \textit{Id.} at 172–73.
\end{footnotes}
account for the presence of nullifiers in the sample population, as opposed to the lack thereof on a real jury.\textsuperscript{88}

Undaunted, the research community rallied to the challenge.

3. The Capital Jury Project’s Answer

In 1990, with leadership by Professor William J. Bowers,\textsuperscript{89} legwork by a tremendous number of university researchers,\textsuperscript{90} and funding by the National Science Foundation,\textsuperscript{91} the Capital Jury Project ("CJP") was formed.\textsuperscript{92} Among its missions: to generate "a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions."\textsuperscript{93}

Broader in scope than any empirical study previously attempted, the CJP addresses each of the Court’s articulated dissatisfactions. First, the CJP studies actual jurors—1201 actual jurors from 354 actual cases\textsuperscript{94}—thus assuaging the McCree Court’s “doubts about the value of these studies in predicting the behavior of actual jurors."\textsuperscript{95} Second, because the CJP studies actual jurors, it necessarily studies those whose decisions were influenced by their peers through the mechanism of jury deliberation.\textsuperscript{96} Finally, because the CJP studies actual jurors, this research data remains uncontaminated by the influence of nullifiers, who would have been excused from service at \textit{voir dire}.\textsuperscript{97}

After carefully controlling for each of the McCree Court’s concerns, the CJP data nevertheless invariably confirms what Professor Zeisel’s study showed back in the 1950s: The death qualification process today still seats

\begin{footnotes}
\item[88] Id. at 171–73.
\item[89] Bowers & Foglia, supra note 13, at 51 n.5.
\item[91] Bowers & Foglia, supra note 13, at 51 n.5.
\item[93] Bowers, supra note 90, at 1101.
\item[94] Bowers & Foglia, supra note 13, at 51.
\item[95] Lockhart v. McCree, 476 U.S. 162, 171 (1986).
\item[96] See id. at 171–72 (emphasizing that studies failed to account for jury deliberation).
\item[97] See id. at 172–73 (emphasizing that almost all studies failed to account for nullifiers).
\end{footnotes}
juries uncommonly willing to find guilt, and uncommonly willing to mete out death.98 "Capital jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution."99

The process of death qualification skews capital juries toward guilt and death through complementary mechanisms. As Supreme Court Justice John Paul Stevens recently said:

Two aspects of the process of selecting juries in capital cases are troublesome. In case after case many days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant. More significantly, because the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.100

Taking Justice Stevens’s points in reverse order: First, the death voir dire shrinks the jury pool. This shrinkage alters the composition of capital juries by siphoning away citizens with defense-friendly dispositions in favor of seating those who are more prosecution-oriented. This ensures that death-qualified juries do not accurately reflect the myriad backgrounds, experiences, and perspectives of a jury of one’s peers, but instead are composed of only a certain select kind of juror—the kind who favors the prosecution. Second, exposure to the death voir dire itself causes those who undergo it to become more likely to convict and more likely to vote for death than they would have been without the experience. Taken together,
these effects highlight the powerfully flawed nature of our capital punishment system.

After over fifty years of empirical research, the reality of these effects cannot be doubted. Regardless of any expressed skepticism on the part of the United States Supreme Court that death qualification in fact improves a prosecutor's odds of conviction, the prosecutors themselves clearly count themselves among the converted. For example, they have a predilection for initially seeking the death penalty in circumstances that all would agree do not seem to merit it, only to drop the capital specification once the jury has been death-qualified. The case of Andrea Yates provides one such instance:

Many observers were shocked when the district attorney prosecuting Andrea Yates, the Texas mother who drowned her five children in a bathtub, announced his intent to pursue the death penalty against her. Obtaining capital punishment for a woman with known psychiatric problems who is accused of killing her children is almost unheard of. The decision was met by some defense attorneys, however, with little surprise: "They may just be trying to get a death-qualified jury to ensure a conviction." Sure enough, once prosecutors secured a conviction, their aggressive pursuit of the death penalty transformed into an endorsement of a life sentence instead.

The knowledge that prosecutors, who are charged with the loftier goal of pursuing justice, rather than winning convictions, would manipulate the system in this way should, at the very least, discomfit the principled executioner. But those prosecutors who are convinced in the guilt of the

101. White, supra note 58, at 1177.
102. Id. at n.7.

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Id.
person charged may not feel any twinge at their use of what amounts to a practical and effective strategy for winning convictions.

Determining whether a given jury is too prosecution-prone, not prosecution-prone enough, or, like Baby Bear's porridge, "just right," may appear to be a fool's errand. With respect to convictions, of course, if we knew which defendants were actually guilty, we would not need a trial. An objective check on the appropriate degree of willingness to impose a death sentence seems equally elusive: "There is not a DNA test for moral judgment. We can't take a defendant, take a drop of [his] blood, and say, 'Oh, yes, the jury got it right that you deserve to die,' or 'the jury got it wrong that you deserve to live.'" We can, however, investigate whether the safeguards the law imposes in capital cases are being implemented. The Capital Jury Project did just that and—far from contradicting the previous fifty years of social science evidence demonstrating the prosecutorial bias of death-qualified juries—CJP researchers have discovered numerous areas that profoundly deepen the cause for concern.

This article focuses on only three: the prevalence of automatic death penalty voters on capital juries; capital jurors' fundamental misunderstandings concerning mitigation; and their presumptions, inculcated before the trial even begins by the very fact of being asked the death qualification questions, that the defendant is guilty and must be sentenced to death.


109. Perhaps the most shameful of the areas in which the CJP data sheds new light is the continued influence of race on capital punishment. The stark victim's race data is old hat: among all capital defendants, those who kill white victims receive the death penalty 8.3 times more often than those who kill black victims; among black capital defendants, those who kill white victims receive the death penalty 21 times more often than those who kill black victims. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 314–15 (1990). Capital Jury Project researchers also uncovered "white male dominance" and "black male presence" effects in cases with a black defendant and a white victim, which powerfully predict the likelihood of death verdicts. Bowers & Foglia, supra note 13 at 77. The likelihood of a death sentence rocketed from 30% with four or fewer white male jurors to 70% when the jury included five or more white males, while the presence of a single black man deflated the likelihood of a death sentence from over 70% for juries without any black men to under 40% for those with. Id. In addition, the CJP data demonstrates that jurors' interpretations of the very same evidence differed wildly based on race. Id. at 77–80. See also supra text accompanying notes 70–75. This data, together with the vast amounts of CJP data
a. Automatic Death Penalty Voters

Morgan v. Illinois\(^1\) requires that jurors be life-qualified as well as death-qualified.\(^2\) “Life qualification” requires a willingness to consider a life sentence: “Any juror to whom mitigating factors are . . . irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.”\(^3\) Despite this, the CJP has demonstrated that our real-world juries in fact include an astonishing number of “automatic death penalty”\(^4\) voters, whose opinions about punishment do not depend on the evidence offered at sentencing, but instead are triggered simply by the fact of conviction.\(^5\)

Seating these jurors violates the law,\(^6\) but our present mechanism clearly fails to prevent it. Again, CJP respondents are all actual jurors who served on actual capital cases and therefore underwent at least some sort of vetting to ensure that they were willing to consider a life sentence. Across the board, however, these actual jurors explained that “the death penalty is the only acceptable punishment” for a variety of death-eligible murders.\(^7\) Over 70% of CJP jurors felt that death “was the only acceptable punishment” for murders committed by a defendant with a prior murder conviction.\(^8\) Almost 60% agreed that death was the only acceptable punishment for “planned or premeditated murder.”\(^9\) Other categories included murders where the victim was “a police officer or prison guard,” murders involving “multiple victims,” and murders “committed by a drug dealer”; approximately half of the jurors felt that death was “the only acceptable punishment” in these situations.\(^10\) There was a considerable amount of overlap, as well: just shy of 30% of these jurors asserted that death was the only acceptable punishment for all of the above.\(^11\) Even felony murder (“a killing that occurs during another crime”), the category

\(^{10}\) 504 U.S. 719 (1992).
\(^{11}\) Id. at 735 (“such jurors—whether they be unalterably in favor of, or opposed to, the death penalty in every case—by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding”).
\(^{12}\) Id. at 739.
\(^{13}\) Bowers & Foglia, supra note 13, at 60–61.
\(^{14}\) Id.
\(^{15}\) Morgan, 504 U.S. at 739.
\(^{16}\) Bowers & Foglia, supra note 13, at 62 & n.60.
\(^{17}\) Id. at 62.
\(^{18}\) Id.
\(^{19}\) Id. at 62–63.
\(^{20}\) Id. at 62.
least likely to prompt jurors to state that death was the “only acceptable punishment,” garnered 24%.121

The numbers of automatic life penalty voters seated on capital juries are drastically different, with 2–3% of jurors responding that “the death penalty [i]s unacceptable” for five of the six scenarios presented, and a high of just under 7% agreeing that death was an unacceptable punishment for felony murders.122 On a twelve-person jury, then, anywhere from two to eight of the members seated are likely to be automatic death penalty jurors,123 while less than one will be an automatic life penalty juror.124 To say the least, these numbers call into question the previously-accepted wisdom that, excluding nullifiers, the ratio of automatic death penalty voters to automatic life penalty voters is 1:36.125

It seems unlikely that jurors are intentionally lying about their willingness to follow the judge’s instructions to consider the evidence at trial and then coming clean about it with researchers after the fact. More likely, the shockingly high number of automatic death penalty jurors seated on capital trials results from a number of factors. First, automatic life penalty voters (those who would fail to death-qualify for their failure to consider death as a possible punishment) tend to have come to their positions through conscious reflection. Presuming candor at voir dire, these individuals may readily be identified for exclusion; they know themselves. In contrast, it seems likely that many automatic death penalty voters simply do not realize that is their position. Presuming equal candor at voir dire (perhaps a naïve assumption),126 automatic death penalty voters will be harder to identify as a result.

A general lack of knowledge about capital crimes, and a corresponding general lack of knowledge about the process of choosing between a sentence of life and a sentence of death,127 contributes to this disparity. Most

121. Id.
122. Id.
123. See supra text accompanying notes 117–21.
124. See supra text accompanying note 122.
125. Rick Selzter et al., The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example, 29 How. L.J. 571, 606 (1986). See also Adams v. Texas, 448 U.S. 38, 49 (1980) (asserting that those excluded under life qualification “will be few indeed as compared with those excluded because of scruples against capital punishment”).
126. See Andrea D. Lyon, The Negative Effects of Capital Jury Selection, 80 Ind. L.J. 52, 53 (2005) (“It’s been my experience that people who oppose the death penalty tend to be pretty honest about it, but people who support it tend to lie and will say upon rehabilitation, ‘oh, sure, I’ll consider mitigation if the judge tells me to.’”). See also Andrea D. Lyon, The Capital Jury, Open Discussion, 80 Ind. L.J. 60, 61 (2005) (noting that to discern automatic death penalty voters “you have to ask really specific questions”).
127. Bowers & Foglia, supra note 13, at 63 n.61.
people presumably believe themselves to be open-minded, and willing to consider the evidence for or against a death sentence. But when asked to give examples of situations where "they would not vote for the death penalty," actual capital jurors offered the following:

- war time
- children playing with a gun
- hunting accident
- [i]f the guy was not guilty

Jurors' unwillingness to impose a death sentence in these circumstances is reassuring since, generally speaking, they are not crimes. Thus, while automatic life penalty voters systematically are swept from capital juries, automatic death penalty voters regularly are overlooked and seated.

The prevalence of automatic death penalty voters on capital juries takes on even greater weight when combined with a related, equally troubling factor prevalent among that group: premature decision-making. Nearly half of the CJP respondents admitted to deciding the proper punishment before they had heard a single piece of evidence on the issue of punishment. Of these, the overwhelming majority were "absolutely convinced" and almost all of those remaining were "pretty sure." Less than 5% chose "not too sure."

Even though most prosecutors surely want a jury composed of individuals who will thoughtfully consider all of the evidence before making up their minds, the fact of the matter is that our capital juries are composed mostly of Philadelphia prosecutor Jack McMahon's dream jurors. As he put it in his training tape:

> You don't want smart people. You do not want smart people. . . . Because smart people will analyze the hell out of your case. They have a higher standard. . . . They take those words "reasonable doubt" and they actually try to think about 'em . . . You don't want people that are gonna think it out. . . . You want people who come in there and say, "Yup, she said he did it, he did it." 

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128. Sandys & McClelland, supra note 82, at 400.
129. For the argument that this systematic sweeping in fact overexcludes, and removes many more persons as death penalty opponents than the law permits, see Susan D. Rozelle, The Utility of Witt: Understanding the Language of Death Qualification, 54 BAYLOR L. REV. 677, 682-90 (2002).
131. Id. at 426.
132. Id. at 427.
133. Id.
134. Audio tape: Jury Instruction with Jack McMahon, supra note 50.
Sadly for society as a whole, and tragically for the individual defendants so convicted, the CJP reveals that these are exactly the jurors who are chosen to sit on death penalty cases.

b. Fundamental Misunderstandings Concerning Mitigation

Fundamental misunderstandings about the role of mitigation comprise the second area in which CJP data demonstrates the prosecution-proneness of the capital jury. For example, approximately half of the CJP jurors wrongly believed that mitigators had to be proven beyond a reasonable doubt and that no mitigator could affect the punishment decision unless jurors agreed on it unanimously.135 Half also wrongly believed that a death sentence was required if the jurors found that the crime was “heinous, vile or depraved” or that “the defendant would be dangerous in the future.”136 In other words, if the crime was legally eligible for a death sentence, half of the jurors believed that a death sentence was mandatory.137 Naturally, this contradicts Woodson v. North Carolina,138 which held that mandatory death sentences violate the Eighth Amendment for their failure to “require[] consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”139 Without a doubt, these beliefs lead to a jury that is more prosecution-prone than it ought to be.

c. Presumptions of Guilt and Death

Finally, not only is it true that “the more a person favors the death penalty, the more likely he or she is to favor conviction,” but the process of being death-qualified—simply being asked the death qualification voir dire questions—actually magnifies this effect.140 This magnification effect makes sense:

Jury selection . . . [is] a process of elimination that is carried out in an intimidating courtroom environment, with a seal, and a person in a robe, and a bailiff who is ordering people around while armed.

136. Id. at 440.
137. See id.
139. Id. at 304.
It's set up to scare you to death. As a result, jurors look for the "correct" answer to the question . . . .\textsuperscript{141}

The correct answer to the death qualification \textit{voir dire} questioning is clear: those who admit they cannot impose death are dismissed, and replaced with someone who can. This process conveys to the jurors who undergo it that the judge and both attorneys—including defense counsel—all believe that the defendant is guilty, and that the only important task remaining is to find enough jurors who can do what is necessary.\textsuperscript{142} That necessary task, of course, is to sentence the defendant to death.\textsuperscript{143}

Craig Haney's famous study\textsuperscript{144} found that, even when all participants were themselves death-qualified, and all were asked whether their views would prevent or substantially impair their ability to find guilt or innocence, an experimental group exposed to additional questions regarding their ability to impose a death sentence (in other words, the group treated the way real capital juries are treated) was radically more likely to find that death was the appropriate punishment. While 21.9\% of the minimally-questioned group would vote for death, the more extensively (and more realistically) questioned group voted for death at over two and a half times that rate: 57\%.\textsuperscript{145}

Once again, the CJP data provides even further support for the claim. Because the CJP involved real jurors, there was no possibility of a control group. This means that all of the respondents were death-qualified through the more extensive, prevailing practice. As a result, researchers here simply took the direct approach and asked jurors "whether the \textit{voir dire} questions made them think the defendant was guilty and should be sentenced to death."\textsuperscript{146} Approximately 10\% of the jurors interviewed reported that the death qualification questions "made them think the defendant 'must be' or 'probably was' guilty," and that death "must be" or "probably was" the appropriate punishment.\textsuperscript{147} In contrast, less than 1\% of the jurors reported that the death qualification questions made them think the defendant "must not be" or "probably was not" guilty, and that death "must not be" or "probably was not" the appropriate punishment.\textsuperscript{148}

\begin{thebibliography}{9}
\item[141.] Lyon, \textit{The Negative Effects of Capital Jury Selection}, supra note 126, at 53.
\item[142.] See Hovey v. Superior Court, 616 P.2d 1301, 1351 (Cal. 1980) (citing Craig Haney, \textit{The Biasing Effects of the Death Qualification Process} (prepublished draft) (1979)).
\item[143.] See id. at 1351–52.
\item[144.] See id.
\item[145.] Id.
\item[146.] Bowers & Foglia, supra note 13, at 65.
\item[147.] Id.
\item[148.] Id.
\end{thebibliography}
Although self-reports are vulnerable to charges of inaccuracy, odds are good that, if anything, these results showing guilt- and death-bias are underinclusive. Many people may have been led toward guilt and death by the *voir dire* questioning without realizing it, and many may have realized it but been unwilling to admit as much.\(^\text{149}\) There would seem to be much less incentive, on the other hand, for people to believe themselves to have been biased toward guilt and death when they were not, or to know that they were not so biased but to claim it anyway.

The bias of capital jurors can be chilling in its frankness: “Of course he got death. That’s what we were there for.”\(^\text{150}\) Such revelations have led to the increased interest in capital punishment in general, and to the increased interest in mechanisms for diminishing capital juries’ bias toward guilt and death in particular, referred to in Part II. In the next part, this article will discuss the role that the unitary jury requirement plays in perpetuating this problem. Concluding that the unitary jury requirement is a profound stumbling block in the way of the principled executioner, this article recommends its repeal.

This is only the beginning, as clearly we also must address head-on the prevalence of automatic death penalty voters, capital jurors’ fundamental misunderstandings concerning mitigation, and their presumption that the defendant is guilty and must be put to death. It may be that solving these problems is beyond our abilities, and that the abolitionists are right: the machinery of death is inherently and inevitably unfair, and must be dismantled.\(^\text{151}\) For those who remain unconvinced, however, true bifurcation offers capital defendants, if not a fair trial, then at least a trial that is more fair. The principled executioner should be interested.

IV. THE UNPRINCIPLED NATURE OF THE UNITARY JURY REQUIREMENT

Although capital trials technically are bifurcated—meaning that the guilt phase and sentencing phase are tried separately—they are unified in another way: the same jurors who heard and decided a defendant’s guilt generally also will hear and decide that defendant’s punishment.\(^\text{152}\) The unitary jury

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149. *Id.*
151. See, e.g., Stevenson, *supra* note 5, at 76–78.
152. See, e.g., Federal Death Penalty Act (FDPA), 18 U.S.C. § 3593(b)(1) (2000) (providing that sentencing “shall be conducted . . . before the jury that determined the defendant’s guilt”); DEL. CODE ANN. tit. 11, § 4209(b) (2001) (“If the defendant was convicted
requirement maximizes the skewing effects of death qualification, ensuring that the scales of justice tilt in favor of the prosecution.

This "so-called bifurcated trial," separating capital cases into guilt and punishment phases, has been criticized for decades.\textsuperscript{153} Although the phases of the trial are separated, with evidence of guilt presented first and evidence in aggravation or mitigation offered later, having the same jurors hear both phases means that there is less difference in practice than the term "bifurcation" might imply. "If the same jury decides both [guilt and punishment] the situation is not different from a unitary trial."\textsuperscript{154}

For this reason, three federal district courts recently ordered what has come to be called "true bifurcation,"\textsuperscript{155} not only separating the guilt and punishment phases of their respective trials, but also entrusting each phase to separate juries.\textsuperscript{156} One jury hears evidence about the alleged crime and decides whether to acquit or convict the defendant. If there is a conviction, an entirely separate jury will hear the evidence regarding—and then determine\textsuperscript{157}—the appropriate sentence.

A. The Benefits of True Bifurcation

True bifurcation is necessary because a unitary jury combines with death qualification to tilt the scales even more firmly toward guilt and death than death qualification alone. Some sort of death qualification procedure appears to be unavoidable. Because the government has a right to a jury free of nullifiers,\textsuperscript{158} as well as a right to a jury free of those who will not consider

of first-degree murder by a jury, [the sentencing] hearing shall be conducted . . . before that jury."). For a more complete list of state unitary jury requirements, see \textit{supra} note 11.

\textsuperscript{153} E.g., \textit{ZEISEL, supra} note 38, at 51 n.33.

\textsuperscript{154} Id.

\textsuperscript{155} For use of the phrase, see, for example, Sam Kamin & Jeffrey J. Pokorak, \textit{Death Qualification and True Bifurcation: Building on the Massachusetts Governor's Council's Work}, 80 IND. L.J. 131, 145–52 (2005).

\textsuperscript{156} United States v. Young, 424 F.3d 499, 501 (6th Cir. 2005); United States v. Green, 407 F.3d 434, 436 (1st Cir. 2005); United States v. Williams, 400 F.3d 277, 279–80 (5th Cir. 2005).

\textsuperscript{157} \textit{Ring v. Arizona}, 536 U.S. 584, 597 n.4 (2002), left undisturbed prior law permitting judges, rather than juries, to be the final arbiter of life or death. \textit{Id.} ("[I]t has never [been] suggested that jury sentencing is constitutionally required.") (quoting \textit{Proffitt v. Florida}, 428 U.S. 242, 252 (1976) (plurality opinion)). \textit{See also Spaziano v. Florida}, 468 U.S. 447, 464 (1984) ("[W]e cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional."). Nevertheless, \textit{Ring} did establish that defendants are constitutionally entitled to have a jury, rather than a judge, find the aggravating factor(s) that trigger their death-eligibility. \textit{See Ring}, 536 U.S. at 609.

\textsuperscript{158} \textit{See Lockhart v. McCree}, 476 U.S. 162, 172 (1986) (explaining that "'nullifiers' may properly be excluded from the guilt-phase jury").
all available punishments, some means of sorting the eligible from the ineligible will be required. Given some mechanism of death qualification, then, the addition of a unitary-jury requirement results in one of two possibilities: (1) death-qualify the jurors before the conviction stage begins, as is current practice, or (2) wait until after the conviction stage, and death-qualify the jurors before the sentencing phase begins.

Although a single, neutrally-phrased question intended to ferret out nullifiers would seem to be appropriate pre-conviction, this does not begin to canvass the extent of our current death qualification practice. As discussed earlier, this means that option one (asking at the very beginning of trial not only whether potential jurors' feelings about death would prevent them from convicting, but also whether it would prevent them from considering death as a punishment) creates an unacceptably guilt-prone jury.

The alternative under a unitary jury system would be option two, waiting to ask those same jurors about their willingness to consider both life and death until after they had returned with a guilty verdict. This is equally unacceptable, as it positively invites jurors to ponder that particular defendant’s sentence before hearing a single piece of sentencing evidence. As Professor Nancy King put it during the Indiana symposium dedicated to the Massachusetts Model Death Penalty Code: “I don’t think you could death-qualify the same jury that imposed guilt. I think that at that point the jury is too focused on whether this person deserves the death penalty as opposed to . . . before the trial . . . when it’s really an abstract issue.”

Neither option available under a unitary jury scheme is acceptable, because both result in prosecutorial bias. Asking jurors to aver a willingness to impose death for capital crimes before the conviction stage tampers with the guilt verdict by asking the jurors to presume guilt in order to answer the question. This makes the idea of guilt familiar and conveys the impression that all those present believe the defendant to be guilty, keeping the emphasis on finding jurors who are capable of doing what has to be done.

On the other hand, asking jurors their feelings about possible punishments after the conviction stage is no better. The first hurdle, of

159. See Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (stating that excluding those who “would not even consider” death penalty would have been permissible).
161. See McCree, 476 U.S. at 172.
162. See discussion supra Part III.B.
164. Rozelle, supra note 129, at 693–95.
165. Id.
course, is that death qualification could result in dismissing too many jurors.\textsuperscript{166} Even presuming this hurdle may be cleared, however, those jurors (who just heard all the facts and details of this defendant’s case, and who just decided that this defendant is guilty) inevitably will be thinking about their feelings, not with regard to the proper punishment for capital crimes in general, but with regard to the proper punishment for this defendant in particular.\textsuperscript{167} The CJP data already shows the clear and disturbing phenomenon of jurors—in direct contravention of their instructions—deciding on punishment before hearing any evidence on the subject.\textsuperscript{168} Death-qualifying a unitary jury post-conviction would serve only to ensure that this disturbing practice becomes even more prevalent.

The unitary jury presents an ugly dilemma: death-qualify pre-conviction and skew toward guilt and death, or death-qualify post-conviction and ensure that jurors decide on punishment without hearing any of the sentencing evidence. Given this dilemma, true bifurcation offers a number of benefits over the traditional, unitary jury. First, seating an entirely separate sentencing jury obviates the need to perform a full, comprehensive death qualification of the liability-phase jury. Instead, the liability-phase jury could be asked a single, neutrally-phrased question intended to suss out tendencies toward nullification.\textsuperscript{169} The operative issue is “whether their feelings about the death penalty would prevent them from considering all of the evidence presented for and against the defendant throughout the trial.”\textsuperscript{170} Thus, potential jurors whose feelings would prevent them from finding impartially on guilt may be detected, while avoiding talk of punishment and its attendant presumption of guilt.\textsuperscript{171}

Death qualification as presently practiced, however, is far more intricate, and consequently is both lengthier and more expensive than the \textit{voir dire} necessary to exclude nullifiers alone.\textsuperscript{172} As Justice Marshall noted in his dissent in \textit{Lockhart v. McCree}, “The \textit{voir dire} needed to identify nullifiers

\begin{footnotesize}
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\item 166. \textit{See infra} text accompanying note 199.
\item 167. King, \textit{supra} note 163, at 59.
\item 168. \textit{See supra} Part III.B.3.a.
\item 169. \textit{See Rozelle, supra} note 129, at 696.
\item 170. \textit{id}.
\item 171. Although not ideal, this approach at least minimizes the untoward effects of asking the necessary nullification question. \textit{See id}. at 699.
\item 172. E.g., Margot Garey, Comment, \textit{The Cost of Taking a Life: Dollars and Sense of the Death Penalty}, 18 \textit{U.C. Davis L. Rev.} 1221, 1257 (1985) (citing L. Saunders et al., An Empirical Study Attempting to Compare the Trial Costs of Capital Cases with the Trial Costs of Non-Capital Cases (Spring 1983) (unpublished manuscript, on file with U.C. Davis Law Review)). This 1983 study found that although noncapital cases seated juries in approximately three days, the average capital case required more than five times as long—sixteen days—to choose its jurors. \textit{id} at 1257 n.173.
\end{itemize}
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before the guilt phase is less extensive than the questioning that under the current scheme is conducted before every capital trial.\textsuperscript{173}

Waiting to ask questions about punishment until the need for a sentencing-phase jury arises guarantees that the costs of death qualification are not incurred unless they are necessary. If the liability-phase jury returns a verdict of not guilty (or guilty, but of a non-death-eligible crime) then the extra time and expense currently lavished on all capital trials is unnecessary. Many defendants initially charged for a capital offense will be either acquitted or found guilty but ineligible for the death penalty.\textsuperscript{174} Acquitted persons are not sentenced at all, of course, and those convicted of non-death-eligible crimes are sentenced by judges, not juries.\textsuperscript{175}

Second, waiting to death-qualify a separate sentencing jury means the liability jury is not death-qualified. This change would remove the taint of prosecution-proneness injected into the proceedings by death qualification’s over-exclusion, not only by demographic group,\textsuperscript{176} but also by ideology. We would avoid sweeping all death penalty opponents (with their accompanying world-views) from the conviction jury, at the same time as we overwhelmingly seated automatic death penalty voters (with their accompanying world-views).\textsuperscript{177} In addition, this approach would eliminate the taint of inculcating jurors pretrial with the idea that this defendant is guilty and that the only real question before them is whether they have the mettle to sentence him to death.\textsuperscript{178} In light of the skewing effects of death


\textsuperscript{174} Ineligibility for death could result either from (1) conviction of a lesser offense in lieu of the initial capital crime or from (2) conviction of the capital crime, but lack of a jury finding on any of the necessary aggravators that can trigger death eligibility. See, e.g., Ring v. Arizona, 536 U.S. 584, 609 (2002). See also LEGISLATIVE DIV. OF POST AUDIT, STATE OF KANSAS, COSTS INCURRED FOR DEATH PENALTY CASES: A K-GOAL AUDIT OF THE DEPARTMENT OF CORRECTIONS 32 (Dec. 2003), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf (noting that half of trials in which death penalty was sought resulted in lesser sentence); JOHN G. MORGAN, COMPTROLLER OF THE TREASURY, TENNESSEE’S DEATH PENALTY: COSTS AND CONSEQUENCES 3 (2004), available at http://www.comptroller.state.tn.us/ora/reports/deathpenalty.pdf (noting that almost 70% of trials in which death was sought resulted in lesser sentence: 102 of 148). Prosecutors contribute to the problem by overcharging, declaring too many cases to be capital ones. Some seek death sentences routinely, or as a “bargaining chip” to facilitate plea bargains. Id. at i. Others simply seek death in order to get a death-qualified jury. See, e.g., Salgado, supra note 104, at 519–20 & nn. 4–7.

\textsuperscript{175} See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.2(a)–(b) (4th ed. 2004) (describing judges as primary sentencers in all but capital cases).

\textsuperscript{176} See discussion supra Part III.B.1.

\textsuperscript{177} See supra text accompanying notes 65–72 (discussing homogeneous juries’ decreased accuracy in fact-finding).

\textsuperscript{178} See supra Part III.B.3.c.
qualification, any principled executioner surely would agree: the defendant has a legitimate claim to a liability jury that has not been so constituted.179

B. Objections and Responses

Despite the benefits of true bifurcation outlined above, several objections may be raised: (1) the statutory requirement; 180 (2) the costs associated with accommodating a separate sentencing jury (e.g., the transaction costs of seating a second jury, as well as the cost of presenting certain evidence twice); (3) forfeiture of the residual doubt argument; and (4) this proposal’s failure to address the skewing effect of death-qualifying the sentencing jury.

1. The Statutory Requirement

Under presently-existing statutory schemes, true bifurcation simply is not an option.181 For example, several circuit courts recently have held that the Federal Death Penalty Act (“FDPA”)182 in most instances will prohibit the kind of “true bifurcation” that has been discussed here.183 As these courts recently explained, the FDPA states that sentencing hearings in death cases:

(1) before the jury that determined the defendant’s guilt;

(2) before a jury impaneled for the purpose of the hearing if—

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant’s guilt was discharged for good cause; or

179. See Witherspoon v. Illinois, 391 U.S. 510, 521 (1968) (prohibiting both “tribunals organized to convict” and those “organized to return a verdict of death”).
180. See supra note 11.
181. Id.
183. See United States v. Brown, 441 F.3d 1330, 1353–54 (11th Cir. 2006); United States v. Young, 424 F.3d 499, 506–07 (6th Cir. 2005); United States v. Green, 407 F.3d 434, 443–44 (1st Cir. 2005); United States v. Williams, 400 F.3d 277, 282 (5th Cir. 2005).
(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.\textsuperscript{184}

The mandate, then, is that the sentencing “shall be conducted . . . before the jury that determined the defendant’s guilt.”\textsuperscript{185} Any other configuration requires special circumstances: either there was no guilt jury,\textsuperscript{186} the guilt jury is no longer available,\textsuperscript{187} or the defendant has waived a sentencing jury and requested a judge to make the determination.\textsuperscript{188}

Some defendants (and the trial judges who granted these defendants’ motions for separate juries)\textsuperscript{189} have argued that the FDPA’s provision allowing a separately-constituted sentencing jury if the guilt jury “was discharged for good cause”\textsuperscript{190} permits a separately-constituted sentencing jury to be appointed in all capital cases. They argue that the economic considerations and skewing effects of death-qualifying the guilt jury provide “good cause.”\textsuperscript{191} The circuit courts that reviewed these trial judges’ decisions disagreed. Fundamentally, they said, the good cause provision in the Act is written as an exception, not a rule.\textsuperscript{192} The kind of economic and skewing arguments relied on by the courts in \textit{Green}, \textit{Williams}, \textit{Young}, and \textit{Brown} apply to all defendants. Accepting that these reasons provide good cause to trigger the exception means every case entails good cause to trigger the exception. Relying on established principles of statutory construction, such a reading is rejected: the exception would swallow the rule.\textsuperscript{193}

This interpretation of the FDPA is analytically sound, and therefore it seems likely that the remaining circuits (and the United States Supreme

\textsuperscript{184} 18 U.S.C. § 3593(b).
\textsuperscript{185} \textit{id}.
\textsuperscript{186} \textit{Id.} § 3593(b)(2)(A) to (B).
\textsuperscript{187} \textit{Id.} § 3593(b)(2)(C) to (D).
\textsuperscript{188} \textit{Id.} § 3593(b)(3). For the effect of \textit{Ring v. Arizona}, 536 U.S. 584 (2002), on judicial imposition of the death penalty, see supra note 157.
\textsuperscript{190} 18 U.S.C.A. § 3593(b)(2)(C).
\textsuperscript{191} \textit{See Young}, 424 F.3d at 505; \textit{Green}, 407 F.3d at 440; \textit{Williams}, 400 F.3d at 281.
\textsuperscript{192} \textit{See Brown}, 441 F.3d at 1353–54; \textit{Young}, 424 F.3d at 506; \textit{Green}, 407 F.3d at 441–42; \textit{Williams}, 400 F.3d at 282.
\textsuperscript{193} \textit{See, e.g., Comm’n v. Clark}, 489 U.S. 726, 739 (1989) (“In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.”).
Court, were it to grant certiorari) would agree: true bifurcation is prohibited under the existing federal statutory scheme. For the same reasons, those states with cognate provisions in their death penalty schema presumably would hold that their language similarly condemns true bifurcation.194

Some have suggested that the effects of death qualification can be ameliorated and the statutory unitary jury requirement comported with simply by seating the maximum number of alternates at a capital trial’s inception.195 Proponents of this approach echo Justice Marshall, whose dissent in *Lockhart* (in addition to advocating for true bifurcation196) suggested that any dismissed jurors could be replaced with alternates.197 Under this proposal, as with the kind of true bifurcation that the statutory unitary jury requirement prohibits, there would be no death qualification until after conviction.198 At that time, the death qualification *voir dire* would be performed and any jurors who failed to death-qualify could be replaced with alternates, thus ensuring there would still be a sufficient number of jurors to deliberate in sentencing.199 Judge Gertner suggested this very alternative in *Green*.200 Unsurprisingly, the prosecution rejected the idea wholesale, taking as it did the ultimately successful position that it was entitled to a unitary jury.201

As with true bifurcation, seating the maximum number of alternates offers the benefits of a non-death-qualified guilt-phase jury: (1) the costs of death qualification would be saved whenever a jury returned with an acquittal;202 and (2) the guilt jury would not be skewed toward guilt, both because the pool would not be artificially emptied of defense-friendly jurors, and because the guilt jurors would be spared the influencing effects

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194. *Compare, e.g.*, Federal Death Penalty Act, 18 U.S.C. § 3593(b) (2002) (sentencing “shall be conducted . . . before the jury that determined the defendant’s guilt”), *with* DEL. CODE ANN. tit. 11, § 4209(b) (2005) (“If the defendant was convicted of first-degree murder by a jury, [the sentencing] hearing shall be conducted . . . before that jury . . . .”). The Delaware statute’s next sentence permits different jurors to determine punishment if the trial jurors are excused “for any reason satisfactory to the Court.” DEL. CODE ANN. tit. 11, § 4209(b). Although it could be argued that this language is broader than the corresponding federal provision, the rationale governing the FDPA (that death qualification itself cannot be a disqualifier lest the exception swallow the rule) seems to apply equally to cognate state provisions.


197. *See id.* at 204.

198. *See id.* at 204–05.

199. *See id.*


of being asked, even before the trial begins, to presume the defendant is guilty and concentrate on the appropriate punishment.\textsuperscript{203}

Seating the maximum number of alternates also offers something true bifurcation does not: hope of compliance with the unitary jury requirement under existing law.\textsuperscript{204} If sufficient additional jurors were seated to hear the guilt phase, then even after dismissing those jurors who failed to death-qualify at the post-conviction \textit{voir dire}, there could still be enough jurors left to deliberate at sentencing. Thus, the same, unitary jury would hear both guilt and punishment phases of the trial, excepting any members of the guilt-phase jury who were dismissed for good cause prior to the sentencing phase (i.e., they failed to death-qualify).\textsuperscript{205}

In the end, however, this proposal suffers from the same problem any unitary jury suffers when the jurors are not death-qualified until after conviction.\textsuperscript{206} Death-qualifying jurors following a conviction suffers from its own skew. Jurors at that stage simply cannot prevent themselves from thinking about \textit{this} defendant as they are being asked the death qualification questions. Naturally, such thoughts would be premature before the jurors have heard the sentencing evidence, and therefore are prohibited. To institute a procedure that ensured jurors began deliberating prematurely surely would be a mistake.

Thus, seating the maximum number of alternates is not a satisfactory alternative after all, and the unitary jury requirement does stand in the way of implementing true bifurcation’s benefits. If the only barrier standing in the way of increasing fairness in our capital punishment system is statutory, it is difficult to imagine that anyone would be opposed to changing the offending law. In the end, this is exactly the point of this article. Before reaching that conclusion, however, a few additional objections to true bifurcation merit attention.

\textsuperscript{203} See supra text accompanying notes 176–79.
\textsuperscript{204} See supra note 152.
\textsuperscript{205} Of course, it also would be entirely possible—and I suspect it would be highly likely—that too many jurors would be dismissed, resulting in a need to empanel a new jury for sentencing in any event. See, e.g., Green, 324 F. Supp. 2d at 331 (anticipating dismissal of too many jurors to go forward with same jury at sentencing despite having seated maximum number of alternates).
\textsuperscript{206} See supra text accompanying notes 166–68.
2. Increased Costs

The first objection to the concept of true bifurcation offered by those unfamiliar with the statutory prohibition is increased cost. Certainly there are increased costs associated with granting all defendants convicted of capital crimes separate sentencing juries. However, because this proposal saves the cost of death-qualifying all liability juries, and incurs the additional costs of a second jury only in those cases where the defendant is convicted, the net increase would seem to be relatively modest. A net savings—though perhaps less likely—is conceivable.

In addition, although separate juries may necessitate presenting certain evidence twice (as when evidence presented to the liability jury is also relevant to sentencing), this is already a common phenomenon. Of the many capital defendants who appealed their convictions from 1973 through 1995, for example, 68% won retrial.207 Thus, attorneys in capital cases are accustomed to presenting such evidence a second time with minimal cost, whether by utilizing trial transcripts and exhibits or other techniques.208 “Stipulated summaries of prior evidence might, for example, save considerable time.”210

Stipulated summaries may be less compelling than live testimony, however. One can readily imagine that in some instances the power of live testimony would be worth the costs of recalling a witness at sentencing. In those cases, though, it seems likely that the power of live testimony would be worth recalling regardless of whether the case were being tried before a separate sentencing jury or before a unitary one. Capital trials as a rule are quite lengthy,211 and even a jury that heard the evidence in a liability phase is unlikely to remember it. Should a trial transcript or similar be deemed


208. Such measures are standard and expected. See, e.g., Federal Death Penalty Act, 18 U.S.C.A. § 3593(c) (West 2000).


211. See, e.g., Garey, supra note 172, at 1258 (citing Saunders et al., supra note 172). The Saunders study found that although noncapital trials averaged twelve days, the average capital trial required three and a half times as long: forty-two days. Id. A 2003 study in Kansas echoed this result, finding their nine-day average for non-capital trials also more than tripled to a total of twenty-eight days for the average capital trial. Legislative Div. of Post Audit, supra note 174, at 15 tbl.I-4.
insufficiently compelling as compared with the original, it seems the live witnesses would be recalled at the sentencing phase regardless: either to remind the same jurors in this more compelling fashion of what they once heard but have since forgotten, or to inform the new jurors in this more compelling way of what they must know in order to choose an appropriate sentence.

"Thus," wrote Justice Marshall in *Lockhart v. McCree*, "it cannot fairly be said that the costs of accommodating a defendant's constitutional rights under these circumstances are prohibitive, or even significant."\(^{212}\)

3. Residual Doubt

For some in the "unitary jury versus truly bifurcated jury" debate, the residual doubt argument is the proverbial 800-pound gorilla. After all, "the best thing a capital defendant can do to improve his chances of receiving a life sentence . . . is to raise doubts about his guilt."\(^{213}\) Once again, it is comforting to know that most\(^{214}\) jurors would hesitate to execute someone whom they believe might be innocent. If the unitary jury is discarded in favor of true bifurcation, however, some argue that defendants will be stripped of the ability to appeal to residual doubt. In light of the recent Supreme Court decision in *Oregon v. Guzek*, this may be an overstatement,\(^{215}\) but at the very least, the effectiveness of defendants' appeals to residual doubt surely would be lessened. A jury empaneled solely for sentencing purposes is in a relatively weak position to second-guess its predecessor jury's conviction decision. The sentencing jury simply does not have the necessary information before it.

214. The qualifier "most" is necessary because more than 20% of the CJP jurors interviewed for Professor Garvey's study indicated that "lingering doubt over the defendant's guilt" had no effect on their likelihood of voting for death. *Id.* at 1559 tbl.4. Even more shocking, some measurable number of respondents (2.6%) actually indicated that lingering doubts over the defendant's guilt made them more likely to vote for death. *See id.* Society can only hope that these responses were accidental, intended to be funny, or otherwise not accurate reflections of juror behavior. In light of additional CJP data wherein jurors asked to give examples of when they would not vote for the death penalty listed "[i]f the guy was not guilty," Sandys & McClelland, *supra* note 82, at 400, however, perhaps this result should not surprise.
215. *Oregon v. Guzek*, 126 S.Ct. 1226, 1232-33 (2006) (holding that defendant had no right to introduce additional residual doubt evidence beyond that entered into evidence at guilt stage). This decision leaves open the possibility that the United States Constitution guarantees defendants the right to argue residual doubt so long as they base their arguments solely on already-admitted evidence. *Id.* at 1233-34 (Scalia, J., concurring).
For this reason, some have argued that a unitary jury benefits capital defendants.\textsuperscript{216} Maybe so, but that would be a strategy decision for defendants to make for themselves; and that decision is complicated by another strong factor in jurors’ sentencing decisions: apparent remorse, or acceptance of responsibility.\textsuperscript{217} Unitary juries may permit defendants to argue residual doubt more effectively, but they also undercut defendants’ ability to contest guilt. The jurors who listened to defendants vigorously assert their innocence at the conviction stage may find it difficult to believe those defendants who so radically change their tune at sentencing. “I didn’t do it; but if you find I did, I’m really sorry,” is a hard sell:

If . . . a defendant claimed innocence at the guilt phase, and now at the penalty phase said, “Let me tell you how I ended up doing this terrible crime,” the verdict almost uniformly was death. The jury’s reaction was, “How dare you try to trick us at the guilt phase and now try to tell us your life circumstances at the penalty phase?”\textsuperscript{218}

Thus, “unless the state is willing to grant the defendant the option to waive this paternalistic protection [of the unitary jury and concomitant ability to appeal to residual doubt more effectively] in exchange for better odds against [sic] conviction [as would result from true bifurcation],”\textsuperscript{219} the claim that the unitary jury requirement operates for defendants’ own good is less than convincing. Indeed, “if the evidence in the case raises doubts about conviction, this is precisely where a defendant might desire a less conviction-prone excludable juror at the guilt-determination phase.”\textsuperscript{220}

Some have indicated a willingness to permit defendants precisely this choice. Based primarily on input from his own blue-ribbon commission and then augmented by a suggestion growing out of the Indiana Symposium,\textsuperscript{221} Governor Romney’s Massachusetts proposal, for example, suggested that convicted defendants be permitted the choice of having their punishment

\textsuperscript{216} E.g., McCree, 476 U.S. at 181.
\textsuperscript{217} See, e.g., Garvey, supra note 35, at 1560–61 (finding that lack of remorse is among the top three reasons jurors vote for a death sentence).
\textsuperscript{220} Id. at 69 n.169.
determined either by the jury that convicted them (enabling defendants to appeal to those jurors’ potential lingering doubts about guilt in arguing for life rather than death) or by a new jury (enabling defendants to avoid death-qualifying their conviction jury), with this choice available to defendants either before or after the conviction stage.\footnote{222}

In any event, the point may very well be moot (at least in federal court if not among the states, as well). Randy Lee Guzek claimed a Federal Constitutional right to present residual doubt evidence at sentencing.\footnote{223} In finding that no such right, even if one existed, would permit Guzek’s evidence,\footnote{224} the United States Supreme Court drew a sharp distinction between evidence tending to show how a defendant committed a crime and evidence tending to show whether the defendant did it.\footnote{225} Given this, Justice Marshall’s dissent in \textit{Lockhart v. McCree} takes on even greater resonance:

But most importantly, it ill-behooves the majority to allude to a defendant’s power to appeal to “residual doubts” at his sentencing when this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings. Any suggestion that capital defendants will benefit from a single jury thus is more than disingenuous. It is cruel.\footnote{226}

Although the Court finally granted certiorari on the subject, it once again refused to recognize a right to introduce residual doubt evidence.\footnote{227} After \textit{Guzek}, the objection that true bifurcation denies defendants the ability to argue residual doubt rings hollow indeed.


\footnote{224} \textit{Id.} at 1232.

\footnote{225} \textit{Id.} at 1231.


\footnote{227} \textit{Guzek}, 126 S.Ct. at 1233. A window for arguing residual doubt might remain, however. To Justice Scalia’s bitter lamentations, the opinion in \textit{Guzek} left open the possibility that there may be a constitutional right to argue residual doubt at sentencing so long as that argument is limited to already-admitted evidence. \textit{Id.} at 1233–34 (Scalia, J., concurring). Additionally, of course, states remain free to permit defendants to argue additional residual doubt evidence if they so choose. \textit{See}, \textit{e.g.}, Cooper \textit{v. California}, 386 U.S. 58, 62 (1967) (noting that the state enjoys “power to impose higher standards . . . than required by the Federal Constitution if it chooses to do so”).
4. Remaining Death Skew

This last of the objections to true bifurcation is perhaps the most serious. To the extent that true bifurcation is aimed at removing the prosecution-skew from capital trials, it succeeds with respect to the guilt phase alone. The process of death qualification, however, serves not only to tilt the scales toward finding guilt, but also toward finding that death is the appropriate punishment. When potential sentencing jurors are asked extended, probing questions regarding their feelings about the death penalty, and likely witness the excusal for cause of several death penalty opponents while witnessing no excusals for cause from life qualification, it is no surprise that they come away with the impression that death is the appropriate punishment. Thus, although ceasing to death-qualify the conviction jury beyond a minimal nullification question would minimize the prosecution skew from the conviction stage, this measure alone does not go far enough. True bifurcation leaves in place the death qualification of the sentencing jurors, thereby continuing to skew the sentencing jury in favor of death.

This concern is very real. More must be done to address death qualification’s profound failure to provide defendants with any semblance of an impartial jury, or we must recognize the futility of the attempt and dismantle the machinery of death for good. Thus, this article concedes that true bifurcation does not go nearly far enough. But if the failure of death qualification cannot be mended, and if abolition is out of reach, true bifurcation is a commonsense, achievable improvement in our capital punishment system’s fairness. At least it is a step in the right direction.

V. CONCLUSION

The unprincipled nature of the unitary jury requirement shames society as a whole.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total

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228. See Allen et al., supra note 98.
230. See discussion supra Part III.B.3.c.
231. See supra Part III.B.3.
232. See supra text accompanying note 151.
233. Nor does this address additional problems revealed by the CJP, such as the prevalence of automatic death penalty voters and capital jurors’ fundamental misunderstandings concerning mitigation, see supra text accompanying note 151, nor myriad other concerns.
The time is right for action. For over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death. With the release of CJP data, gathered via rigorous and comprehensive methods expressly designed to overcome the flaws complained of by the United States Supreme Court in *Lockhart v. McCree*, any doubts on this score surely have been laid to rest. Efforts to ameliorate death qualification's prosecutorial bias have been hamstrung, however, by the statutory unitary jury requirement. Granting for the sake of argument that some form of death qualification must be suffered, the addition of a unitary jury requirement leaves capital defendants unconscionably disadvantaged. Either death qualification is performed on these jurors pre-conviction, thereby skewing them toward guilt, or it is performed on these jurors post-conviction but pre-sentencing phase. Post-conviction, the death qualification questions necessarily prompt jurors to consider their willingness to put to death, not some capital defendants in general, but this one in particular. Having just heard the grisly details of this defendant's death-eligible crime and having just found this defendant guilty, it would be asking far too much to imagine that these jurors can divorce themselves from their context. When death qualification questions are asked post-conviction and pre-sentencing phase, jurors will almost unavoidably be answering based on their willingness to put this defendant to death—and that before hearing the first piece of mitigation evidence.

Although several arguments may be raised against true bifurcation, on reflection it becomes clear that they are either illusory or else readily managed. In the end, the only real barrier to the benefits true bifurcation offers is the artificial statutory one erected by the unitary jury requirement. Such an artificial barrier is unprincipled and should be abandoned. Although this measure does not go far enough, it is a readily-achievable, if only incremental, improvement in fairness for capital defendants. Therefore, the unitary jury requirement should be abandoned in favor of true bifurcation. If death is to remain a permissible punishment, then capital defendants must, at the very least, receive the fairest possible trial. Surely the principled executioner would agree.
