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Death Qualification and True Bifurcation: Building on the Massachusetts Governor's Council's Work

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JEFFREY J. POKORAK[‡]

INTRODUCTION

For many death penalty opponents, death qualification of the capital jury is the worst part of a broken system.[1] The United States Supreme Court has accepted, at least for the sake of argument, the proposition that a death-qualified jury—one consisting entirely of jurors who state a willingness to apply the death penalty in accordance with state law[2]—is more likely to convict a defendant of capital murder than is a non-death-qualified jury.[3] Yet the Court has also held that a death-qualified jury may constitutionally determine the defendant's guilt or innocence of capital murder as well as the defendant's appropriate sentence; any interest the defendant has in a wholly impartial trial jury is outweighed by the state's efficiency interest in impaneling a single, death-qualified jury to decide both the defendant's guilt or innocence and his appropriate punishment.[4]

The drafting in Massachusetts of a set of best practices for the litigation of capital cases has occasioned a careful look at the practical questions of conducting capital trials.[5] The goal of the Massachusetts Governor's Council on Capital Punishment was to help create as nearly perfect a death penalty statute as is possible; to ensure that only the guilty are convicted of capital murder; and that only the "worst of the worst" are

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[†] Assistant Professor, Sturm College of Law, University of Denver. I would like to thank Joe Hoffmann for hosting a conference on the Massachusetts death penalty and to the participants at that conference for helping formulate the thoughts contained herein. Thanks also to the faculties at the University of San Diego and University of Cincinnati where this paper was given as a faculty colloquia. Needless to say, all errors or omissions remain those of the authors.

[‡] Associate Professor and Director, Clinical Programs, Suffolk University Law School. I appreciate the work of Prof. Hoffmann and the entire Massachusetts Governor's Council for their thoughtful consideration of the serious issues involved in the maintenance of a modern death penalty scheme. I also wish to thank the Indiana University—Bloomington for the opportunity to present my ideas and to learn from such thoughtful participants.

1. *See, e.g.*, Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 82 (1980); Welsh S. White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 406 (1980).

2. Wainwright v. Witt, 469 U.S. 412 (1985); *see also* Witherspoon v. Illinois, 391 U.S. 510 (1968).

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

4. *Id.* at 178.

5. MASSACHUSETTS GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT, *available at* http://www.mass.gov/Agov2/docs/5-3-04%20MassDPReportFinal.pdf (last visited December 27, 2004) (reprinted *supra* at 1) [hereinafter "GOVERNOR'S COUNCIL REPORT"].

sentenced to death.[6] The Council's Report is thus one of a very few attempts to carefully rethink the way that "death is done" in the United States today.[7]

The question of death qualification, however, is not directly addressed in the Massachusetts Council's Report, and, if anything, the original Report misses an important opportunity to adopt a new paradigm for determining when and how juries may be death qualified. At a conference convened at the Indiana University School of Law in Bloomington, Indiana to discuss and critique the Council's work, this failure to address death qualification was noted and discussed at some length. In this essay we build on both the Massachusetts Council's work and the ideas developed at the conference, using both as a spring-board for the formulation of an appropriate set of procedures for death qualification in capital trials.[8] In particular, we recommend the following approach to death qualification and bifurcation in a capital trial:

> A capital defendant should be given the option of electing to have a separate jury impaneled for the sentencing phase of the trial, in the event that the guilt-phase jury convicts him of capital murder. The defendant should be allowed to exercise this option either prior to the guilt phase of the trial or after conviction of capital murder. If the defendant makes a pretrial election to have a separate jury impaneled for sentencing, then the guilt-phase jury will not be death-qualified. If the defendant decides to defer the election until after conviction of capital murder, then the guilt-phase jury will be death-qualified.

We argue in this essay that this approach meets both a state's interest in impaneling a jury willing to comply with its charge and the defendant's interest in having a jury as impartial as both practical and possible. While the procedures that we propose might require a greater expenditure of time and resources than currently-conducted capital trials, we believe such incremental increase is more than justified by the significant enhancement in fairness that such a system would provide. In fact, we argue that any state that takes seriously the goals of creating as fair a death penalty system as possible ought to include such a plan for *true* bifurcation and limited death qualification.

This essay proceeds as follows. We begin by summarizing the constitutional law that governs death qualification of the capital jury. We demonstrate that the Supreme Court has consistently held both that death qualification of a capital jury is constitutionally permissible and that the use of a death-qualified jury to determine the capital defendant's guilt or innocence does not violate any of the Constitution's provisions. We then review the criticism—both doctrinal and empirical—that these holdings have received over the years.

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6. *Id.* at 4.

7. The most obvious exception is the Illinois study of the practice of capital punishment. REPORT OF THE COMMISSION ON CAPITAL PUNISHMENT (April, 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (last visited December 27, 2004) [hereinafter "ILLINOIS COMMISSION REPORT"].

8. The suggestion that forms the basis of this essay grew out of free-flowing discussions at the Indiana conference. It is the product of the careful thought of many of the bright minds at the conference. We defend it here, but share the credit for its assertion with all of those who participated in the conference.

Next, we turn to the work of the Massachusetts Governor's Council, describing its general approach, its ten recommendations, and in particular, its recommendations on the bifurcation of the capital trial. What we demonstrate is that while the Council's work is silent on death qualification, it implicitly endorses the Supreme Court's historic position that a death-qualified jury may fairly evaluate the defendant's guilt.

Finally, we assess possible solutions to what we identify as the problems with the Court's current death penalty jurisprudence; that is, we ask how a bifurcated trial could be organized to avoid the death qualification and forced-choice problems it currently presents. We conclude that a modification of the Council's report to permit the defendant to elect to be judged by a non-death-qualified jury on the question of guilt or innocence would bring the report closer to its goal of stating the best practices for the imposition of the death penalty in the United States.

I. THE CONSTITUTION AND DEATH QUALIFICATION

A. Restricting the States' Exclusion of Jurors

In 1968, the Supreme Court decided *Witherspoon v. Illinois*.[9] The narrow issue before the Court in that case was whether the Sixth Amendment prohibits the exclusion of jurors in a death penalty case who have "conscientious scruples against capital punishment."[10] While Witherspoon primarily urged the Court to hold that the death qualification process infected jurors' ability to properly adduce guilt or innocence of a capital crime, the Court deferred that claim, based in part on a suspicion about the supporting empirical data.[11]

Instead, the Court addressed the impact of broad juror exclusion on the likelihood of a sentence of death. Under the capital sentencing scheme in Witherspoon's case, the jury was required to decide both guilt and punishment in a unified proceeding.[12] This was a very simple process—if the jury concluded that the defendant was guilty of the capital crime charged it would then decide, without the benefit of any further proceeding, whether the defendant should be executed or sentenced to life imprisonment.[13] The judge at Witherspoon's trial stated early in the voir dire process: "Let's get these conscientious objectors out of the way without wasting any time on them."[14] The state thereafter removed for cause 47 venirepersons because of their attitudes regarding capital punishment.[15] The resulting jury convicted the defendant and sentenced him to death.

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9. 391 U.S. 510 (1968).

10. *Id.* at 512 (quoting Ill. Rev. Stat. ch. 38, §743 (1959).

11. *Id.* at 516–518. This issue was ultimately decided adversely to the capital defendant 18 years later in *Lockhart v. McCree*, 476 U.S. 162 (1986). See Part I.C., *infra*.

12. *Witherspoon*, 391 U.S. at 518.

13. *Id.* The unified or unitary capital punishment scheme, where guilt and punishment were decided in the same deliberation, soon became the focus of abolitionist court arguments, culminating in *McGautha v. California*, 402 U.S. 183 (1971) (Douglas, J., and Brennan, J., dissenting).

14. *Witherspoon*, 391 U.S. at 514.

15. *Id.*

In passing on the constitutionality of this process, the Court recognized that excluding all jurors who merely had "conscientious scruples" against capital punishment "armed the prosecution with unlimited challenges for cause,"[16] and "produced a jury uncommonly willing to condemn a man to die."[17] Therefore, the Court held, the practice of death qualification of juries based on conscientious scruples is a violation of the Sixth Amendment.[18] In so finding, the Court created a broad standard applicable to the qualification of jurors in all death penalty states: all that could constitutionally be required of jurors was a willingness "to *consider* all the penalties provided by state law."[19] If a state allowed the exclusion of jurors "on any broader basis than this, the death sentence cannot be carried out . . . ."[20] The decision was specifically limited in its reach to capital sentencing and thus did not impact the defendant's conviction of capital murder.[21] The Court further limited its decision's application by stating that its decision did not "affect the validity of any sentence other than death."[22]

The impact of this decision on the then-extant death penalty system across the country cannot be underestimated. In light of *Witherspoon*, in both state and federal courts reviewing state convictions, thousands of inmates sought relief on grounds of improper juror exclusion.[23]

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16. *Id.* at 512.

17. *Id.* at 521 (note omitted).

18. *Id.* at 518 ("[I]t is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which petitioner was entitled under the Sixth and Fourteenth Amendments.").

19. *Id.* at 522, n.21.

20. *Id.* In the now-famous footnote 21 of *Witherspoon*, the Court created a stringent test for federal review of claims of improper juror removal. The Court stated that veniremen excluded for cause could only be those

> who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. (emphasis in original).

21. *Id.*

22. *Id.* This construction prefigures the jurisprudence of heightened reliability that is now a recognized aspect of the modern death penalty. *See e.g.*, Caldwell v. Mississippi, 472 U.S. 320 (1985); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977).

23. Anthony Amsterdam, *In Favorum Mortis: The Supreme Court and Capital Punishment*, 14 HUM. RTS. 14, 49 (1987). Amsterdam estimates the number of death sentence reversals on *Witherspoon* grounds between twelve and thirteen hundred cases. *Id. Witherspoon* was fully retroactive to cases that were already in federal habeas corpus proceedings because of the Court's holding that "a death sentence cannot be carried out" if a jury was thus composed. This retroactivity determination applied to the *punishment* might have a very different outcome today. *See* Teague v. Lane, 489 U.S. 288 (1989) (retroactivity is threshold issue that bars federal postconviction relief based on "new rules" except in narrowly excepted situations)

B. *The Effect of* Furman v. Georgia *and* Gregg v. Georgia

Witherspoon was an important part of a broad attack on the death penalty that took place in the federal courts in the late 1960s and early 1970s. This attack led to a *de facto* execution moratorium in the states[24] and culminated in the Supreme Court's 1972 decision in *Furman v. Georgia*,[25] that the death penalty, as it was then being conducted, violated the Constitution. The nine members of the Court generated ten opinions in *Furman*; two of the justices believed that the death penalty was cruel and unusual punishment in all cases, three justices held that the discretionary nature of the Georgia sentencing regime at issue violated defendants' rights, and four justices would have upheld the constitutionality of the Georgia regime.

If *Witherspoon*'s impact was broad, *Furman*'s was epochal. It had the effect of emptying the nation's death rows, and sending the state legislatures back to their respective drawing boards. Throughout the land, legislators parsed the Court's various opinions in *Furman* and wrote statutes attempting to comply with the Court's ambiguous mandate in that case. These new capital statutes were tested for the first time four years later when the Supreme Court heard a challenge to the new Georgia statute as well as to the statutes passed in North Carolina,[26] Florida,[27] Louisiana[28] and Texas.[29] The Supreme Court upheld the Georgia statute, essentially holding it out as a model to the states.[30]

In upholding the Georgia statute, the Court praised a number of the procedural safeguards that had been added to the process of capital adjudication: the direct and automatic appeal provided for, the instructions to guide juror discretion, and the bifurcation of the capital trial into a guilt-innocence phase and a sentencing phase. As a result of the decisions in *Gregg* and its companions, the Georgia factors were soon adopted nationwide, becoming something of a gold standard for the conducting of criminal trials. As we shall see in the next section, the wide-spread adoption of these procedural safeguards had enormous implications for the question of death qualification.

C. *Death Qualification Redux*

Having endorsed both the move from the unitary trial to the bifurcated trial and the required restraints on the discretion of capital jurors, the Supreme Court returned to the question of death qualification in *Wainwright v. Witt*,[31] ostensibly to decide what effect these changes in the structure of the capital trial had on the doctrine first announced in *Witherspoon*. *Witherspoon*, decided eight years earlier, and by a very different Supreme Court, had held the states to a very strict standard of proof before a juror with scruples against the death penalty could constitutionally be removed for cause. After

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24. Franklin E. Zimring, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003).
25. 408 U.S. 238 (1972).
26. Woodson v. North Carolina, 428 U.S. 280 (1976).
27. Proffitt v. Florida, 428 U.S. 242 (1976)
28. Roberts v. Louisiana, 428 U.S. 325 (1976)
29. Jurek v. Texas, 428 U.S. 262 (1976).
30. Gregg v. Georgia, 428 U.S. 153 (1976)
31. 469 U.S. 412 (1985).

the death penalty had been reinstated in *Gregg*, attorneys for condemned inmates continued to use the *Witherspoon* standard to seek and secure reversals of their convictions in federal courts via habeas petitions, notwithstanding the fundamental changes in the way capital cases were now being tried.[32]

Justice Rehnquist, writing for the *Witt* majority, began by limiting the *Witherspoon* case to its facts[33] and reducing its most important holding to dicta.[34] Relying on a cut and paste analysis of *Lockett v. Ohio*[35] and *Adams v. Texas*,[36] the majority found that "[t]he state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital

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32. *See, e.g., id.* at 415–416. After Witt was tried for capital murder, convicted, and sentenced to die, the litigation of his *Witherspoon* claim began:

> On appeal to the Florida Supreme Court respondent raised a number of claims, one of which was that several prospective jurors had been improperly excluded for cause because of their opposition to capital punishment, in violation of this Court's decision in *Witherspoon*. . . . The Florida Supreme Court affirmed the conviction and sentence, and this Court denied certiorari. *Witt v. State*, 342 So.2d 497 (Fla. 1977), *cert. denied*, 434 U.S. 935 (1977). After unsuccessfully petitioning for postconviction review in the state courts . . . respondent filed this petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida, raising numerous constitutional claims. That court denied the petition. On appeal, the Court of Appeals for the Eleventh Circuit reversed and granted the writ [on *Witherspoon* grounds]. [*Witt v. Wainwright*,] 714 F.2d 1069 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984).

Id. at 415. As evidenced by the proceedings in Witt's case, it was a federal court that finally vindicated his meritorious *Witherspoon* claim.

33. *Id.* at 418. *See, generally*, Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741, 1746–50 (1987). *Witherspoon* was a case born of an era where federal constitutional concerns outweighed the courts seeming preference for procedural barriers to review.

34. *Witt*, 469 U.S. at 422 ("[T]he statements in the *Witherspoon* footnotes are in any event dicta. The Court's holding focused only on circumstances under which prospective jurors could *not* be excluded; under *Witherspoon*'s facts it was unnecessary to decide when they *could* be.") (emphasis in original). *But see, id.* at 439, 455 (Brennan, J., dissenting) ("[T]he label 'dictum' does not begin to convey the status that the restrictions embodied in footnote 21 [of *Witherspoon*] have achieved in this Court and state and federal courts over the last decade and a half.").

35. 438 U.S. 586 (1978). In *Lockett*, the Court found that jurors were properly excluded when they made it unmistakably clear that their scruples against the death penalty prevented them from abiding by existing law and following the instructions of the trial judge. *Id.* at 596. The Court in *Lockett* also unmistakably adopted the standard of *Witherspoon*'s footnote 21. *Id.*

36. 448 U.S. 38 (1980). In *Adams*, the Court reversed the sentence of the petitioner because jurors had been excluded on the basis of their refusal to take an oath which required them, *inter alia*, to promise that the mandatory penalty of death would not affect his deliberations. *Id.* at 42. As in *Lockett*, the Court favorably relied on *Witherspoon* footnote 21. *Id.* at 44. The Court held that "a juror cannot be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45.

punishment, will nevertheless conscientiously apply the law to the facts adduced at trial."[37]

To ease the courts in this difficult task, the Court adopted the language of *Adams* as the new standard for analyzing juror exclusion claims:

> Although this task may be difficult in any event, it is obviously made more difficult by the fact that the standard applied in *Adams* differs markedly from the language of footnote 21. The tests with respect to sentencing and guilt, originally in two prongs, have merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely high burden of proof. In general, the standard has been simplified.[38]

The more disturbing aspect of *Witt* for death-sentenced habeas petitioners was the majority's decision to put the entire issue into the hands of the state trial judge, thus "de-regulating" the federal control over this aspect of death penalty administration.[39] The Court relied on *Patton v. Yount*,[40] decided only a year earlier, which had held a trial judge's findings, regarding the exclusion for cause of a juror on grounds of bias, were findings of fact requiring federal court deference under §2254(d).[41] The Court then determined that the "simplified" version of capital trial juror exclusion was no different than the determination of bias.[42] From there, the Court took the quick step that all but precluded federal review of juror exclusion claims:

> Once it is recognized that excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias, *Patton* must control. The trial judge is of course applying some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These are "factual issues" that are subject to §2254(d).[43]

The effect of this holding was that state trial judges' decisions regarding a juror's willingness to impose the death penalty could be overturned by a federal court only if the trial judge's opinion was "clearly erroneous."

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37. *Witt*, 469 U.S. at 421.

38. *Id.* at 421.

39. *See* Burt, *supra* note 33 at 1785; *see also generally*, Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (1984).

40. 467 U.S. 1025 (1984).

41. *Id.* at 1038.

42. *Witt*, 469 U.S. at 429.

43. *Id.*

The dissent, written by Justice Brennan, assailed the Court on both of these points.[44] One of only three remaining members of the *Witherspoon* Court,[45] Justice Brennan once again urged upon the Court the Sixth Amendment basis for that decision.[46] The *Witherspoon* Court had considered the constitutional interests of the defendant who faced the death penalty superior to the interests of the State that sought his death.[47] This weighted balancing led the Court to require "the State to make an exceptionally strong showing that a prospective juror's views about the death penalty will result in actual bias toward the defendant before permitting exclusion of the juror for cause."[48] This strict standard prevented the State from stacking a jury with those inclined to impose death and creating a panel that was "uncommonly willing to condemn a man to die."[49]

The *Witherspoon* standard was thus not merely a product of offhand dicta, as suggested by the majority, but was a reasoned attempt to standardize and make rationally reviewable the states' death qualification practices. Justice Brennan saw the

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44. *Id.* at 439 (Brennan, J., dissenting). The dissent also took issue with the Court's wholly irrelevant discussion of the facts of the underlying capital murder:

> The Court has depicted the lurid details of respondent Witt's crime with the careful skill of a pointillist. Had the Court been equally diligent in rendering the holding below, it might not have neglected to mention that, as in every case of a violation of *Witherspoon*, . . . only the defendant's death sentence and not his conviction was vacated. However heinous Witt's crime, the majority's vivid portrait of its gruesome details has no bearing on the issue before us. It is not for this Court to decide whether Witt deserves to die. That decision must first be made by a jury of his peers, so long as the jury is impartial and drawn from a fair cross section of the community in conformity with the requirements of the Sixth and Fourteenth Amendments.

Id. at 440 n.1.

45. The other two were Justices Marshall and White.

46. *Id.* at 439.

47. *Id.* at 444–45:

> [U]ntil today—we viewed the risks to a defendant's Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded as far more serious than the risk to the State from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant, we placed on the State an extremely high burden to justify exclusion.

48. *Id.* at 439; *see also id.* at 443–44:

> Three important consequences flow from *Witherspoon*'s stringent standard for exclusion. First, it permits exclusion only of jurors whose views would prevent or substantially impair them from following instructions or abiding by an oath, and not those whose views would simply make these tasks more psychologically or emotionally difficult . . . . Second, it precludes exclusion of jurors whose *voir dire* responses to death-qualification inquiries are ambiguous or vacillating . . . . Third, it precludes exclusion of jurors who do not know at *voir dire* whether their views about the death penalty will prevent them abiding by their oaths at the trial.

49. *Witherspoon*, 391 U.S. at 521. *See also*, *Witt*, 469 U.S. at 446 ("We have repeatedly stressed that the essence of *Witherspoon* is its requirement that only jurors who make it unmistakably clear that their views about capital punishment would prevent or substantially impair them from following the law may be excluded.") (citing Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969)).

Court's decision in *Witt* not as the "simplification" it disingenuously proclaimed itself to be,[50] but as a well planned move to end federal review of the death qualified juror exclusion claims:

> The crucial departure is the decision to discard *Witherspoon*'s stringent standard of proof. The Court no longer prohibits exclusion of uncertain, vacillating, or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath. Instead, the trial judge at *voir dire* is instructed to evaluate juror uncertainty, ambiguity, or vacillation to decide whether the juror's views about capital punishment "*might* frustrate administration of a State's death penalty scheme."[51]

Only after the majority had altered the *Witherspoon* standard for death qualification was it possible to describe death qualification determinations as "factual issues" and not legal conclusions.[52] This change in the way death qualification was conceived virtually eliminated federal review of death qualification claims and largely exempted capital jury selection from rational federal review.[53]

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50. Justice Brennan commented on the inability to rationally review any determinations of trial judges in these circumstances because of their completely subjective nature:

> [T]he Court goes on to ascribe to the trial judge the power to divine through demeanor alone which of such jurors "would be unable to faithfully and impartially apply the law," . . . and requires deference to the trial-court decisions to exclude for this reason. Not surprisingly, the Court provides no support for the rather remarkable assertion that a judge will, despite ambiguity in a juror's response, be able to perceive a juror's inability to follow the law and abide by an oath when the juror himself or herself does not yet know how he or she will react to the case at hand.

Id. at 453 n. 9 (quoting *id.* at 426).

51. *Id.* at 452 (quoting *id.* at 416) (emphasis in the original). Justice Brennan exposed this departure as the means to the true ends of the Court—bringing questions of juror qualification within the "factual issue" limitation on federal habeas corpus jurisdiction:

> [The Court's] discussion of the proper standard of review of state-court *Witherspoon* determinations cannot pass without some comment. One evident purpose of the Court's redefinition of the standards governing death-qualification is to bring review of death-qualification questions within the scope of the presumption of correctness of state-court factual findings on federal collateral review.
>
> Had the Court maintained *Witherspoon*'s strict standards for death-qualification, there would be no question that trial-court decisions to exclude scrupled jurors would not be questions of fact subject to the presumption of correctness. Whether a prospective juror with qualms about the death penalty expressed an inability to abide by an oath with sufficient strength and clarity to justify exclusion is certainly a "mixed question"—an application of a legal standard to undisputed historical fact.

Id. at 461–62

52. *Id.* at 462.

53. Since *Witt*, there have been no federal cases finally overturning a death sentence based

Once again, the Court avoided answering the difficult question of the effect that death qualification had on the adjudication of guilt of a capital offense. The Court would dispose of that remaining issue the very next term in *Lockhart v. McCree*.[54] The petitioner in the case, Adria McCree, was tried in Arkansas for capital felony murder. Before the trial began, eight potential jurors were removed for cause because they stated during voir dire that they could not vote for a penalty of death. The resulting, death-qualified jury found the defendant guilty of capital murder and then fixed the appropriate punishment as life imprisonment.[55] The Supreme Court granted certiorari to answer the question it had reserved in both *Witherspoon* and *Witt*: Whether a death-qualified jury is unconstitutionally predisposed to convict a defendant of a capital crime.[56]

To support his claim, McCree relied on several empirical studies that suggested that a death-qualified jury was unconstitutionally organized not only for death, but for guilt as well.[57] The lower courts had reviewed these studies and held that McCree had met his burden of demonstrating that death qualification unconstitutionally tainted the jury in the guilt/innocence phase of the trial.[58] The Supreme Court accepted the premises of the lower court's evidentiary conclusions, but only after savaging that same evidence. The Court started by pointing out what it believed "to be several serious flaws in the evidence upon which the courts below reached the conclusion that 'death qualification'

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on a state trial court's erroneous determination that a specific juror was excludable for cause under the majority standard. The continuing assault on the federal review of claims raised by state inmates, particularly those under sentence of death, spurred Justice Brennan in his dissent in *Witt* to identify three continuing themes in the majority's constitutional criminal law jurisprudence:

> Today's opinion for the Court is the product of a saddening confluence of three of the most disturbing trends in our constitutional jurisprudence respecting the fundamental rights of our people. The first is the Court's unseemly eagerness to recognize the strength of the State's interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant to such interests. *United States v. Leon*, 468 U.S. 897, 929–30 (1984) (Brennan, J., dissenting). The second is the Court's increasing disaffection with the previously unquestioned principle, endorsed by every member of this Court, that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . . ." *Spaziano v. Florida*, 468 U.S. 447, 468 (Stevens, J., concurring in part and dissenting in part) [further citations omitted]. The third is the Court's increasingly expansive definition of "questions of fact" calling for application of the presumption of correctness of 28 U.S.C. §2254(d) to thwart vindication of fundamental rights in the federal courts.

Id. at 462–63. These themes have continued to predominate Supreme Court jurisprudence for the past twenty years.

54. 476 U.S. 162 (1986).

55. *Id.* at 166.

56. The question addressed by the Court was: "Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?" *Id.* at 165.

57. *Id.* at 168–70 (listing and describing studies).

58. *Id.* at 167–68.

provides conviction prone juries."[59] Regarding the studies that bolstered McCree's case and that were also part of the *Witherspoon* litigation, the Court found that "[i]t goes almost without saying that if these studies 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."[60] As for the remaining studies, the Court quibbled with individual aspects of some and decided the remaining few were too isolated to entitle the petitioner to relief.[61] After this dissection, however, the Court continued to the legal issue:

> [W]e will assume for purposes of this opinion 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. We hold nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.[62]

The Court examined two separate Sixth Amendment arguments presented by McCree, rejecting each in turn. First, the Court rejected the argument that death qualifying guilt-phase jurors violated the fair cross-section requirements of the Sixth Amendment as applied through the Fourteenth Amendment.[63] The fair cross-section protection requires that the process for choosing the venire—the larger pool from whom the ultimate jury is chosen—does not systematically exclude any "'distinctive' group in the community."[64] While the Court noted that it had previously held blacks,[65] women,[66] and Mexican-Americans[67] to be distinctive groups worthy of constitutional protection from exclusion, the group of potential jurors who could be excluded under *Witherspoon* differed "significantly from the groups . . . previously recognized as 'distinctive.'"[68] The Court held that exclusion of jurors who could not vote for death was "carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."[69]

McCree also urged the Court to rule that a jury predisposed to convict was also a violation of the impartiality requirements of the Sixth Amendment.[70] The Court rejected this claim as well, primarily because McCree could only argue that it was the

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59. *Id.* at 168 (note omitted)
60. *Id.* at 171.
61. *Id.*
62. *Id.* at 173.
63. *Id.* at 174.
64. *Id.* at 175 (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).
65. Peters v. Kiff, 407 U.S. 493 (1972).
66. Castaneda v. Partida, 430 U.S. 482 (1977).
67. Duren v. Missouri, 439 U.S. 357 (1975).
68. *McCree*, 476 U.S. at 175.
69. *Id.* at 175–76. The Court also noted that McCree did not argue that "'death qualification' was instituted as a means for the State to arbitrarily skew the composition of capital case juries." *Id.* at 176 (note omitted). However, it is likely that many jurisdictions maintain such practice specifically for that purpose.
70. *Id.* at 177. This claim has traditionally been applied when it demonstrated that a particular juror has been influenced or biased by extra-trial information.

jury as a whole that was skewed and could point to no *single juror* who was actually biased toward guilt.[71] Just as in the analysis of the fair cross-section claim, the Court relied for its conclusion on the "State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case."[72]

The Court thus decided that even though death qualification is presumed to create a risk of generating a conviction-prone jury, that risk was outweighed by the state's two stated interests.[73] The first of these was a state's interest in judicial administrative economy. Under this rationale, the Court reasoned:

> [I]t seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase; if two different juries were to be required, such evidence would have to be presented twice, once to each jury.[74]

The second stated rationale accepted by the Court was the paternalistic idea that single juries in capital cases actually benefit defendants because of the opportunity they provide for a single jury to consider "residual doubt" in the punishment phase of the trial.[75] The Court concluded that these two rationales were "sufficient to negate the inference . . . concerning the lack of any neutral justification" to support the State's maintenance of the single jury procedure in the face of the risk of guilt-verdict bias.[76]

Together with *Witt*, *McCree* placed a capital defendant in great peril. Taken together, these decisions made it easier for the state to deathqualify a capital trial and upheld the notion that a single, death-qualified jury could judge both the defendant's appropriate punishment *and* the question of guilt or innocence.[77]

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71. *Id.* at 177–78. The Court noted that it had "consistently rejected this view of jury impartiality" and had recently "held that an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'" *Id.* at 178 (emphasis in original) (quoting *Witt*, 469 U.S. at 423).

72. *Id.* at 180.

73. This risk-based constitutional analysis is a precursor of the analysis used by the Court in *McClesky v. Kemp*, 481 U.S. 279 (1987). In *McClesky*, the Court rejected a challenge to the imposition of his death sentence on the basis that the death penalty was applied in a discriminatory manner. As in *McCree*, the Supreme Court presumed that the proffered statistical evidence proved what it purported to, but nonetheless held that the defendant had failed to make out a constitutional violation.

74. *McCree*, 476 U.S. at 181.

75. *Id.* ("Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase."). As the dissent pointed out, the state is an odd advocate for the interests of capital defendants. Below, we return to the question of residual doubts, concluding that they may well be an important consideration, but one that defendants ought to be able to consider on their own.

76. *Id.* at 182.

77. In 1992, the United States Supreme Court, in a "goose and gander" case, resolved the question of what should be the appropriate constitutional treatment of jurors who stated they would ignore mitigating evidence and vote for death if the defendant were found guilty of the crime. In *Morgan v. Illinois*, 504 U.S. 719 (1992), such jurors are referred to as "reverse *Witherspoon*" jurors. In Morgan's trial, seventeen potential jurors were removed under *Witt*'s

II. THE MASSACHUSETTS PROPOSAL

A. Overview

In September 2003, newly elected Massachusetts governor Mitt Romney convened a blue ribbon panel to draft a set of best practices for the application of a new death penalty in his state.[78] At the time of Romney's initiative, Massachusetts had been without a valid death penalty statute since the Supreme Judicial Court struck down the prior statute in 1984[79] and had gone more than fifty years without an execution.[80]

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substantial effects test. *Id.* at 722–23. However, the trial court refused to ask a potential juror Morgan's proposed inquiry: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Id.* at 723.

Justice White, writing for the majority, first held that the Sixth Amendment's Impartial Jury Clause and the Due Process Clause of the Fourteenth Amendment require juror impartiality at sentencing in a capital case. *Id.* at 726–27. As the Court held, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do so." *Id.* at 729.

The Court also held that, if requested, a trial court must inquire into prospective jurors' views about consideration of mitigation evidence. A juror's failure to even consider mitigating evidence, as expressed by a predetermined plan to automatically vote for death after conviction, violated the law which requires that jurors consider all the evidence, including mitigating evidence. *Id.* at 732-33; *see* Lockett v. Ohio, 438 U.S. at 604 (plurality opinion) (jurors may 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") (emphasis in original); *see also* Eddings v. Oklahoma, 455 U.S. 104 (1982); McCleskey v. Kemp, 481 U.S. 279, 306 (1987).

The Court ultimately held that the trial court's failure to specifically inquire regarding "reverse *Witherspoon*" jurors rendered the trial unfair:

> Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those perspective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in absence of questioning, to strike those who would *never* do so.

Id. at 733–734 (emphasis in original).

Although *Morgan* balanced the procedures for juror exclusion between defense and prosecution, the practical effect has been small. Absent a complete refusal by the trial court to inquire of jurors whether they would automatically vote for death, reversals based on *Morgan* are nearly non-existent. This is because the answers of prospective jurors, once inquiry is made, are treated under the *Witt* standard—as facts that the trial court determines which are practically unreviewable. Therefore, in many cases, close-call *Witherspoon* excludables are removed from the jury while close-call *Morgan* excludables are allowed to remain. These practically unreviewable decisions further lean capital juries toward conviction and decisions in favor of death.

78. GOVERNOR'S COUNCIL REPORT, *supra* note 5, at 3. The Council's report is not technically a death penalty statute. It is written as an incomplete set of suggestions rather than a complete, internally consistent set of rules that could be used to run a capital trial. The process of incorporating these recommendations into a statute continues at the time of this writing.

79. Commonwealth v. Colon-Cruz, 470 N.E.2d 116 (Mass. 1984)

80. The last execution in Massachusetts occurred in 1947. *See* Facts about the Death Penalty in Massachusetts, *available at* http://www.mass.gov/doc/factsdp.htm. (last visited December 28, 2004).

Romney, a Republican who had won election in a traditionally Democratic state, saw the appointment of the Governor's Council as an important step in meeting his campaign promise of returning the death penalty to Massachusetts.

Massachusetts was, of course, not alone in the early years of this millennium in impaneling a commission to study the practice of the death penalty. However, it approached the question from a very different historical place than did many of the other states involved in careful death penalty study. For example, Illinois has been a death penalty state for decades and has executed twelve people since the reinstitution of the death penalty in *Gregg v. Georgia* in 1976.[81] Illinois had also, quite famously, been forced to release thirteen condemned inmates from its death row when evidence of their innocence was brought to light.[82] Illinois's Governor George Ryan responded to these developments by imposing an execution moratorium in his state and appointing a commission to look into the problems with the system as it then existed.[83] The commission made more than 100 recommendations for the improvement of Illinois's capital system[84] and Governor Ryan, on leaving office in early 2003, pardoned or commuted the sentence of each of the more than 160 men on Illinois's death row.[85]

The Massachusetts project, therefore, is very different from those ongoing in Illinois and other current death penalty states. While those states have been attempting to rescue their current death penalty practices from the taint of the condemnation of the innocent or the undeserving, the Massachusetts project aims to *add* Massachusetts to the list of 38 states and the federal system which currently permit the imposition of the death penalty for certain homicides. In this sense, the Massachusetts project flies in the face of what has seemed, to some, like a slow march *away* from the widespread acceptance of the death penalty.[86]

Mindful of the national mood of increased skepticism regarding the death penalty schemes that produced such flawed results, Governor Romney's charge to the Council was to produce a death penalty statute that would, to the extent possible, ensure that only the guilty are convicted of capital crimes and that only the "worst of the worst" are sentenced to death.[87] Romney made clear to the Council that he was more concerned with procedural regularity than with a statute of broad practical application; he therefore instructed the Council that its work would be welcomed even if it led to a system under which only a handful of offenders are ever sentenced to death.[88]

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81. *See* Governor George Ryan's Commutation Announcement, January 11, 2003, *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm. (last visited December 28, 2004) [hereinafter "Ryan Commutation Announcement"].

82. *Id.*

83. ILLINOIS COMMISSION REPORT, *supra* note 7, at 14.

84. *Id.*

85. *See* Ryan Commutation Announcement, *supra* note 81.

86. *See* Franklin E. Zimring, *Symbol and Substance in the Massachusetts Commission Report*, *supra* Plenary Address at 115 (citing SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002, at Table 6.76 (showing a drop in executions nationwide from a high of 98 in 1999)).

87. GOVERNOR'S COUNCIL REPORT, *supra* note 5, at 4.

88. Conversation at Symposium with William J. Meade, Deputy Chief Legal Counsel, Office of the Governor of Massachusetts (September 10, 2004).

After several months of investigation, conferring and drafting, the Council came up with ten recommendations addressing what the Council saw as the greatest impediments to the just imposition of the death penalty in the United States. Upon the release of the Council's report, Governor Romney stated that he was sufficiently confident of the safeguards recommended that he would bet his own life on the reliability of the proposed system. The Governor's office is in the process of studying the Council's recommendations, and has given assurances that it will incorporate each of these recommendations into a bill that will ultimately be sent to the state legislature.[89]

Several of the Council's proposals have received widespread press attention and positive support from academics and practitioners. For example, the sixth proposal, likely to be the most controversial of the Council's recommendations, states that a capital defendant may not be sentenced to death in the absence of physical evidence that strongly corroborates the defendant's guilt.[90] Other provisions establish a narrow list of death eligibility factors, guidelines for the application of prosecutorial discretion at the sentencing phase, guidelines for the qualification of capital defense counsel, new procedures for the bifurcation of the capital trial, special jury instructions on the fallibility of human evidence, a requirement of scientific evidence to corroborate the defendant's guilt, a heightened burden of proof at the sentencing phase, the grant of authority to trial and appellate courts to set aside any death verdict, and the creation of a permanent commission to review claims of innocence or error.[91]

B. Bifurcation and the Failure to Address Death Qualification

It is the fourth of these recommendations to which this essay is most closely addressed. That recommendation reads in full:

> At the end of the guilt-innocence stage of the capital trial, if the defendant is convicted of capital murder, the defendant should have the right to request the selection of a new jury for the sentencing stage. If the defendant exercises this right, then the defendant should be deemed to have waived the issue of residual or lingering doubt about guilt, and should not be allowed to raise such an issue during the sentencing stage. At the start of the sentencing stage, if a jury has been selected, the prosecution shall be permitted to present otherwise admissible evidence to the new jury to the extent reasonably necessary to inform the new jury about the nature and circumstances of the crime, including each of the elements . . . that were found by the original jury at the guilt-innocence stage, and to allow the new jury to determine the appropriate weight to be given to these facts in deciding the sentence. The new jury shall be instructed that each of the elements that were found by the original jury at the guilt-innocence stage shall be deemed established beyond a reasonable doubt for purposes of the sentencing stage, but that any additional facts elicited by the prosecution at the sentencing stage that are not essential to the verdict of guilty of capital murder shall not be deemed established

89. *Id.*
90. GOVERNOR'S COUNCIL REPORT, *supra* note 5, at 20–21.
91. *Id.* at 5.

beyond a reasonable doubt. The new jury should not be told whether the defendant contested his guilt during the guilt-innocence stage.[92]

In essence, the Massachusetts report allows a defendant to make a strategic choice in the event that he is convicted of capital murder. He may choose to have a single jury consider the questions of guilt or innocence *and* punishment, retaining the guilt-phase jury after conviction in the hopes that he can argue to them the question of residual doubts remaining from their guilty verdict. Alternatively, a defendant convicted of a capital crime may choose, having determined from the guilt-phase that the jury's sympathies are not with him, to have a separate jury impaneled to determine the appropriate punishment in his case.

C. Critique of the Massachusetts Approach

Without question, the Massachusetts proposal is an improvement over current practice in the states. Today, no state's capital statutory scheme contemplates the impaneling of separate juries to determine guilt or innocence and penalty in the original prosecution of a capital defendant.[93] Though there have been calls for exactly this sort of *true* bifurcation virtually since the time of *Gregg*,[94] no state has yet put such a plan in place. The primary stated reason, of course, is usually expense.[95] The Massachusetts proposal raises the specter of death qualifying *two* juries in the event that the defendant elects to have a second jury consider the question of punishment. Given the difficulties, costs, and time associated with impaneling a *single* capital jury, it is not surprising that states uniformly employ a single jury to sit and act during both phases.

From the defense perspective the advantages of the proposed Massachusetts system are apparent. The reliance by the Supreme Court on bifurcation as a restraint on

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92. *Id.* at 17–18.

93. The authors can discover no statute which explicitly authorizes, let alone requires, two separate juries for the separate phases of an initial capital trial. This may indeed reflect the shared understanding of the executive branch, the legislature, and the United States Supreme Court that death qualification of a jury favors the state at the guilt-innocence phase of the trial. All states, however, allow a separate jury to be empanelled if a case is overturned on appeal on sentencing error alone. Therefore, it cannot be said that states actually oppose separate juries for sentencing for such a policy would require complete new trials—both guilt-innocence and punishment phases—for reversals based on error at any point in the proceeding. What can be concluded, ultimately, is that states do not oppose separate trials when that procedural expedience benefits the state.

94. *See, e.g.*, Maury Albon Hubbard III, Note, Lockhart v. McCree*: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional*, 66 N.C. L. REV. 183, 197 (1987) (arguing that death qualification makes a jury so conviction-prone that it may induce prosecutors to seek the death penalty in cases they would otherwise not.); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. (1984) (describing the ways in which death qualification makes jurors more prone to convict).

95. We say "stated" reason because we believe that the conviction-prone nature of the death qualified capital jury is a strong incentive for the use of a single jury. *See* Hubbard, *supra* note 94.

arbitrariness[96] has largely been misplaced. While the temporal distancing of the guilt and punishment determinations at the bifurcated trial relieves some of the pressure on a defendant to choose between contesting either his guilt or his death-worthiness, it certainly does not remove such pressures. A defendant who knows that his mitigation case will be based primarily upon acceptance of responsibility and remorse, for example, may feel great pressure not to vigorously test the state's murder case for fear that this will prejudice his capacity to assert his sincere remorse at the penalty phase. Similarly, a defendant who has made a vigorous assertion of his innocence at the guilt phase may now feel that the assertion of remorse and responsibility at the penalty phase will only anger jurors who have heard him argue his non-involvement at the earlier stage. The existence of a single jury to resolve both questions in a capital trial makes largely illusory any strategic choices that bifurcation might seem to offer.

Such Hobson's choices are all but eliminated by the Massachusetts proposal. For example, if a defendant wishes to, he may take the stand at his murder trial and claim mistaken identity, minimal participation, or any other defense to a capital murder charge. If he is unsuccessful in convincing a jury that he did not commit the murder or did not participate to the extent alleged, he may either proceed with that same jury to the penalty phase or may choose to have another impaneled in its place. If he elects to proceed before a second jury, such a jury would be untainted by his previous assertion of innocence and thus, at least theoretically, would be more inclined to take seriously a mitigation case based on acceptance of responsibility and remorse. Conversely the defendant might conclude that, having established the possibility of actual innocence in the jury's mind, it would make sense to proceed to sentencing with the same jury and to make out a mitigation case based in part upon those lingering doubts.

This choice would be made by the defendant himself, in consultation with his counsel, rather than paternalistically by a court that presumes that a defendant would be prejudiced rather than helped by the impaneling of a second jury.[97] As we discuss below, different factual situations might counsel for or against the impaneling of a second jury in any particular case in ways that will often not be foreseeable beforehand or to outside observers. In this context, the authority to determine which strategy is most advantageous can only sensibly be vested in the defendant and his counsel.

In these important ways, therefore, the Massachusetts statute is a significant improvement over current practice. Our critique of the proposal, in fact, is that it fails to go far enough. Principally, we would have it address a question on which it is entirely silent—that of death qualification. As we discuss in the next section, we believe that the provision of a *truly* bifurcated trial would undo the damage created by *Lockhart v. McCree* and thus greatly increase the fairness of the capital trial.

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96. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 190–91 (1976) (arguing that bifurcation is "more likely" to limit arbitrary results than is a unitary capital system).

97. *See* Lockhart v. McCree, 476 U.S. 162, 181 (1986) ("Another interest identified by the State in support of its system of unitary juries is the possibility that, in at least some capital cases, the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase.").

D. Possible solutions

For nearly as long as death qualification has been used, it has been criticized. Even before the Supreme Court endorsed the practice in *Witherspoon*, commentators had noted what is lost when those with scruples against the imposition of the death penalty are excluded from service on the capital jury. In this section we discuss some of the alternatives to the current practice of death qualification that have arisen, concluding ultimately that none strikes the balance between fairness and efficiency as well as our proposed modification of the Massachusetts recommendation.

1. No death qualification (the Douglas approach)

In *Witherspoon v. Illinois*, Justice William O. Douglas concurred in the Court's judgment that those who express scruples against the imposition of the death penalty may not be removed from service on a capital jury for that reason alone. However, Justice Douglas would have had the Court go much further, and would have precluded death qualification entirely:

> A fair cross-section of the community may produce a jury almost certain to impose the death penalty if guilt were found; or it may produce a jury almost certain not to impose it. The conscience of the community is subject to many variables, one of which is the attitude toward the death sentence. If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not impose the death sentence. A jury representing the conscience of that community would do one of several things depending on the type of state law governing it: it would avoid the death penalty by recommending mercy or it would avoid it by finding guilt of a lesser offense. In such instance, why should not an accused have the benefit of that controlling principle of mercy in the community? Why should his fate be entrusted exclusively to a jury that was either enthusiastic about capital punishment or so undecided that it could exercise a discretion to impose it or not, depending on how it felt about the particular case?
>
> I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.[98]

For Douglas, then, the petit jury that is actually impaneled in a capital case ought to represent the fullness of views on capital punishment shared by the citizenry, even if those views would preclude some jurors from imposing the death penalty under any circumstances. Implicit in the process of trial by jury, he seems to argue, is the possibility that those with extreme views will be impaneled to judge or sentence their peers.

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98. Witherspoon v. Illinois, 391 U.S. 510, 528 (opinion of Douglas, J.).

The problem with Douglas's view, in our opinion, is that it is inconsistent with the concept that all jurors must be willing and able to fulfill their legal duties as jurors.[99] If state law requires the jurors to deliberate on the defendant's aggravating and mitigating factors in order to determine whether the appropriate punishment is life imprisonment or death, a juror who will not engage in that process should be excluded for the same reason that a juror who will not deliberate on any other basis should be excluded. Certainly, those opposed to death qualification would admit that a venireperson who stated that she could not fairly judge the defendant's guilt should be excluded from service. Why then, should the defendant benefit from the service of a juror who has made clear her unwillingness to consider his moral culpability according to the procedures laid out by state law?[100]

2. Two Juries

Another possible solution is the impaneling of two juries, one death qualified, one not, in each capital case. Both juries would hear the guilt testimony, and the non-death-qualified jury would determine the question of the defendant's guilt or innocence of capital murder. In the event that the guilt jury convicts the defendant of a capital crime, the death-qualified jury would be seated to determine penalty and the guilt jury will be excused. In the event that the guilt jury acquits of the capital count(s), the death-qualified jury will be excused without being needed.

The use of two juries in a single criminal trial is not unheard of and arises principally in the case of multiple defendants tried together. In such circumstances, some evidence is admissible against all of the defendants, some against a subset of these defendants.[101] By seating one jury to hear the evidence against each defendant, a

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99. Justice Douglas's proposition was made in the context of unified capital trials in which juries determined whether to impose life or death in the same discussion in which guilt or innocence was decided. In such a scheme, in most jurisdictions, the life or death decision was guided by no standards or limitations. *See, e.g.*, McGautha v. California, 402 U.S. 183 (1971). If the jury decided to spare the person—or execute them—because of the color of their eyes, such an arbitrary basis for such a momentous decision was not illegal and was unreviewable. Therefore, as to the sentencing decision in a unified proceeding, there was really no "law" about which to be "lawless." So to say that Douglas's proposal in a unified system allowed jurors to be seated who would not follow the law would only be true in a very narrow class of jurors—namely those jurors whose opinions regarding (either for or against) the death penalty affected their ability to properly decide the guilt/innocence question. Only jurors who either were so in favor of executing wrongdoers that he or she was willing to vote "guilty" even in the absence of adequate proof; or was so opposed to the death penalty that he or she would vote "not guilty" in the face of proof beyond a reasonable doubt, could be truly considered "lawless" in a unified system without sentencing standards. Without a system to prevent these jurors from sitting, Douglas's plan would in these rare cases seat improper jurors.

100. We agree with the view the Court stated in both *Witherspoon* and in *Witt*, that the state may not remove from service those who merely have scruples against the imposition of the death penalty or for whom the decision would be a difficult one. In our minds, the position stated in *Witherspoon* is the correct one: Only those who make unmistakably clear that they would invariably refuse to impose the death penalty may be removed for cause.

101. This problem arises most often in the context of *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Court concluded that the admission of the inculpatory statement of one

judge can control problems of admissibility by seating only the jury or juries considering the guilt of a defendant against whom a particular piece of evidence is admissible. Such systems have been approved in various states and the federal system.[102]

The principal advantage of such a system, of course, is that a non-death-qualified jury decides the question of guilt or innocence. As we have discussed, such a jury would be more impartial on the question of guilt than one that has been death-qualified. Another advantage is that the jury that determines the appropriate penalty will have heard all of the testimony at trial. By contrast, both the Massachusetts Council's approach to bifurcation and our suggested modification of it would permit a defendant to be sentenced by a jury who had not heard the guilt case, requiring duplication of proof at the penalty phase. Of course, allowing a single jury to hear all of the evidence at both phases of a capital case inhibits a defendant's capacity to contest the government's proof at both stages. The two-jury solution, therefore, is also very much a compromise.

3. A Single Hybrid Jury

A final alternative to our proposed modification of the Massachusetts approach is the impaneling of a jury consisting of both death-qualified and non-death-qualified jurors to determine guilt. Prior to trial, the jurors could be questioned as they currently are under *Witt* with regard to their views on the death penalty; however; no juror could be removed for cause from the guilt-phase on the basis of their answers. Instead, a jury would be impaneled with both death-qualified and *Witt*-excludable jurors. This would lead to a hybrid jury of between 12 (if none of the first dozen jurors were *Witt*-excludable) and 24 members (if all of the first twelve jurors were *Witt*-excludable).

The first twelve members of this hybrid jury would then consider the defendant's guilt, with the remaining members available as alternates. In the event that such a jury convicts the defendant of a capital crime, the non-death-qualified jurors would be excused and only the death-qualified jurors would be allowed to consider the appropriate sentence. The non-death-qualified jurors—who would have been identified during voir dire—could be removed from the jury and the court could proceed directly to the penalty phase without interruption of the proceedings.[103]

The use of a hybrid jury would be an improvement over current practice from the defendant's point of view and an improvement on the Council's recommendation from the point of view of the state. For the capital defendant, the hybrid jury would permit him to be judged by a jury that has not been death-qualified, thus greatly increasing the chances of his acquittal or of his conviction on a non-capital charge. From the state's point of view, the hybrid jury has the advantage of a single voir dire; however such a

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defendant against another defendant could not be cured by a limiting instruction. *Id.* at 126.

102. *See, e.g.*, United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972) (finding that a trial judge acted within his discretion by impaneling two juries to avoid the problems of *Bruton v. United States*); People v. Ricardo B., 538 N.Y.S.2d 796 (1989) (same); People v. Wardlow, 118 Cal. App. 3d 375 (1981) (same); People v. Church, 429 N.E.2d 577 (Ill. App. 1981) (reaching the same conclusion despite the fact that the court concluded that the procedure was not authorized by state law).

103. The effect of such a proceeding on jury-juror dynamics is purely a matter of speculation.

voir dire will be incrementally more intensive (because more jurors would be needed than are currently used in the typical capital case).

The primary problem with such a system, however, is that it fails to remedy the current conundrum in capital cases of the single jury evaluating both the defendant's guilt-phase defense and his penalty-phase arguments. Under the current system, a defendant will generally have to choose which of his claims to focus upon, aware that the assertion of inconsistent arguments is likely to doom him in the jury's eyes.[104] While the absence of a death-qualified jury on the question of guilt would be an improvement, the lack of *true* bifurcation keeps the hybrid jury from being a panacea.

4. The Modified Massachusetts Solution

We remain convinced that the proposal we outlined above–a modification of the Massachusetts proposal to allow a defendant to elect before trial or after conviction of a capital crime to proceed with two separate juries—is the most trustworthy means of conducting a capital trial. It allows a defendant to truly determine where his case is strongest and to make that case to the jury in a way that best puts the prosecution to its proof. For example, some defendants may understand that the government's capital murder case against them is strong and that their greatest opportunity to save their lives is to build a case in mitigation. Such defendants might decline to make a pretrial election of a separate sentencing jury, in the hope of using the guilt phase of the trial to establish the basis of a case in mitigation before the same jury that will determine their death-worthiness. If the guilt-phase mitigation case does not appear to be going well or if the guilt-phase jury seems particularly unsympathetic, however, such defendants would retain the right to elect a separate sentencing jury upon conviction of capital murder.

By contrast, some defendants will have a much stronger case on the question of guilt of capital murder. As strong as that case might be, however, making it before a death-qualified jury greatly weakens the chances for its success. Thus, under our approach, such defendants would quite logically make a pretrial election to impanel a second jury to determine punishment, and thus proceed to trial on the question of guilt or innocence before a non-death-qualified jury. The only thing they would lose thereby would be the opportunity to make their mitigation case over a longer period of time or to plead residual doubts during the penalty phase. In most capital cases this would be a very wise strategic decision indeed.

Furthermore, our proposal has some efficiency arguments that the current Massachusetts proposal does not. Under the current Massachusetts proposal, since the guilt phase jury in every case *might* end up determining the question of punishment (if the defendant elects to keep them after they convict him of capital murder), that first jury must in every case be death-qualified. Only if the defendant ultimately decides to

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104. There is also the question of how jurors will react to some of their number being dismissed prior to the commencement of the penalty phase. An instruction could no doubt be written to inform the jurors to read nothing into this removal and to continue to base their conclusions on the evidence and the applicable law. Whether such an instruction would be able to keep the remaining jurors from speculating as to the reasons for their inclusion and others' exclusion, however, would be an open, empirical one.

proceed with the same jury for sentencing will the extra expense of death qualifying *two* juries be avoided.

Under our proposal, by contrast, in at least some cases there will be no need to death qualify the first jury at all, because the defendant will have committed to using two separate juries prior to trial. Because some of these cases would have resulted in two death qualified juries under the Massachusetts proposal—had the defendant deferred his decision to request a separate sentencing jury until after conviction—our proposal may have the benefit of increasing both the fairness *and efficiency* of the capital trial.

CONCLUSION

While we are both strong opponents of the death penalty, we agree that current capital jury selection is governed by the holdings in the *Witherspoon/Witt* line of cases.[105] Generally speaking, both defendants and the state should have the opportunity to impanel a capital jury that will follow the duly enacted laws that the jury must apply. Where we part company with the Court is at its decision in *Lockhart v. McCree* that the state's interest in efficiency trumps the defendant's interest in fairness and permits a death qualified jury to decide questions of guilt or innocence.

In this essay we argue that the best way around the conundrum of *McCree* is to permit a defendant to decide, prior to his capital trial, that he will be judged by separate juries for guilt and sentencing. The procedure we outline allows a defendant to avoid being tried on the question of guilt or innocence by a jury predisposed to convict him. Because such increases in fairness come at a relatively moderate cost, we argue, they ought to be incorporated into any statute aimed at instituting best practices for the just administration of the death penalty.

105. We disagree, of course, with the weakening of the standard of proof and the removal of federal oversight that the Court authorized via its *Witt* opinion.