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Keep Tinkering: The Optimist and the Death Penalty

Susan D. Rozelle

I. INTRODUCTION

When it comes to capital punishment, it may make sense to be a little bit defeatist. Like abortion, the death penalty is a topic about which you have to presume that you are never going to change anyone else's mind. Whether the other person views it as a necessary part of the justice system or as a moral outrage, odds of changing the other person's mind through reasoned discourse are slim.

The first question for death penalty opponents must always be whether it is better to fight from inside the system or from outside it.¹ The fear is that the more fair the system is made, the more palatable it becomes, and correspondingly, the farther away the ultimate goal of abolition is pushed.²

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1. See Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 775 n.37 (2006) [hereinafter *The Principled Executioner*].

2. As the author previously recognized in *The Principled Executioner*:

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."

Id. (quoting Justice John Paul Stevens, Remarks at the Thurgood Marshall Awards Dinner (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html [<https://perma.cc/F8FC-FLS4>]).

The optimistic coalition-builder, on the other hand, replies that every improvement in fairness stands to save someone's life. More pragmatically, abolition is taking a very long time. Finally, the coalition-builder asks, whose minds would be changed? A fairer system will not persuade most abolitionists to become death-penalty proponents. These opponents of capital punishment, for the most part, do not care about the machinery of death and whether it is fair or unfair. They are motivated by the fact that a capital punishment scheme means the State sanctions killing people. A system that is more fair but continues to kill is unlikely to change their minds.

Cynics may ask whether an increase in fairness stands a chance of changing any minds at all. Disturbingly, polls show that proponents of capital punishment are willing to accept a certain amount of collateral damage. As of October 2009, "for many Americans, agreement with the assertion that innocent people have been put to death does not preclude simultaneous endorsement of the death penalty. A third of all Americans, 34%, believe an innocent person has been executed and at the same time support the death penalty."³ It appears, then, that thirty-four percent of those polled accept the price of executing innocent people in order to kill those other capital defendants who did really bad things.

Despite the cynics, a "keep tinkering" approach seems to offer the most hope for coalition-building. Presumably, most proponents of the death penalty are people of good faith who would prefer not to pay the price of innocent lives—or, even if not innocent, still not the worst of the worst for whom death is supposedly reserved. Under a fairer system, proponents would get the benefit of a structure that is more defensible. No doubt those who are conscientious proponents of capital punishment are troubled by the flaws in the system and would prefer a

For more information on capital punishment, see *Defense Resources*, CORNELL DEATH PENALTY PROJECT, <http://www.lawschool.cornell.edu/research/death-penalty-project/resources.cfm> [https://perma.cc/B5R3-JB6C]; DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org> [https://perma.cc/LGB9-Y48P].

3. Frank Newport, *In U.S., Two-Thirds Continue to Support Death Penalty*, GALLUP (Oct. 13, 2009), <http://www.gallup.com/poll/123638/in-u.s.-two-thirds-continue-support-death-penalty.aspx> [https://perma.cc/8FUB-E3BL].

scheme that would allow them to sleep better at night. Death penalty opponents would get fewer executions (though it is true that this comes at the cost of working within the system).⁴ Although continuing to bring light to these dark, nonfunctional areas of the system may fail to persuade people to stop executions completely, it might, at least, save a few more lives. And so we keep tinkering.

You may have heard by now that Florida's death penalty law was recently found unconstitutional again. In *Hurst v. Florida*,⁵ the U.S. Supreme Court finally got around to what was clear back in 2002 when it decided *Ring v. Arizona*.⁶ The right to a jury trial includes the right to have the jury decide, beyond a reasonable doubt, the facts that stand to increase a defendant's possible punishment from life to death.⁷

Florida's system at the time *Ring* was decided (and right up through *Hurst*) relied on a jury to make a sentencing recommendation only.⁸ The ultimate decision in Florida was made by the judge, the exact procedure that the Court had found unconstitutional in the Arizona case.⁹ In other words, it took Florida fourteen years to acknowledge crystal clear precedent.¹⁰ When it did, the Legislature put together a better death penalty law, in that it gave power to the jury to decide on life or death.¹¹

4. This presumes that a capital punishment system that is more fair would result in fewer executions, rather than more: killing fewer people who do not deserve it, rather than killing more people who do not deserve it. Cf. RUSH, *The Trees, on HEMISPHERES* (Mercury Records 1978) ("And the trees are all kept equal, By hatchet, Axe, And saw . . .").

5. 136 S. Ct. 616, 624 (2016).

6. 536 U.S. 584 (2002).

7. *Id.* at 609.

8. FLA. STAT. ANN. § 921.141(2)-(3) (West 2005); FLA. STAT. ANN. § 921.141(2)-(3) (West 2016) (effective Oct. 1, 2016), *invalidated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst*, 136 S. Ct. at 620.

9. *Hurst*, 136 S. Ct. at 620-21.

10. *Id.* at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough.").

11. FLA. STAT. ANN. § 921.141(3)(a)(2) (West 2017) (effective Oct. 1, 2016), *invalidated by* *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

The one piece it refused to give up was the majority rule.¹² The old death penalty scheme permitted a death sentence with a bare majority of jurors voting for death (seven to five).¹³ After *Hurst*, the legislators were chastened, but not entirely reformed. The new law permitted death with a vote of ten to two.¹⁴

Florida legislators had plenty of notice that this would not suffice. Some members of the Florida Supreme Court had said years before that unanimity should be required.¹⁵ The Court even went so far as to include a section entitled “The Need for Legislative Action” on unanimity of jury recommendations in capital sentencing in a 2005 opinion.¹⁶ It makes sense. Without a unanimity requirement, we simply do not see the kind of deep discussion of the evidence—that is, the hard grappling with aggravators and mitigators—that is warranted when someone’s life is on the line.¹⁷

12. FLA. STAT. ANN. § 921.141(2)(c)-(3)(a)(2) (West 2017) (effective Oct. 1, 2016, stating that “[i]f at least 10 jurors determine that the defendant should be sentenced to death,” the court may impose either a death sentence or life imprisonment), *invalidated by* *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

13. FLA. STAT. ANN. § 921.141(3) (West 2016) (“Notwithstanding the recommendation of a majority of the jury . . .”), *invalidated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

14. FLA. STAT. ANN. § 921.141(2)(c) (West 2017) (effective Oct. 1, 2016, stating that “[i]f at least 10 jurors determine that the defendant should be sentenced to death, the jury’s recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury’s recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.”), *invalidated by* *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

15. *See, e.g.*, *Bottoson v. Moore*, 833 So. 2d 693, 710 (Fla. 2002) (Anstead, C.J., concurring); *King v. Moore*, 831 So. 2d 143, 153 (Fla. 2002) (Pariente, J., concurring). *But see* *Hurst v. State*, 147 So. 3d 435, 446 (Fla. 2014) (rejecting the defendant’s argument that *Ring* required a “unanimous jury recommendation as to sentence”), *reversed*, 136 S. Ct. 616, *remanded to* 202 So. 3d 40 (Fla. 2016).

16. *State v. Steele*, 921 So. 2d 538, 548-50 (Fla. 2005), *abrogated by* *Hurst v. Florida*, 136 S. Ct. 616 (2016).

17. *Steele*, 921 So. 2d at 549.

It is unclear why the Legislature persisted in ignoring the writing on the wall, but the ten to two version was enacted in 2016.¹⁸ It was struck down by the Florida Supreme Court seven months later.¹⁹ Among other things, the *Hurst* opinion held that jurors must be unanimous in recommending death,²⁰ unanimous about why (which aggravating factors they found),²¹ and unanimous that the aggravators outweigh the mitigators in the case.²²

[W]e perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The “heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate”; *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the “reliability” of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

Id. (quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988)).

18. FLA. STAT. ANN. § 921.141(2)(c) (West 2016) (effective Mar. 7, 2016), *amended by* FLA. STAT. ANN. § 921.141(2)(c) (West 2017) (effective Oct. 1, 2016), *invalidated by* *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *See also* Alan Blinder, *Death Sentences Require Unanimous Jury, Florida Supreme Court Rules*, N.Y. TIMES (Oct. 14, 2016), https://www.nytimes.com/2016/10/15/us/florida-death-penalty.html?_r=0 [https://perma.cc/UMY9-JYNF] (discussing the recent overhaul of Florida’s capital punishment legislation).

19. *Hurst*, 202 So. 3d at 58-60, *cert. denied*.

20. *Id.* at 44 (“[I]n order for the trial court to impose a sentence of death, the jury’s recommended sentence of death must be unanimous.”).

21. *Id.* The court found “the requirement of jury unanimity as to the elements of a criminal offense” to mean the ultimate recommendation of the unanimous jury is death. *Id.* “In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.” *Id.*

22. *Hurst*, 202 So. 3d at 44.

As a result, Florida was once again without a death penalty.²³ Although this appeared to follow the trend of shrinking support for capital punishment across the country over the last forty years,²⁴ this state of affairs, in Florida at least, did not last. Given the level of support for a death-sentence option in the Sunshine State,²⁵ the Legislature predictably passed another version of a capital-punishment statute when it reconvened in March 2017.²⁶ Even so, bit by bit, the law of capital punishment is getting narrower, applying to fewer and fewer people.²⁷ Bit by bit, the tinkerers are winning.

The trend is visible in many other places as well. One telling example is from a completely different part of the country than Florida. Lefty-liberal Massachusetts has not had a death penalty since the 1940s.²⁸ But when former Republican presidential hopeful Mitt Romney ran for governor, he pledged

23. It is unclear whether this will stop death sentences. The Florida Supreme Court heard oral arguments on Tuesday, February 2, 2016, regarding whether to proceed with the execution of Cary Michael Lambrix and Richard Knight, ultimately granting stays pending further clarification of the law. Order Granting Stay of Execution, *Lambrix v. Florida*, No. SC16-8 (Fla. 2016). See Dara Kam, *Florida Supreme Court Justices Halt Execution Amid 'Consternation'*, LEDGER (Feb. 2, 2016, 8:16 PM), <http://www.theledger.com/article/LK/20160202/News/608076624/LL/> [<https://perma.cc/V4ZA-KD3M>] (discussing stay of executions of Cary Michael Lambrix and Richard Knight).

24. As of October 2016:

Support for the death penalty in the United States is at its lowest level since November 1972, according to a Gallup poll released October 25. Gallup reported that 60% of respondents said they support capital punishment—off one percentage point from last year—while opposition remained at 37%, matching its highest level since the U.S. Supreme Court struck down the death penalty in 1972.

Gallup Poll: Support for Death Penalty at Lowest Level Since 1972, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6589> [<https://perma.cc/ST8M-HC8L>].

25. “A Sun-Sentinel poll found that only 45% of Floridians support the death penalty when offered the sentencing option of life in prison without parole, down from 60% last November. In addition, support for life in prison without parole has risen from 16% last year to 28% this year.” *State Polls and Studies, Florida*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-polls-and-studies?scid=23&did=210#Florida> [<https://perma.cc/5VVH-6ZQ2>].

26. FLA. STAT. ANN. § 921.141 (West 2017) (effective Mar. 13, 2017); Blinder, *supra* note 18.

27. See *infra* Part III.

28. Massachusetts ceased executing prisoners in 1947. Scott Helman, *Death Penalty Bill Fails in House: Romney Initiative Roundly Defeated*, BOSTON GLOBE, Nov. 16, 2005, at B1.

to his conservative base that he would bring it back.²⁹ In support of my premise that our best chance for progress comes from joining together to ameliorate what procedural pieces we can, Romney proved himself a tinkerer. He pledged, even when appealing to his conservative, Republican brethren, that he would bring capital punishment back in “failsafe” form.³⁰

Once elected, Romney did indeed appoint a blue-ribbon Governor’s Council on Capital Punishment, which produced a report in 2004.³¹ Too modest to call its recommendations “failsafe,” the Council proclaimed them only “as infallible as humanly possible.”³²

Modesty aside, it was a good report. In fact, *New York Times Magazine* called it one of the most noteworthy ideas of the year.³³ The proposed recommendations addressed many of the same issues that most capital punishment critics raise to this day:

- (1) Execute only the “worst of the worst”;
- (2) Pay for good defense lawyers;
- (3) Warn juries about problems with confessions, eyewitness identifications, and other known limitations of the kinds of evidence presented;

29. *See id.*

30. *See id.*

31. JOSEPH L. HOFFMANN ET AL., REPORT OF THE GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, reprinted in 80 IND. L.J. 1, 2 (2005) (reporting findings of Massachusetts Governor Mitt Romney’s Council on Capital Punishment); *see also* Emily Bazelon, *Foolproof Death Penalty*, *The*, N.Y. TIMES MAG. (Dec. 12, 2004), <http://www.nytimes.com/2004/12/12/magazine/foolproof-death-penalty-the.html> [<https://perma.cc/Z3CC-U33J>].

32. HOFFMAN ET AL., *supra* note 31.

33. Bazelon, *supra* note 31. 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. Create a death-penalty-review commission. And base death sentences on a “no doubt” standard of proof.

Id. 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.*

- (4) Require cutting edge scientific evidence of guilt (e.g., DNA match); and
 (5) Change the standard of proof in death cases to “no doubt.”³⁴

Among the concerns that critics raise, the problem of residual doubt stands out for its hubris. In social science research, one of the factors that jurors consistently cite as most important to them is the presence of residual doubt.³⁵ The reasoning is stunning, but jurors report that when they were not sure they had the right person, they imposed life in prison rather than death.³⁶

Hubris aside, even this “infallible as humanly possible” version of a death penalty scheme was not enough to convince Massachusetts to reinstitute capital punishment.³⁷ Presumably, Romney knew the effort would fail (and it did: the vote in Massachusetts ended up being two to one against).³⁸ The day before the vote, Romney downplayed what he surely expected was its upcoming failure when he stated that the death penalty was important, but not at the “highest level”: not as important as healthcare, education, job creation, & (wait for it) auto insurance reform.³⁹

34. *Id.*

35. See Patrick Mulvaney & Katherine Chamblee, *Innocence and Override*, 126 YALE L.J. 118, 122 (2016).

36. See 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.”).

37. See Helman, *supra* note 28, at B1.

38. Legislators voted against the bill by an almost two-to-one margin (defeated 100 to 53). *Id.* 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).

39. Helman, *supra* note 28, at B1. Perhaps trying to minimize a foreseeably negative outcome for his initiative, the day before the vote it was said of Governor Romney that:

[A]lthough 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.

The readers of this article probably think the death penalty is as important as saving money on auto insurance, so I propose one modest way in which capital punishment in this country could be made more fair. Ideally, this will be an idea that both abolitionists and proponents of capital punishment can get behind. My suggestion is simply that we begin to use the law of death qualification that we already have.

II. WHAT IS DEATH QUALIFICATION?

Prospective jurors in capital cases are questioned about their views on the death penalty in a process called “death qualification.”⁴⁰ The idea is to excuse for cause any individuals who “are so opposed to capital punishment that they either (1) would not find [guilt] regardless of the evidence, or (2) would not consider death as a possible sentence regardless of the [evidence].”⁴¹ Those who would not find guilt are called “nullifiers,” and those who would not consider death as a possible sentence are called “excludables.”⁴²

Few would argue that nullifiers should serve on a jury.⁴³ If asked, “Did this person violate the law?” jurors are sworn to answer truthfully. Nullification is a real jury power, of course, and an important check on the system.⁴⁴ However, jurors who

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

41. *Id.*; see also Woodson v. North Carolina, 428 U.S. 280, 290 (1976) (plurality opinion) (referring to “the problem posed by the not infrequent refusal of juries to convict murderers rather than subject them to automatic death sentences.”); Rick Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 HOW. L.J. 571, 572-74 (1986).

42. See *The Principled Executioner*, *supra* note 1, at 776.

43. See, e.g., Lockhart v. McCree, 476 U.S. 162, 172 (1986) (“[N]ullifiers’ may properly be excluded from the guilt-phase jury”); Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (excluding those who “would not even consider” death penalty would have been permissible).

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

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.”

use that power are expressly refusing to follow the law.⁴⁵ Of course, that is the point of nullification, and its link with capital punishment is a long and honorable one.⁴⁶ In fact, nullification is credited with being the reason that we have the set of homicide laws (among other things) that we have today.⁴⁷ Generally speaking, there is universal agreement that if prospective jurors say they will not apply the law, they should be excused.⁴⁸ The fight is over the excludables—those prospective jurors who will find guilt if it is warranted, but will not consider death under any circumstances.⁴⁹

III. THE BIG IDEA

In practice, many more prospective jurors are excluded under existing law than should be.⁵⁰ Jurors are death qualified when asked, in essence, whether their views about the death penalty would “substantially impair” their ability to follow

The Principled Executioner, supra note 1, at 776.

45. *Id.* at 776-77.

46. *See id.* at 776 (citation omitted).

47. *See* Andrew J. Parmenter, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 386 (2007).

48. *See, e.g.*, LINDA E. CARTER & ELLEN KREITZBERG, *UNDERSTANDING CAPITAL PUNISHMENT LAW* 57 (2004).

49. *See* *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). *See generally* *Lockhart v. McCree*, 476 U.S. 162, 167 (1986) (arguing that the resulting prosecutorial basis created by death-qualification violates the constitutional rights of the defendant under the Sixth Amendment’s fair cross-section requirement and the requirement of impartiality in the Due Process Clause of the Fourteenth Amendment). Some scholars and advocates have argued that we should end the practice of death qualification completely, because it violates the defendants’ right to be tried by a jury drawn from a fair cross-section of the community. *See, e.g., id.* at 173-77 (summarizing and declining to adopt respondent’s argument); Stephen Gillers, *Proving the Prejudice of Death-Qualified Juries after Adams v. Texas*, 47 U. PITT. L. REV. 219, 239, 252-53 (1985); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1168-69 (2014); Welsh S. White, *Death-Qualified Juries: The “Prosecution-Proneness” Argument Reexamined*, 41 U. PITT. L. REV. 353, 406 (1980). So far, anyway, these people have all lost, and with the election of Donald Trump and his Supreme Court appointee(s), it seems unlikely that the country will revisit those arguments anytime soon.

50. *See The Utility of Witt*, supra note 40, at 691-93.

instructions and obey their oaths, either in finding guilt or in considering death as a possible punishment.⁵¹

Leaving aside nullifiers, the duty at issue is the juror's duty to consider and weigh the aggravating and mitigating circumstances presented in the case.⁵² Unlike the factual question answered in bad faith by nullifiers (did this defendant commit the crime?), the question at issue for excludables is a normative one (should this defendant live or die?). Nullifiers violate their oaths because they swear to find facts truthfully, and fail to do that.⁵³ Although the honest answer to the question "Did the government establish beyond a reasonable doubt that this defendant committed this crime?" is "Yes," the nullifier replies, "No." Excludables, on the other hand, do not violate their oaths. They cannot. Because the question "Should this defendant live or die?" is a normative one, there is no dishonest answer.

Mandatory or automatic death sentences are unconstitutional.⁵⁴ No mitigator is off-limits, and mercy is always an option.⁵⁵ As a result, it is impossible to lie when answering the normative question, at least in the direction of life. Jurors may decide, for example, that this defendant should die (because of x), but they will vote that he should live (because of y), or they might conclude the opposite. As long as the aggravators they consider are on the list of permissible statutory considerations, there is no wrong answer to the

51. *Wainwright v. Witt*, 469 U.S. 412, 433 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)) (finding jurors may be excused for cause whenever their "views 'would prevent or substantially impair the performance of [their] duties as [] juror[s] in accordance with [their] instructions and [their] oath.'").

52. *The Utility of Witt*, *supra* note 40, at 682–83. "In all thirty-nine jurisdictions currently permitting a death penalty, the sentencer is to 'consider' or 'weigh' the aggravating and mitigating circumstances in the case, or other language to that same effect." *Id.*

53. *Id.* at 684.

54. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1975) (plurality opinion) (finding that mandatory death sentences are unconstitutional for violating the Eighth Amendment).

55. See Stephen Gillers, *The Quality of Mercy: Constitutional Accuracy at the Selection Stage of Capital Sentencing*, 18 U.C. DAVIS L. REV. 1037, 1083, 1088–90 (1985) (discussing the discretion the sentencer has when imposing the death penalty).

normative question.⁵⁶ All mitigators are permissible,⁵⁷ and death is never mandatory.⁵⁸ By definition, then, whatever the jury ultimately decides is the right answer to the “should this defendant live or die?” question is an honest answer.

Unfortunately, this is not how it works in the real world. In reality, some prospective jurors in *voir dire* will say things such as, “I’m opposed to capital punishment. I would never vote for the death penalty.” The judge then presses those jurors more or less closely on whether they really mean it, and barring the jurors’ convincing the judge that, on second thought, they really could, those jurors are excused for cause.⁵⁹

Legally, though, this is wrong. In fact, almost all of those prospective jurors are competent. The argument goes like this:

- 1) There is no such thing as a mandatory death sentence.⁶⁰
- 2) That means that no particular sentencing outcome is ever required.⁶¹
- 3) Therefore, under no circumstance must a juror vote for death.⁶²

In other words, it is entirely consistent with existing law, assuming jurors diligently follow their instructions and their oaths, for any given jurors never to vote for death.⁶³

56. *Jones v. United States*, 527 U.S. 373, 407-08 (1999) (Ginsburg, J., dissenting).

57. *Gregg v. Georgia*, 428 U.S. 153, 197, 203 (1976) (upholding a statutory scheme which provided: “The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy . . . but it must find a *statutory* aggravating circumstance before recommending a sentence of death.”).

58. *See Woodson*, 428 U.S. at 304-05.

59. Then-professor and now Dean Andrea Lyon doubts the accuracy of this process, stating:

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.” . . . 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. It’s set up to scare you to death. As a result, jurors look for the “correct” answer to the question—the civics answer.

Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 IND. L.J. 52, 53 (2005).

60. *Woodson*, 428 U.S. at 304-05.

61. *See Roberts v. Louisiana*, 428 U.S. 325, 335-36 (1976).

62. *See People v. Bernette*, 197 N.E.2d 436, 443 (Ill. 1964).

63. *See Wainwright v. Witt*, 469 U.S. 412, 443-45 (1985) (Brennan, J., dissenting).

The law requires jurors do two things. First, they must *consider* and then *weigh* the evidence for and against each possible sentence.⁶⁴ To consider means to think about.⁶⁵ The fact that some jurors may have thought about a death sentence in the abstract, or in the context of another case, is legally irrelevant.⁶⁶ What is required is that jurors think about it again, this time with regard to the specific facts of the case before them.⁶⁷ In *Witherspoon v. Illinois*, the U.S. Supreme Court expressly held that opposition to capital punishment in principle is not disqualifying.⁶⁸ What is disqualifying is the unwillingness to think about it in the context of the facts of this case.⁶⁹

This is the basis for my contention that almost all people who are excused for cause due to their opposition to capital punishment are, in fact, qualified to sit and ought not be excused. Although small children might put their fingers in their ears and call out, “I can’t hear you!” most prospective jurors would contain themselves and listen. Especially in the context of a capital jury trial, it seems reasonable to presume that almost all fellow human beings will take their duty seriously. Frankly, if we cannot trust capital jurors to take seriously their duty to consider the evidence before them, then we have bigger problems.

The second thing required of jurors is that they weigh the evidence.⁷⁰ In other words, they are obligated to decide how much each mitigator and each aggravator counts, and, in the

64. See *The Utility of Witt*, *supra* note 40, at 687-89.

65. *Id.*; see also LAURENCE URDANG, *THE OXFORD THESAURUS* 75 (Am. ed. 1992); *Consider*, *BLACK’S LAW DICTIONARY* (6th ed. 1990) (“To fix the mind on, with a view to careful examination; to examine; to inspect.”).

66. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968). See *United States v. Flores*, 63 F.3d 1342, 1356 (5th Cir. 1995) (“In [the juror’s] case, the source of his bias was not the death penalty in the abstract, or in some irrelevant hypothetical case[,]” which would not have been instructive or legally significant as to his attitude towards imposition of capital punishment).

67. *Witherspoon*, 391 U.S. at 519.

68. *Id.* at 520.

69. *Id.* at 519-22.

70. *Zant v. Stephens*, 462 U.S. 862, 914-15 (1983) (Marshall, J., dissenting).

end, which outcome is called for.⁷¹ As a close relative of the “should this defendant live or die?” question, there is no right answer to this question, either. Jurors are not given a scale to weigh aggravators against mitigators.⁷² There is no law governing their discretion as to the comparative weight accorded each aggravator versus each mitigator.⁷³ We cannot test a drop of blood and find an answer to the question of whether the jury correctly found that this defendant deserves to live or die. If there were such a test, we would not need jury trials.⁷⁴ That is, of course, the point of a jury constituted from a cross-section of the community—to provide a gut-check of the community’s norms and values.⁷⁵ It is perfectly permissible (and common) for jurors to decide that a circumstance presented by the defense as a mitigator does not qualify as such, or vice versa.⁷⁶ The fact that a defendant held a steady job, for example, offered to prove that he had some good qualities and some potential worth saving, can be viewed by some jurors as proof of his culpability, in that it shows he had the ability to behave better.⁷⁷ Likewise, evidence offered by the prosecution as proof that he made the conscious choice to commit a crime may be taken by some jurors as proof of his potential to do right.⁷⁸ And in either case, some jurors could conclude that fact does not matter at all, or

71. In fact, the statutes in Alabama and Wyoming explicitly state that the mere numerical comparison has no significance. See ALA. CODE § 13A-5-48 (West 2016); WYO. STAT. ANN. § 6-2-102(d)(i)(C) (West 2016).

72. *The Utility of Witt*, *supra* note 40, at 684.

73. *Id.*

74. *Id.* at 688-89.

[A]s long as prospective jurors will carefully examine and ponder over the evidence, they will follow the instruction to “consider” it. They need not conclude that any probative force should be given to this or that piece of evidence. Constitutionally, they cannot be required to conclude any such thing. They can be and are required to engage in the process, to give the evidence its due consideration.

Id. at 688.

75. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 173-77 (1986).

76. See *McKoy v. North Carolina*, 494 U.S. 433, 442-43 (1990).

77. *The Utility of Witt*, *supra* note 40, at 690.

78. See *id.*

that it matters more than anything else.⁷⁹ Their job is to weigh the evidence.

As before, the law does not—and cannot⁸⁰—dictate which outcome prospective jurors will reach with respect to how to weigh the evidence in the case. What matters is the process by which they get there.⁸¹ In the same way, it is not what they will ultimately decide as to life or death.⁸² We cannot require that.⁸³ What we can, and do, require is a system that regulates how they arrive at their decision.⁸⁴ Will they consider and weigh the evidence? The answer for almost everyone is surely “yes.”

IV. WHY IS THIS IMPORTANT?

The fact that almost everyone is qualified to serve on a capital jury (because almost everyone will listen carefully to the evidence and think about how much weight to give each fact that argues for life versus death) matters because wrongly excusing excludables has two important side effects. First, it removes those potential jurors who are more defense-friendly in general from juries. Second, the process of death qualification convinces those who undergo it that defendants are guilty, and the only task left is to find jurors who can vote for death.⁸⁵ It is a simple deduction. Those prospective jurors who say they would never vote for death get excused. Ergo, the judge must be looking for jurors who will.

There is a lot of social science research on these points. These investigations include, for example, the Capital Jury Project—which interviewed 1,200 actual capital jurors in 350 cases⁸⁶—and Craig Haney’s famous studies.⁸⁷ The research

79. *See id.*

80. *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976) (plurality opinion).

81. *Id.* at 301.

82. *Id.* at 302, 305.

83. *Id.* at 303.

84. *Id.* at 303-04.

85. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 *LAW & HUM. BEHAV.*, 121, 128-30 (1984).

86. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 *CRIM. L. BULL.* 51, 51 (2003).

87. Haney, *supra* note 85.

shows that death qualification removes those who are more defense-friendly from juries.⁸⁸ Blacks, women, and democrats, for example, are disproportionately stricken in death qualification.⁸⁹

The Capital Jury Project's race-related data are especially striking. In cases with a black defendant and a white victim, the racial composition of the jury powerfully predicts who gets death.⁹⁰ Researchers coined terms for the "white male dominance effect," describing the fact that when there are four or fewer white males on a jury, there is an approximately thirty percent chance of a death sentence.⁹¹ Five or more white males on a jury, however, raises the odds of death to about seventy percent.⁹² The other side of this coin is the "black male presence effect," describing the fact that a jury containing no black men jurors will return a death sentence about seventy percent of the time.⁹³ The presence of a single black man on the jury brings the odds down to about forty percent.⁹⁴

Among other reasons, researchers have confirmed that jurors' interpretations of the same evidence vary widely based on race.⁹⁵ This, too, makes sense. We all see things through the lens of our own experiences.⁹⁶ My favorite example has nothing to do with race, but illustrates the principle nicely. Evidence that a man held an empty beer bottle over his head while hollering "bitch!" at his wife is ambiguous by itself. Is the

88. *Id.* at 130.

89. Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1187 (1973) (surveying post-*Witherspoon* studies confirming prosecution-proneness of death-qualified juries); Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1253-54 (1974).

90. Bowers & Foglia, *supra* note 86, at 77.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Bowers & Foglia, *supra* note 86, at 77-80. *See also The Principled Executioner*, *supra* note 1, at 781 (describing the potential risks of a homogenous jury).

96. "There are no facts, only interpretations." Friedrich Nietzsche, *Nachlass*, <http://www.theperspectivesofnietzsche.com/nietzsche/ntruth.html> [https://perma.cc/2VT7-2QUB]. "Why does man not see things? He is himself standing in the way: he conceals things." Friedrich Nietzsche, *Daybreak*, <http://www.theperspectivesofnietzsche.com/nietzsche/ntruth.html> [https://perma.cc/8R3F-Y89P].

bottle a weapon raised in an imminent attack, or just a request (less than charming, certainly, but not physically threatening) for another beer?⁹⁷ Jurors' experiences and backgrounds will make one of these explanations more intuitive than the other. If different experiences and backgrounds are not represented on the jury, then the less-intuitive (for those jurors who did sit) explanation might never be considered simply because it never occurred to anyone on that jury—even if it happens to be the right one.

Removing the excludables skews the jury in other ways, too. There are a startling number of automatic death penalty voters, for example. It is as unconstitutional to vote for death as it is to vote for life without considering and weighing the facts of the particular case,⁹⁸ but the number of actual capital jurors who said to researchers that the “only acceptable sentence” was death ranged from twenty-four to seventy percent, depending on the circumstances.⁹⁹ In contrast, those actual capital jurors who said the “only acceptable sentence” was life ranged from two to seven percent.¹⁰⁰ On a twelve-person jury, then, the typical defendant can expect to have between two to eight automatic death votes, and less than one automatic life vote.¹⁰¹

Jurors' knowledge of the law is a problem, as well. When asked to give examples of when they would not vote for death, actual capital jurors offered the following instances: war time, children playing with a gun, a hunting accident, and (my favorite) if the guy was not guilty.¹⁰² This would be funny but for the fact that real people are being sentenced to death by

97. *Cf.* *State v. Hundley*, 693 P.2d 475, 476, 479 (Kan. 1985) (involving similar facts relevant to self-defense claim in context of battered-spouse syndrome).

98. “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.” *Morgan v. Illinois*, 504 U.S. 719, 739 (1992).

99. Bowers & Foglia, *supra* note 86, at 62.

100. *Id.*

101. *See The Principled Executioner*, *supra* note 1, at 789.

102. Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 385, 400 (James R. Acker et al. eds., 2d ed. 2003).

jurors who think the only time it is appropriate to impose a life sentence is when the accused's behavior is not a crime at all.

Additional concerning results of jurors' votes being skewed towards death include the fact that the overwhelming majority of jurors settled on punishment before hearing a single piece of evidence in sentencing, saying they were "absolutely convinced" or "pretty sure" about how they would vote.¹⁰³ Fewer than five percent chose "not too sure."¹⁰⁴ This is yet another effect of death qualification. By asking prospective jurors before they hear any evidence on sentencing about their feelings regarding the death penalty, and by excusing any who say they never would vote for death before the guilt phase even begins, the system primes jurors to consider the defendant guilty and deserving of death before trial even begins.¹⁰⁵

There is a lot more to say on this topic, but the bottom line, for the moment, is that if we were simply to start enforcing the law as it already exists, we would see more fairness in the administration of the death penalty.¹⁰⁶ We would see more fairly balanced juries in terms of viewpoint and life experiences, which would produce more accurate verdicts both in terms of guilt and in applying the community norms for valuing aggravators and mitigators. We would also see fewer premature decisions, with jurors able to hear the evidence on guilt and punishment without being primed from the beginning to believe that the defendant is guilty and deserves death.¹⁰⁷

These two suggestions are something that supporters of capital punishment should be able to get behind, simply because they increase fairness in the process. It seems unlikely that people of good faith would want to keep using a system in which the racial composition of the jury is so predictive of outcomes, or one in which the typical jury contains no fewer than two and perhaps as many as eight automatic votes for

103. *The Principled Executioner*, *supra* note 1, at 790.

104. *Id.*

105. See *The Utility of Witt*, *supra* note 40, at 693-95; *The Principled Executioner* *supra* note 1, at 795-96.

106. *The Utility of Witt*, *supra* note 40, at 699.

107. *Id.*

death, when automatic voting—voting without considering and weighing the evidence—is always impermissible. And death penalty opponents should like the fact that with these two changes, fewer people will be killed.

Hope springs eternal.