LOADING THE DICE FOR DEATH: STRUCTURAL PROBLEMS IN CAPITAL PUNISHMENT

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Texas Tech Criminal Law Symposium
"Are there good reasons for abolishing the death penalty?"
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I. INTRODUCTION

The wisdom of punishing transgression with death has been debated since time immemorial.[1] This Symposium, then, is in good company in

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1. Compare the codification of the death penalty in Babylon in 1800 B.C. with the abolition of the death penalty in China in 747. *See, e.g.*, HAMMURABI, THE CODE OF HAMMURABI (L.W. King trans., CreateSpace Independent Publishing Platform 2015) (1754); CHARLES BENN, DAILY LIFE IN TRADITIONAL CHINA: THE TANG DYNASTY 209 (Greenwood Press 2001). In modern times, compare the Catechism under Pope John Paul II with the Catechism under Pope Francis. *See cf.* Press Release, Holy See Press Office, New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty – Rescriptum "ex Audentia SS.mi" (Feb. 8, 2018) ("Recourse to the death penalty on the part of legitimate authority…was long considered an appropriate response to the gravity of certain crimes and an acceptable, albeit extreme, means of safeguarding the common good."); Press Release, Holy See Press Office, Letter to the Bishops Regarding the New Revision of No. 2267 of the Catechism of the Catholic Church on the Death Penalty (Feb. 8, 2018) ("[N]o matter how serious the crime that has been committed, the death penalty is inadmissible because it is an attack on the inviolability and the dignity of the person.") (quoting Pope Francis, Address to Participants in the Meeting Promoted by the Pontifical Council for Promoting the New Evangelization (Oct. 11, 2017)).

posing this panel, "good reasons to abolish," in contrast to the prior panel's "good reasons to keep." Still, I resist the effort to paint the picture as one of "us" versus "them." Frankly, there is too much of that going on already.[2]

And so today, as in everything I have written in this arena, I am going to aim for consensus. Following in the footsteps of United States Supreme Court Justice Stephen Breyer in his dissenting opinion in *Glossip v. Gross*,[3] I invite you to leave aside the merits of whether the death penalty in itself is a good idea or a bad idea. Truth be told, I am not optimistic about changing anyone's mind on the moral stance.[4] But regardless of where you come down in the abstract, there is overwhelming evidence that capital punishment as implemented in this country is a procedural nightmare.[5]

Others have capably described many of the problems with capital punishment as we practice it,[6] but I want to share with you today a problem that has not gotten the attention it deserves. It may have gone relatively unnoticed because it is so surprisingly counterintuitive to the ideals and premises on which the criminal justice system in the United States of America purports to be founded.[7] Or maybe I am just being naïve.

I take as a first premise the (hopefully noncontroversial) position that all punishments—but especially the highest of them—should be exacted fairly. And yet the death penalty is not. Justice Stewart, concurring in the decision that resulted in the temporary moratorium on capital punishment that ran from 1972 to 1976, famously compared a government-imposed death sentence to a lightning strike.[8] But review of the evidence shows it is worse than that. The death penalty as implemented is more like a dice throw—with loaded dice.

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2. Eli Saslow, *'Nothing on This Page Is Real': How Lies Become Truth in Online America*, WASH. POST (Nov. 17, 2018), https://www.washingtonpost.com/national/nothing-on-this-page-is-real-how-lies-become-truth-in-online-america/2018/11/17/edd44cc8-e85a-11e8-bbdb-72fdbf9d4fed_story.html?noredirect=on&utm_term=.bc9445919c14/.

3. Glossip v. Gross, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting). Justice Breyer did not address capital punishment's morality in itself, but instead cataloged its practical "constitutional defects," including "serious unreliability [and] arbitrariness in application," among other concerns. *Id.*

4. Famed negotiation expert, Victoria Pynchon, points to neuroscience to explain that "the neural networks controlling our thought patterns are actual physical structures in the brain . . . built over the course of a lifetime . . . . In other words, it is impossible to know and extremely difficult to change someone else's mind." Victoria Pynchon, *A New Approach to Negotiating*, 46 TRIAL 20, 24 (2010) (citing David Rock & Jeffrey Schwartz, *The Neuroscience of Leadership*, STRATEGY+BUSINESS (May 30, 2006)).

5. *See, e.g.*, *Glossip*, 135 S. Ct. at 2755–72 (Breyer, J., dissenting). *See generally* KENNETH WILLIAMS, MOST DESERVING OF DEATH?: AN ANALYSIS OF THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE (2012).

6. *See, e.g.*, WILLIAMS, *supra* note 5.

7. *See infra* text accompanying notes 14–19 (discussing foundational presumptions that defendants are innocent until proven guilty, and that life is a more appropriate sentence than death even for most murders).

8. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

There are at least two structural reasons the dice are loaded, but the good news is that we can fix them both. And yet, despite the fact that I have written about them before,[9] they remain. I don't get it.

II. THE PROBLEM

The fact that there are problems with the death penalty is not news to anyone.[10] One of the best known and certainly most concerning problems infecting capital punishment is racial bias.[11] Defendants who kill white victims, for example, are far more likely to get the death penalty than those who kill black victims.[12] For black defendants who kill white victims, the odds of a death sentence increase twenty-one times over those whose victims were black.[13] Telling? Yes. Wrong? Yes. Surprising? No, not really.

But one defect stands out as something most people probably do not already know. Most people probably imagine that capital defendants enter the process with a presumption of innocence. After all, we are all innocent until proven guilty,[14] a concept so venerable that it comes to us from the Latin: *ei incumbit probatio qui dicit, non qui negat* ("the burden of proof is on the one who declares, not on one who denies").[15]

Most people probably also imagine that the more serious the crime charged, the more important that presumption. I certainly care a lot more about never being wrongly found guilty of murder than I do about never being wrongly found guilty of stealing a pack of gum.

Similarly, most people (who know something about homicide law, anyway) probably imagine that capital defendants enter the process with a

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9. *See generally* Susan D. Rozelle, *Keep Tinkering: The Optimist and the Death Penalty*, 70 ARK. L. REV. 349 (2017) [hereinafter Rozelle, *Keep Tinkering*]; Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769 (2006) [hereinafter Rozelle, *Principled Executioner*]; Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002) [hereinafter Rozelle, *Utility of* Witt].

10. *See, e.g.*, WILLIAMS, *supra* note 5.

11. *See, e.g.*, *id.* at 39–58 (Chapter 3, Race and the Death Penalty).

12. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD–90–57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990), https://www.gao.gov/assets/220/212180.pdf (reviewing empirical studies from 1972 to 1990); Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1245–51 (2013) (reviewing studies from 1990 to 2013).

13. DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 314–15 (1990).

14. Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

15. 2 THE DIGEST OF JUSTINIAN (Alan Watson ed., 1985); *see* SEYMOUR S. PELOUBET, A COLLECTION OF LEGAL MAXIMS IN LAW AND EQUITY: WITH ENGLISH TRANSLATIONS (2018) (1880). The concept is enshrined today in the Universal Declaration of Human Rights. *See* G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.").

presumption that, even if they are guilty, life is a more appropriate sentence than death. Remember that murder, on its face, is not even a death-eligible crime.[16] To become death-eligible in most United States jurisdictions, the killing must have been especially "heinous, atrocious, or cruel," involving multiple victims, a police officer, death by torture, or other similar necessary aggravators.[17] Just "run of the mill murder," as Eric Carpenter put it, does not merit the highest punishment.[18] We reserve death, the law says, for the worst of the worst.[19]

Despite these express presumptions—that a defendant is innocent until proven guilty, and that life is more appropriate than death even for most murderers—one of the strangest things about capital cases is that they actually predispose jurors first to find guilt, and then to vote for death.[20] The usual presumptions of innocence and life in capital cases are not just missing but affirmatively backwards.[21] In these most serious kinds of cases, where the stakes are the highest, defendants are presumed guilty, and deserving of death.

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16. Atkins v. Virginia, 536 U.S. 304, 319 (2002) ("[T]he culpability of the average murderer is insufficient to justify the most extreme sanction available to the State . . . .").

17. *See* FLA. STAT. ANN. § 921.141(6) (West 2018); LA. STAT. ANN. § 14:30 (2018); NEB. REV. STAT. ANN. § 29-2523 (West 2018); N.C. GEN. STAT. ANN. § 15A-2000 (West 2018); OKLA. STAT. ANN. tit. 21, § 701.12 (West 2018); TENN. CODE ANN. § 39-13-204 (West 2018); UTAH CODE ANN. § 76-5-202 (West 2018); *see, e.g.*, ALA. CODE § 13A-5-40(a)(1)-(20) (2018); ARIZ. REV. STAT. ANN. § 13-751(F)(1)-(14) (2018); ARK. CODE ANN. § 5-10-101(a) (West 2018); CAL. PENAL CODE §§ 187–99 (West 2018); COLO. REV. STAT. ANN. § 18-1.3-1201 (West 2018); GA. CODE ANN. § 17-10-30 (West 2018); IDAHO CODE ANN. § 19-2512 (West 2018); IND. CODE ANN. § 35-50-2-9(b) (West 2018); KAN. STAT. ANN. § 21-5401 (West 2018); KY. REV. STAT. ANN. § 532.025(2)(a) (West 2018); MISS. CODE ANN. § 97-3-19(2) (West 2018); MO. ANN. STAT. § 565.032 (West 2018); MONT. CODE ANN. § 46-18-303 (West 2017); NEV. REV. STAT. ANN. § 200.033 (West 2017); N.H. REV. STAT. ANN. § 630:1 (2018); N.M. STAT. ANN. § 31-20A-5 (West 2018); N.Y. PENAL LAW § 125.27 (McKinney 2018); OHIO REV. CODE ANN. §§ 2901.01, 2929.02, .04 (West 2018); OR. REV. STAT. ANN. § 163.095 (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 9711 (West 2018); S.C. CODE ANN. § 16-3-20(C)(a) (2018); S.D. CODIFIED LAWS § 23A-27A-1 (2018); TEX. PENAL CODE ANN. § 19.03 (West 2017); VA. CODE ANN. § 18.2-31 (West 2018); WASH. REV. CODE ANN. § 10.95.020 (West 2018); WYO. STAT. ANN. § 6-2-102 (West 2018).

18. Eric Carpenter, Professor, Fla. Int'l Univ. Coll. of Law, Criminal Law Discussion Group at the Southeastern Association of Law Schools Annual Meeting (Aug. 5, 2018).

19. *Atkins*, 536 U.S. at 319 ("[O]ur jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes.").

20. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 84–85 (2003) ("[D]eath qualification 'leave[s] an especially conviction-prone and punishment prone group of individuals to decide capital cases.'"); Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances.") (alteration in original); Rozelle, *Principled Executioner*, *supra* note 9, at 785 n.98 (citing Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715, 724–25 (1998)) (analyzing data and concluding death qualification increases likelihood both of guilty verdicts and of death sentences).

21. *See* Rozelle, *Principled Executioner*, *supra* note 9, at 793.

Worse, given the lengthy history and renown of these data,[22] the conclusion that loading the dice for prosecutors this way is done deliberately becomes harder to avoid. "[D]eath 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."[23]

III. HOW DOES THIS HAPPEN?

These backward presumptions are created through a process called death qualification.[24] In order to sit on a capital jury, prospective jurors must be willing to consider whether the defendant is guilty of a death-eligible crime, and if so, whether death is an appropriate punishment.[25]

No doubt we need jurors to listen to the evidence and decide cases fairly based on that evidence. "Nullifiers," as jurors who would simply refuse to convict rather than run the risk of a death sentence are known, "may properly be excluded from the guilt-phase jury . . . ."[26] "[E]xcludables" is the term for those jurors whose views on the death penalty are so strong—either for[27] or against[28]—that they would automatically vote for their preferred sentence (either death or life, respectively) without even considering the evidence presented in the case before them. These jurors, too, should not sit,[29] lest they undermine faith in the entire criminal justice system.[30] After all, if we allowed jurors to make up their minds without first considering the evidence, there

22. *Id.* at 778–93 (reviewing the then-fifty years of history of social science research on death qualification's effects that appears in United States Supreme Court decisions and response by the social science research community to call for better data).

23. Andrea D. Lyon, *The Capital Jury*, *Open Discussion*, 80 IND. L.J. 60, 64 (2005).

24. *See* 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, 385–86, 395 (James R. Acker et al. eds., 2d ed. 2003) (citing Allen et al., *supra* note 20, at 724).

25. Zant v. Stephens, 462 U.S. 862, 878–79, 885 (1983); *see also* Hildago v. Arizona, 138 S. Ct. 1054, 1054 (2018) (mem.) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)).

26. Lockhart v. McCree, 476 U.S. 162, 172 (1986).

27. Morgan v. Illinois, 504 U.S. 719, 733 (1992) (establishing removal for cause of prospective jurors shown not to be life-qualified).

28. Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (establishing removal for cause of prospective jurors shown not to be death-qualified).

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

30. Robert P. Lawry, *The Moral Obligation of the Juror to the Law*, 112 PA. ST. L. REV. 137, 173 (2007) (citing United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972)). "The standard judicial view is quite clear and quite negative . . . that to allow a judicial charge of nullification 'risks the ultimate logic of anarchy,' [and yet] . . . is sometimes warranted in the 'exceptional case.'" *Id.* at 139–40 n.17 (citations omitted). I concede the need to ensure prospective jurors will listen to the evidence and follow the law but do not want to overlook the need, on the other hand, for the safety valve of jury nullification in our system. *Id.*; *see also* Andrew J. Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 386 (2007).

would be no need for a trial.[31] Unfortunately, the process of screening out those properly excused jurors also inculcates the two crucial reversed presumptions.[32] Which means that, ironically, death qualification encourages exactly what it was supposed to prevent: jurors deciding the issues without hearing the evidence.[33] Only instead of seating jurors who have decided in advance that they would not convict[34] or would not consider death,[35] we convince jurors to decide in advance that this person is guilty[36] and deserves to die.[37] We load the dice.

IV. WHAT CAN WE DO ABOUT IT?

Very few persons tell judges during voir dire that they would not even consider a sentence of life in prison, but instead would automatically vote for death regardless of the evidence, particularly when compared to those who say they would automatically vote for life.[38] As a practical matter, then, the average capital juror sees several prospective jurors dismissed for refusing to consider death, while never seeing anyone dismissed for refusing to consider life.[39] This has a foreseeable impact: "Preoccupation with [death qualification questioning] creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant."[40] Multiple generations of rigorous social-science research demonstrates that when those who state they would not vote for death are

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31. *See* Rozelle, *Keep Tinkering*, *supra* note 9, at 365. Despite this recognition, and the life-qualification efforts expended in every capital case, one of the more disturbing facts uncovered by researchers is the number of automatic death penalty voters actually seated on real juries. *See id.* Anywhere from 24%–70% of actual capital jurors reported to researchers that "the only acceptable punishment" was death, depending on the circumstances of the crime. Bowers & Foglia, *supra* note 20, at 62. Death-qualification efforts, in contrast, are much more successful. The number of actual capital jurors who reported that the only acceptable punishment was life clocked in at 2%–7%. *Id.* "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." Rozelle, *Keep Tinkering*, *supra* note 9, at 365.

32. *See* WELSH S. WHITE, THE DEATH PENALTY IN THE EIGHTIES: AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT 167–68 (1987).

33. *See, e.g.*, United States v. Resko, 3 F.3d 684, 688–90 (3d Cir. 1993) (reviewing reasons for prohibition on premature jury deliberation).

34. *See* 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).

35. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).

36. WHITE, *supra* note 32.

37. *Id.*

38. *E.g.*, Seltzer et al., *supra* note 34, at 573.

39. *See* Morgan v. Illinois, 504 U.S. 719, 728 (1992); Adams v. Texas, 448 U.S. 38, 49 (1980); *see also supra* note 31 and accompanying text (discussing the striking ineffectiveness of life qualification in contrast to the success of death qualification).

40. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

excused, the onlooker prospective jurors draw a rational conclusion: the lawyers, the bailiff, the judge—everyone present in the courtroom—knows the defendant is guilty and deserves to die.[41] The only task remaining is to find enough jurors with enough fortitude to do what must be done.[42] "Of course he got death," one capital juror reported.[43] "That's what we were there for."[44]

In capital cases, the fundamental presumptions of innocence and life are not just missing, but actually backwards.

A. Change #1: True Bifurcation

If the death penalty is abolished, of course, then this ceases to be a concern. Short of that, though, two small changes would help tremendously. First, we should truly bifurcate capital trials.[45]

Capital cases are already bifurcated in the sense that they proceed in two phases: guilt and sentencing.[46] Many jurisdictions' laws, however, require a unitary jury.[47] As a result, and assuming the defendant is found guilty, the same jurors who heard the guilt phase then also hear the sentencing phase of trial.[48] This unitary jury requirement should be repealed.

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41. *See, e.g.*, Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 IND. L.J. 52, 53 (2005); *see also* Hovey v. Superior Court of Alameda Cty., 616 P.2d 1301, 1351–52 (Cal. 1980) (discussing a study demonstrating death-qualified jurors to be more guilt prone than those who were not death-qualified).

42. *Hovey*, 616 P.2d at 1351 (citing Craig Haney, The Biasing Effects of the Death Qualification Process (1979) (prepublished draft)).

43. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 46 (1988).

44. *Id.*

45. *See generally* Rozelle, *Principled Executioner*, *supra* note 9, at 772–95 (promoting the benefits of true bifurcation in capital cases).

46. *Id.* at 793.

47. *See, e.g.*, 18 U.S.C. § 3593(b)(1) (2018); ALA. CODE § 13A-5-43(a) (2018); ARK. CODE ANN. § 5-4-602(3) (West 2018); COLO. REV. STAT. ANN. § 18-1.3-1201(1)(a) (West 2018); CONN. GEN. STAT. ANN. § 53a-46a(b) (West 2018); DEL. CODE ANN. tit. 11, § 4209(b) (West 2018); GA. CODE ANN. §§ 17-10-30(b)–(c) (West 2018); IDAHO CODE ANN. § 19-2515(5)(b) (West 2018); 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West 2018); IND. CODE ANN. § 35-50-2-9(d) (West 2018); KY. REV. STAT. ANN. § 532.025(1)(b) (West 2018); LA. CODE CRIM. PROC. ANN. art. 905.1(A) (2018); MISS. CODE ANN. § 99-19-101(1) (West 2018); NEB. REV. STAT. ANN. § 29-2520(2)(a) (West 2018); N.H. REV. STAT. ANN. § 630:5(II)(a) (2018); N.C. GEN. STAT. ANN. § 15A-2000(a)(2) (West 2018); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2018); OKLA. STAT. ANN. tit. 21, § 701.10(A) (West 2018); OR. REV. STAT. ANN. § 163.150(1)(a) (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 9711(a)(1) (West 2018); S.C. CODE ANN. § 16-3-20(B) (2018); S.D. CODIFIED LAWS § 23A-27A-2 (2018); TENN. CODE ANN. § 39-13-204(a) (West 2018); UTAH CODE ANN. § 76-3-207(1)(c) (West 2018); VA. CODE ANN. § 19.2-264.3(C) (West 2018); WASH. REV. CODE ANN. § 10.95.050(3) (West 2018); WYO. STAT. ANN. § 6-2-102(b) (West 2018).

48. *See, e.g.*, 18 U.S.C. § 3593(b)(1) (2018); ALA. CODE § 13A-5-43(a) (2018); ARK. CODE ANN. § 5-4-602(3) (West 2018); COLO. REV. STAT. ANN. § 18-1.3-1201(1)(a) (West 2018); CONN. GEN. STAT. ANN. § 53a-46a(b) (West 2018); DEL. CODE ANN. tit. 11, § 4209(b) (West 2018); GA. CODE ANN. §§ 17-10-30(b)–(c) (West 2018); IDAHO CODE ANN. § 19-2515(5)(b) (West 2018); 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West 2018); IND. CODE ANN. § 35-50-2-9(d) (West 2018); KY. REV. STAT. ANN. § 532.025(1)(b) (West 2018); LA. CODE CRIM. PROC. ANN. art. 905.1(A) (2018); MISS. CODE ANN.

It simply is not necessary to death-qualify guilt-phase jurors. Because they will determine only whether the defendant is guilty or not guilty, we need not inquire into their willingness to consider death.[49] By refraining from death- (or life-) qualifying jurors at this first stage, we avoid asking jurors to bring to mind their views on capital punishment, which of course are relevant only if the defendant is guilty. In other words, before a single piece of evidence is presented to a unitary jury, those prospective jurors are asked to presume that the defendant is guilty in order to answer questions at voir dire that only become salient if the defendant is found guilty.[50] And the fewer times we ask prospective jurors to think of the defendant as guilty before the trial has even begun, the better.

Under this proposal, there would be no death qualification at all unless the defendant is convicted. One could argue instead for a unitary jury at the defendant's election,[51] primarily on the ground that residual doubt is the most powerful factor in mitigation at sentencing.[52] In other words, "the best thing a capital defendant can do to improve his chances of receiving a life sentence . . . is to raise doubt about his guilt."[53] At the same time, however, one of the most powerful factors in aggravation is lack of remorse.[54] As difficult as it may be to argue to a newly impaneled sentencing jury that it should doubt the guilty verdict it inherited, it is even harder to argue to the same jury that heard the defendant claim he did not do it at the guilt phase that the defendant now accepts responsibility and is truly sorry at sentencing.[55] And in cases where there is significant residual doubt, it is especially important to avoid skewing the jury toward guilt in the first place.[56]

The other main objection to true bifurcation is the idea that it will increase costs through sometimes requiring re-presentation of evidence to the sentencing-phase jury that was already presented at the guilt phase.[57] As I

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§ 99-19-101(1) (West 2018); NEB. REV. STAT. ANN. § 29-2520(2)(a) (West 2018); N.H. REV. STAT. ANN. § 630:5(II)(a) (2018); N.C. GEN. STAT. ANN. § 15A-2000(a)(2) (West 2018); OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2018); OKLA. STAT. ANN. tit. 21, § 701.10(A) (West 2018); OR. REV. STAT. ANN. § 163.150(1)(a) (West 2018); 42 PA. STAT. AND CONS. STAT. ANN. § 9711(a)(1) (West 2018); S.C. CODE ANN. § 16-3-20(B) (2018); S.D. CODIFIED LAWS § 23A-27A-2 (2018); TENN. CODE ANN. § 39-13-204(a) (West 2018); UTAH CODE ANN. § 76-3-207(1)(c) (West 2018); VA. CODE ANN. § 19.2-264.3(C) (West 2018); WASH. REV. CODE ANN. § 10.95.050(3) (West 2018); WYO. STAT. ANN. § 6-2-102(b) (West 2018).

49. *See* Rozelle, *Principled Executioner*, *supra* note 9, at 793–94.

50. *See id.* at 794–95.

51. *See, e.g.*, Joseph L. Hoffmann, *Response to Professors Kamin and Pokorak*, 80 IND. L.J. 153 (2005); Pam Belluck, *Massachusetts Governor Urges Death Penalty*, N.Y TIMES (Apr. 29, 2005), https://www.nytimes.com/2005/04/29/us/massachusetts-governor-urges-death-penalty.html (describing a proposed bill that would give defendants the option of electing a bifurcated jury).

52. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998).

53. *Id.*

54. *Id.* at 1560–61.

55. Rozelle, *Principled Executioner*, *supra* note 9, at 803–04.

56. Michael Finch & Mark Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 69–70 n.169 (1986).

57. Rozelle, *Principled Executioner*, *supra* note 9, at 798.

have explained elsewhere, however: (1) the cost of re-presentation of evidence is often borne regardless; (2) prosecutors have gotten good at minimizing any such expenses; and (3) the costs are offset by the savings reaped from not death-qualifying juries in cases with not-guilty verdicts, or where the capital specification is dropped before sentencing.[58]

The bottom line is that this first proposed change of true bifurcation would go a long way toward preventing the presumption of innocence from being perverted into a presumption of guilt.

B. Change #2: Follow Existing Law

The second proposed change is even smaller. Calling for no change in the law at all, this asks only that we follow the law we already have.[59] Capital jurors are obligated to listen to the evidence, and carefully consider which of the legally permissible punishments is most appropriate under the circumstances.[60] In practice, though, prospective jurors are disqualified for offering predictions like, "I never would vote for death."[61] This, despite the fact that opposition to the death penalty in general, as a philosophical position, is expressly not disqualifying.[62] In fact, such jurors constitutionally may not be disqualified.[63]

Some might mistakenly believe that limit is incompatible with death qualification, but death qualifying a jury is entirely consistent with seating jurors who will never vote for a death sentence. Capital jurors must consider and weigh the evidence presented, and using their judgment, they must then determine whether, everything considered, this defendant deserves life in prison or the death penalty.[64] The weight jurors give each piece of evidence, the conclusion jurors reach after exercising their judgment about which punishment is truly deserved, these things cannot be predetermined.[65] The United States Supreme Court struck down mandatory death sentences as unconstitutional,[66] holding that jurors must have the opportunity to exercise mercy.[67] And it remains the case: if we knew what the outcome should be, we would not need a jury. So it is not any particular outcome that can be required.[68] Indeed, it could be that if the juror heard a thousand cases, that

58. *Id.* at 802–03.

59. *See generally* Rozelle, *Utility of* Witt, *supra* note 9.

60. Witherspoon v. Illinois, 391 U.S. 510, 519–20 (1968) (holding that while opposition to capital punishment in principle is not disqualifying, refusal to consider it in light of the facts of the case is).

61. *See, e.g.*, *id.* at 515.

62. *Id.* at 519 ("A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror.").

63. *Id.* at 520.

64. *See id.* at 519–22.

65. *See id.*

66. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

67. *See id.* at 299.

68. *See Witherspoon*, 391 U.S. at 521–23.

juror never would conclude the death penalty were warranted. What can be and is required is the process. Jurors must be willing to listen—to consider and weigh.[69] The disqualifying thing would be to refuse to consider the facts of the case.[70]

Certainly any jurors who refused to consider the facts of the case would be violating their oath, not just capital jurors.[71] But I understand the heightened concern in capital cases.[72] It is conceivable that some prospective jurors might feel so passionately opposed to state-authorized killing that they would not listen at trial, and would simply vote for acquittal or for a life sentence without considering the evidence presented. Such jurors would be violating their instructions and their oaths, and they should not sit.[73]

Most adults, however, particularly in the context of the solemnity of a capital jury trial, will focus their minds on the task at hand. Most in good faith will think hard about the evidence presented, doing their jobs as instructed.[74] And once they have determined how much to value each piece of evidence in aggravation and in mitigation, most jurors then will think sincerely about whether this defendant deserves life in prison or a death sentence.[75] It is the process—the consideration—that is required, not one outcome or the other.[76] The outcome, in constitutional fact, cannot be required.[77]

All of which is a long way of saying that the proper judicial response to "I never would vote for death," is a gentle redirection. I suggest something to the effect of the following:

> General philosophical positions aside, we need a sentencing recommendation for this person, seated here today. Would you listen to the evidence presented to you, weigh it, and determine whether, in your judgment, this particular defendant deserves a life sentence or a death

69. *See id.* at 519–22.

70. *Id.* at 520 ("If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty.").

71. *See* Wainwright v. Witt, 469 U.S. 412, 423 (1985) ("[T]here is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries.").

72. *See supra* text accompanying notes 26–30 (discussing reasons not to seat nullifiers and excludables in capital cases).

73. *See supra* text accompanying notes 26–30 (discussing reasons not to seat nullifiers and excludables in capital cases).

74. Rozelle, *Utility of* Witt, *supra* note 9, at 684–85.

75. *Id.* at 687 ("[T]he solemnity of the occasion is sure to impress upon jurors the importance of giving careful consideration to everything presented to them. Although some prospective jurors genuinely may fail to consider the evidence as instructed, it seems that only the most slothful, inattentive, or uncaring would do so.") (footnote omitted).

76. *See* Woodson v. North Carolina, 428 U.S. 280, 303–04 (1976); Rozelle, *Keep Tinkering*, *supra* note 9, at 359–60.

77. *Woodson*, 428 U.S. at 304.

> sentence? Either sentence is legally permissible. All we require is that you consider the evidence before you decide.

V. WHY SHOULD ANYONE CARE ABOUT THIS?

Highlighting the difference between those who oppose the death penalty so strongly that they would not consider the evidence presented (and so are excludable) and those who oppose the death penalty in principle, but who nevertheless will listen in good faith to the evidence presented, consider it, weigh it, and determine in this individual case whether this defendant, in light of the evidence, deserves life in prison or a death sentence, even if in the end, those persons never will conclude a death sentence is warranted (and so are death-qualified), may seem like splitting hairs, but disqualifying people for their general opposition to the death penalty matters. Not only does the process itself skew the jurors who are seated toward both guilt and death by conveying the idea that the point of the proceedings is to find jurors who are able to steel themselves to do what everyone present knows needs to be done, since those who admit they cannot are sent home,[78] but the process also results in seating jurors who are more inclined toward guilt and death to begin with.[79]

Unsurprisingly, different demographic groups feel differently about capital punishment. Blacks, women, and Democrats, for example, oppose the death penalty more strongly than other groups.[80] That means that refusing to seat qualified death penalty opponents disproportionately shrinks jury representation of those groups.[81] Further, studies also show how stunningly more likely conviction and death become without those voices in the jury room.[82] Adding a lone black man to the jury, for example, reduces the likelihood of a death sentence from over 70% for juries without any black men to under 40% for those with one.[83] More generally, it is true that simply having greater numbers of people with different backgrounds and viewpoints in the room increases accuracy in fact-finding.[84]

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78. Stevens, *supra* note 40.

79. Bowers & Foglia, *supra* note 20, at 84–86.

80. Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1253–54 (1974); Welsh S. White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1187 (1973) (discussing data regarding demographic groups excluded as potential jurists under *Witherspoon*).

81. Stevens, *supra* note 40 ("[B]ecause 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.").

82. Bowers & Foglia, *supra* note 20, at 77.

83. *Id.*

84. *See, e.g.*, Sheen S. Levine & David Stark, Opinion, *Diversity Makes You Brighter*, N.Y. TIMES (Dec. 9, 2015), https://www.nytimes.com/2015/12/09/opinion/diversity-makes-you-brighter.html (describing results of empirical study demonstrating that "[w]hen participants were in diverse company, their answers were 58 percent more accurate [than those in homogeneous groups].").

No one is surprised to find race at the center of so many of our capital punishment system's defects. I do not imagine my modest proposals here would have any effect on racism, implicit or explicit.

But the fact that death qualification as currently practiced actually predisposes capital jurors to find guilt and impose death—both by shrinking the jury pool in a predictably guilt- and death-skewing direction,[85] and by persuading those who experience it that guilt and death are the right result, before trial has even begun[86]—is a defect we can fix now, today, without waiting for some future Supreme Court to abolish the death penalty.

VI. CONCLUSION

We should (1) repeal the unitary jury requirement, and (2) seat all jurors who would think about what this particular defendant deserves after considering the facts of the case, regardless of how they might vote in the end.

Death qualification and the unitary jury requirement actually reverse the twin presumptions of innocence and life—which presumptions, by the way, are our highest and best claim to civilization. So, regardless of whether you believe today we should abolish capital punishment or keep it, I hope we can all agree to stop loading the dice.

85. *See supra* notes 79–83 and accompanying text (describing the skewing effect on the composition of the jury after death-qualification excusals).

86. *See supra* notes 40–44 and accompanying text (describing the skewing effect on jurors' thought processes after the death-qualification experience).