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An Alternative to Death-Qualification: The Nonunanimous Penalty Jury

By Jane Tucker¹

Abstract: Eliminating jurors for cause based on their opinions concerning the death-penalty (“death-qualification”) is a widespread practice that has been upheld by multiple Supreme Court cases, but which has been widely criticized for resulting in juries that studies have shown to be more conviction-prone, and biased toward the prosecution, in addition to being unrepresentative of the community at large. This Note offers a possible solution to the problems caused by death-qualification at both the guilt and penalty phases, unlike those proposed thus far: specifically, the elimination of death-qualification altogether, coupled with the relaxation of the unanimity requirement at the penalty phase.

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I. INTRODUCTION

“Let’s get these conscientious objectors out of the way, without wasting any time on them,”² the judge presiding over William Witherspoon’s 1960 murder trial³ said before quickly eliminating nearly half of the potential jurors based on their views about the death penalty.⁴ Only five of the forty-seven eliminated on such grounds stated explicitly that they could never vote for the ultimate punishment; the vast majority of the others merely admitted to having “‘conscientious or religious scruples’ against its infliction ‘in the proper case.’”⁵ The result was a jury full of only those who expressed no qualms about condemning a man to death. Perhaps unsurprisingly, Witherspoon received that very sentence.

In *Witherspoon v. Illinois*,⁶ the Supreme Court deplored such practices, then widespread, as resulting in a “tribunal organized to condemn a man to death.”⁷ In response, the Court found that the state may not exclude members of the venire who express reservations against the death penalty unless they either make it unmistakably clear that they would automatically vote against the death penalty regardless of the evidence, or that their attitude toward the death penalty would prevent them from impartially determining the defendant’s guilt or innocence.⁸ Many critics question, however, whether despite the Court’s introduction of limitations intended to preclude such a result, juries selected under the system that arose from the *Witherspoon* opinion, commonly referred to as “death-qualification,”⁹ are not perhaps still precisely the sort of

² *Witherspoon v. Illinois*, 391 U.S. 510, 514 (1968) (quoting trial judge).

³ *People v. Witherspoon*, 36 Ill. 2d 471, 224 N.E.2d 259 (1967).

⁴ *Witherspoon*, 391 U.S. at 513.

⁵ *Id.* at 515.

⁶ *Id.*

⁷ *Id.* at 521.

⁸ *Id.* at 522 n.21.

⁹ Veniremen who survive this process are said to be “death-qualified.” I will use both these terms throughout the course of the paper. Furthermore, while the death-qualification of jurors functions to ensure both that the jurors selected would be able to vote for the death penalty, and that they would be

“hanging jury” that the Court denounced.¹⁰ Empirical findings suggesting that individuals qualified to be jurors under the *Witherspoon* standard may differ from the general population on a number of dimensions relevant to their willingness to convict and to favor the prosecution¹¹ have led to charges that the “impartial jury” mandate of the Sixth and Fourteenth Amendments is not being met.¹² That the Court relaxed the standard for exclusion, and gave more deference to trial judges under *Wainwright v. Witt*¹³ presents further cause for worry, as both developments ensure that a broader swath of potential jurors are being excluded based on their views of capital punishment,¹⁴ resulting in juries possessing the aforementioned qualities to an even greater extent. Finally, evidence that peremptory strikes are often used to remove any remaining members of the venire who have expressed scruples about the death penalty¹⁵ further suggests that the jurors who do make the cut possess a unique readiness to “condemn a man to death.”

Still, some form of death-qualification is generally regarded as necessary to balance the State’s interests with the defendant’s constitutional rights. More often than not, even those who oppose it on the basis of it resulting in “conviction-prone” juries aim their criticisms at its use for

able to impartially determine the defendant’s guilt, the criticism on the topic generally construes “death-qualification” more narrowly, to refer only to the former aspect, taking no issue with the latter. I too will use the term to denote this narrower concept.

¹⁰ *Witherspoon*, 391 U.S. at 523.

¹¹ See, e.g., Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); George L. Jurow, *New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); William C. Thompson, Claudia L. Cowan, Phoebe C. Ellsworth & Joan C. Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984).

¹² E.g., *Lockhart v. McCree*, 476 U.S. 162, 198 (1986) (Marshall, J., dissenting).

¹³ 469 U.S. 412, 426-431 (1985).

¹⁴ See *Lockhart*, 476 U.S. at 191 (Marshall, J., dissenting) (arguing that “[j]udicial applications of the *Witherspoon* standard have also expanded the class of jurors excludable for cause”). The more recent case of *Uttecht v. Brown*, 551 U.S. 1 (2007), lends further credence to such concerns. See Brooke A. Thompson, *Criminal Law—The Supreme Court Expands the Witt Principles to Exclude A Juror Who Would Follow the Law. Uttecht v. Brown*, 127 S. Ct. 2218 (2007), 30 U. ARK. LITTLE ROCK L. REV. 845, 877 (2008)

¹⁵ See *Lockhart*, 476 U.S. at 190-91 (Marshall, J., dissenting).

assembling the jury responsible for the guilt determination, while accepting its utility for the penalty phase of the trial.¹⁶

In this paper, I will argue that there may be an alternative to the death-qualification of jurors that courts and critics have largely overlooked. Specifically, I will argue that allowing penalty phase determinations to be made by a supermajority largely achieves the same goals as death-qualification while avoiding its serious problems. Part I of this paper presents a brief overview of death-qualification, the primary criticisms leveled against it, and how the Court has responded to some of them. Part II briefly assesses some alternative solutions proposed by critics, and explains why they ultimately fall short in solving the problems that death-qualification causes. Part III presents a possible alternative that would eliminate the need for death-qualification altogether, and discusses some of its merits, in addition to addressing some anticipated objections to such a proposal. Part IV offers a brief conclusion.

II. DEATH-QUALIFICATION AND ITS CRITICS

A. Death-Qualification: The Court's Compromise

The solution at which the Witherspoon Court arrived has since been conceived as the Court's effort to strike a balance between interests of the State and the defendant that are in tension with one another. The State's interests in question have been described by the Court's later jurisprudence on the topic alternately as "obtaining jurors who can follow their instructions

¹⁶ See, e.g., *Lockhart*, 476 U.S. at 203-206 (Marshall, J., dissenting); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769 (2006); Richard Salgado, *Tribunals Organized to Convict: Searching for A Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. REV. 519 (2005).

and obey their oaths”¹⁷ and “excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially and who therefore might frustrate administration of a State’s death penalty scheme,”¹⁸ and are generally viewed nowadays to encompass both ideas. The defendant’s relevant interests have been treated within the Court’s jurisprudence as primarily centering around the impartial jury guarantee of the Sixth and Fourteenth Amendments.¹⁹

The solution at which the Court has thus far arrived in an effort to balance these two sets of interests has been to allow the State to strike potential jurors for cause based on their views about the death penalty, but to limit the circumstances in which they may do so. In *Witherspoon*, the Court ruled that a potential juror could not be struck unless he made it “*unmistakably clear*” that he would automatically refuse to vote for death or his views on the subject would “*prevent* [him] from making an impartial decision as to the defendant’s guilt,”²⁰ a standard that was then relaxed under *Witt* to allow the dismissal of jurors whose views would “prevent or substantially impair the performance of his duties as a juror,”²¹ and grant deference to the trial judge in making such a determination.²²

¹⁷ *Adams v. Texas*, 448 U.S. 38, 44 (1980).

¹⁸ *Wainwright v. Witt*, 469 U.S. 412, 416 (1985).

¹⁹ *E.g.*, *Lockhart v. McCree*, 476 U.S. 162 *passim* (1986); *Witt*, 469 U.S. *passim*; *Adams*, 448 U.S. 38, *passim*; *Witherspoon v. Illinois*, 391 U.S. 510 *passim* (1968). A second right that has been referenced, though not treated with quite the same level of gravity and uniformity, has been that of the fair cross-section requirement embedded within the Sixth and Fourteenth Amendment guarantees. *See Witherspoon*, 391 U.S. at 519-520 (“[A] jury that must choose between life imprisonment and capital punishment can do little more . . . than express the conscience of the community on the ultimate question of life or death. Yet . . . a jury composed exclusively of [people who believe in the death penalty] cannot [do so]”); *See also id.* at 528 (Douglas, J., concurring) (discussing the concept of the jury as representing “fair cross-section of the community” and “the conscience of the community”). *But see Lockhart*, 476 U.S. at 173 (declining to extend the fair-cross section requirement to the composition of petit juries).

²⁰ *Witherspoon*, 391 U.S. at 522 n.21.

²¹ *Witt*, 469 U.S. at 420 (quoting *Adams*, 448 U.S. at 45) (emphasis omitted).

²² *Id.* at 426-431.

B. Criticisms of Death-Qualification

This solution has been widely criticized, both for its practical and theoretical implications. I will briefly review some of the criticisms here.

Over the decades following *Witherspoon*, a number of studies investigated the possible implications of death-qualification.²³ A few key findings were confirmed over and over again. First, those whose survey responses indicated that they would survive the death-qualification process were found to possess attitudes favoring the prosecution, and to be more likely to convict (a quality referred to “conviction-proneness”) than the average population when reviewing the same evidence, calling into question whether juries selected by such methods are truly “impartial” within the meaning of the Sixth Amendment.²⁴ Second, *Witherspoon* qualification was found to disqualify a significant segment of the population,²⁵ leading to concerns of whether such juries are truly constitute a representative cross-section of the community.²⁶ Third, death-qualification has been shown to disqualify a disproportionate number of blacks and women,²⁷ exacerbating the already considerable concerns over underrepresentation of these groups.²⁸ Finally, evidence suggests that the process of death-qualification might actually predispose jurors

²³ For a detailed review, see the district court opinion in *Lockhart*, Grigsby v. Mabry, 569 F. Supp. 1273, 1291-1305 (E.D. Ark. 1983).

²⁴ See, e.g., studies cited *supra* note 10.

²⁵ See, e.g., Edward J. Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Edward J. Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California*, 3 WOODROW WILSON L.J. 11 (1980); Ellsworth, Phoebe C. & Fitzgerald, Robert, *Due Process vs. Crime Control: Death-Qualification and Jury Attitudes*, 8 LAW AND HUM. BEHAV. 31 (1984).

²⁶ See, e.g., studies cited *supra* note 24.

²⁷ *Id.*

²⁸ See, e.g., Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945 (1998); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000).

to think that the defendant must be guilty.²⁹ All of these findings have raised concerns as to the ability of the criminal justice system to meet the constitutional mandates of the Sixth and Fourteenth Amendments. The narrowing of the standard for exclusion under *Witt* has only increased the gravity of which concerns.³⁰

The way that death-qualification appears to operate in the real-life courtroom setting strengthens these criticisms. The broad discretion awarded to judges under *Witt* makes it easier for judges to exclude a broader swath of jurors without risking reversal, increasing the likelihood of questionable dismissals.³¹ Moreover, the existence of practices among prosecutors, including the use of peremptory strikes to exclude any death-scrupled veniremen remaining after death-qualification,³² and, more controversially, the strategy of seeking of the death penalty purely for the purposes of securing the advantage of having a death-qualified jury,³³ subject a broader swath of the population to exclusion than the aforementioned studies even accounted for. It is also interesting to note that the latter practice may corroborate such studies' findings with regard to death-qualified juries being conviction-prone and biased toward the prosecution.³⁴ Finally, although the process of death-qualification is intended to disqualify not only those who would refuse to impose the death penalty, but also those who regard it as the only acceptable

²⁹ See, e.g., Cowan, Thompson & Ellsworth, *supra* note 10; Jurow, *supra* note 10; Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW AND HUM. BEHAV. 121 (1984).

³⁰ See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 192 (1986) (Marshall, J., dissenting); Finch & Ferraro, *The Empirical Challenge to Death Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 63 (1986).

³¹ *Lockhart*, 476 U.S. at 191-92 (Marshall, J., dissenting). For evidence that this is taking place, see, for example, Eric Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEXAS L. REV. 977, 993-1032 (1984).

³² Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 39 (1982).

³³ David Lindorff, *Aiming for a Conviction*, NATION, at <http://www.thenation.com/article/aiming-conviction> (May 20, 2011).

³⁴ See Richard Salgado, *Tribunals Organized to Convict: Searching for A Lesser Evil in the Capital Juror Death-Qualification Process in United States v. Green*, 2005 B.Y.U. L. REV. 519, 532 (2005).

punishment for murder, studies have shown that many individuals who hold the latter view still end up serving on juries.³⁵

Other criticisms against death-qualification have taken a variety of different forms, ranging from appeals to the spirit of the criminal jury as envisioned by the founding fathers of the Constitution,³⁶ to strictly practical arguments based on judicial economy.³⁷ Despite the numerosity and variety of arguments against death-qualification, however, the Supreme Court has upheld its practice.

C. *Lockhart v. McCree*

In *Witherspoon*, the defendant introduced a handful of social scientific studies suggesting that juries from which those who oppose the death penalty are excluded may be, on average, significantly more likely to convict than those that include such individuals. The *Witherspoon* Court dismissed the evidence as “too tentative and fragmentary to established that the jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.”³⁸ As the Court was careful to add, however:

[A] defendant convicted by [a death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt . . . [and if] he were to succeed . . . the question would then arise whether the State’s interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant’s interest in a completely fair determination of guilt or innocence . . .³⁹

³⁵ Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 309-10 (2001).

³⁶ See G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87 (2008).

³⁷ *E.g.*, *Lockhart v. McCree*, 476 U.S. 162, 204 (1986) (Marshall, J., dissenting).

³⁸ *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1968).

³⁹ *Id.* at 520 n.18.

Eighteen years later, the Court did revisit the issue in *Lockhart v. McCree*.⁴⁰ The literature on the topic of the attitudes and composition of death-qualified juries, formerly “tentative and fragmentary,” had meanwhile developed into a body of nearly three dozen studies,⁴¹ all affirming the same key findings discussed earlier.⁴² Not a single study existed that contradicted these findings.⁴³

Nevertheless, a sharply-divided court held that death-qualification is permitted under the Constitution. It charged the studies with a number of methodological flaws,⁴⁴ but stated that even if the studies were valid and sound in their conclusions, mere conviction-proneness was not enough to contravene the Constitutional guarantee to an impartial jury, because “an impartial jury consists of nothing more than ‘jurors who will conscientiously apply the law and find the facts.’”⁴⁵ The Court further stated that the fair cross-section requirement only applies to jury venires, not to the composition of petit juries themselves,⁴⁶ but that even if it did, *Witherspoon*-excludables do not qualify as the sort of “‘distinctive’ group in the community”⁴⁷ whose systematic exclusion the requirement is designed to protect.

Justice Marshall, joined with Justices Brennan and Stevens, wrote a long, forceful dissent, arguing that the studies are methodologically sound and provide ample evidence to indicate a blatant Constitutional violation.⁴⁸ Numerous critics have agreed.⁴⁹ Still, chances that

⁴⁰ 476 U.S. 162.

⁴¹ See Brief for Amicus Curiae American Psychological Association in Support of Respondent at i, *Lockhart*, 476 U.S. 162 (No. 84-1865) (listing studies in Table of Authorities).

⁴² See *supra* Part II.B.

⁴³ See *Grigsby v. Mabry*, 758 F.2d 226, 238 (8th Cir. 1985).

⁴⁴ See *Lockhart*, 476 U.S. at 168-173.

⁴⁵ *Lockhart*, 476 U.S. at 178 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985)) (emphasis added).

⁴⁶ *Id.* at 173 (citing *Duren v. Missouri*, 439 U.S. 357, 363-34 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975)).

⁴⁷ *Id.* at 174 (quoting *Duren*, 439 U.S. at 364).

⁴⁸ *Id.* at 184-206 (Marshall, J., dissenting).

the Court will revisit the issue any time soon and reverse its previous finding may be slim at best.⁵⁰ Nevertheless, as one critic points out, just because the Supreme Court has refrained from declaring death-qualification unconstitutional does not make it the “fairest” approach, and as such, we ought still to consider what other approaches might be available to balance the State’s interests with those of the defendant.⁵¹

III. ALTERNATIVE SOLUTIONS AND WHY THEY FALL SHORT

A number of possible alternatives to the death-qualification scheme upheld by the court have been proposed by critics concerned by its numerous shortcomings. Most, however, only address the problem as it arises with regards to the guilt-determining jury. The U.S. District Court for the District of Massachusetts, concerned with judicial economy as much as fairness, considered a couple possible reforms of this variety in a 2004 case, *United States v. Green*.⁵² The first alternative would be to empanel a non-death-qualified jury for the guilt phase, while also picking the maximum number of alternates allowed, and then, if the trial needed to proceed onto the penalty phase, death qualifying that jury and as many alternates as necessary to assemble a new jury.⁵³ The second alternative would be to empanel an entirely new jury to determine penalty post-conviction, and only death-qualifying that one.⁵⁴

⁴⁹ E.g., Maury Albon Hubbard III, *Lockhart v. Mccree: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional*, 66 N.C. L. REV. 183 (1987); Michael W. Peters, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?* (*Lockhart v. McCree*, 106 S. Ct. 1758 (1986)), 26 WASHBURN L.J. 382 (1987).

⁵⁰ Subsequent cases have lent support to such a supposition. See *Uttecht v. Brown*, 551 U.S. 1 (2007) (upholding dismissal of a potential juror who said she could vote for the death penalty); *Buchanan v. Kentucky*, 483 U.S. 402 (1987) (finding no constitutional right to a non-death qualified jury, even for a co-defendant not facing the death penalty).

⁵¹ Salgado, *supra* note 33, at 522.

⁵² 324 F. Supp. 2d 311 (D. Mass. 2004).

⁵³ *Id.* at 331.

⁵⁴ *Id.*

Both of these alternatives suffer from a number of deficiencies.⁵⁵ Some of the problems could be alleviated with some slight modifications, such as, in the case of the first method, to ask the questions relevant to death-qualification during the initial *voir dire*, but to refrain from using that information until the jury must be reconvened for the penalty-phase,⁵⁶ or, in the case of the second, empanelling two juries, one death-qualified and one not, simultaneously, and allowing both to view the guilt phase of the trial, having the death-qualified jury take over to determine the penalty in the case of a conviction by the non-death-qualified jury.⁵⁷ Both of these proposed alternatives address some of the concerns of each of the methods they modify, while leaving others intact.

The main problem I perceive with all these methods, however, is that while they address part of the problem of death-qualification, that it results in juries who may be biased and unrepresentative and allows them to determine guilt or innocence of criminal defendants, they ignore an equally problematic consequence: that it then allows such juries to determine whether the defendant will live or die. For this reason, I advocate a method that eliminates the need for death-qualification altogether.⁵⁸

IV. MY PROPOSAL: THE NONUNANIMOUS SENTENCING JURY

One of the amici briefs filed in support of the respondent-defendant McCree pointed out a number of trial schemes that would eliminate the need for death-qualification while still protecting the State's interests. Among the possible solutions enumerated was that of a

⁵⁵ For a summary, see Salgado, *supra* note 33 at 538-49.

⁵⁶ To solve the problems caused by questioning jurors about their ability to sentence the defendant to death after they have already sat through the guilt phase of the trial. See *id.* at 547-51, for a summary of such problems and the reasons in support of such an alternative method.

⁵⁷ To solve the judicial economy problems associated with having to repeat part of the trial. Such scheme was employed in *People v. Carpenter*, 935 P.2d 708, 726-27 (Cal. 1997).

⁵⁸ See *infra* Part IV.A-B.

“nonunanimous sentencing jury.”⁵⁹ This suggestion, while presumably permissible under the Constitution,⁶⁰ has so far received little attention among critics of death-qualification. Part of this may be due to the widely-held notion that the unanimity requirement exists as one of the few safeguards afforded to defendants in capital trials, and not something to be given up lightly.⁶¹ Properly construed, however, I believe that eliminating this requirement in the penalty phase provides the best solution to the conflict of interests that death-qualification is meant to resolve, without its many problems. In this Part, I will start by outlining the contours of my proposed solution, then I will consider the arguments both in favor and against such an approach, and why I think the arguments in favor prevail.

A. The Specifics

My proposal is a narrow one. First and foremost, it would be predicated on the condition that no death-qualification take place at all,⁶² allowing even those jurors whose opposition to the death penalty rises to such a level that they could never impose it to serve on the jury. Second, the guilt-innocence phase of the trial would still require a unanimous verdict. Third, the penalty determination would require a supermajority of at least nine jurors.

⁵⁹ Brief of Amici Curiae at 42, *Lockhart v. McCree*, 476 U.S. 162 (1986) (No. 84-1865).

⁶⁰ The Supreme Court has held, in both *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), that the Constitution does not require unanimity to convict. Furthermore, the Florida death penalty statute, FLA. STAT. § 921.141(3) (2009), which so far has not been deemed unconstitutional, allows for the majority in capital juries to return an advisory verdict with respect to penalty.

⁶¹ See, e.g., Raoul G. Cantero & Robert M. Kline, *Death Is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, (2009).

⁶² This excludes the inquiry of the potential jurors ability to fairly determine guilt and innocence. See *supra* note 8.

The reason for the first qualification should be obvious: my proposal suggests nonunanimity in the penalty phase primarily as a means to eliminate the practice of death-qualification. I agree with critics of the Florida Death Penalty statute⁶³ who regard unanimity at the penalty phase as an essential safeguard against what becomes an otherwise all-too-easy process of condemning a man to death.⁶⁴ I do not believe, however, that such a safeguard remains necessary once the jury includes individuals representing all views on the death penalty opinion spectrum, for reasons that I will soon develop more fully.

I do still, however, believe that the safeguard of unanimity should still be regarded as necessary for conviction, and because I think lowering the bar would not serve any legitimate state interest in the same way that lowering the bar for the penalty determination would, I would adamantly insist that conviction remain a unanimous decision.

A mere simple majority should not be enough, however. A supermajority should be required, to foster more discussion and agreement among jurors. I have selected nine as the number as a compromise between the State's and society's interests: anything higher might reintroduce the State's concerns about it not in practice being possible to secure a death penalty, while anything lower might reduce the need for deliberations to an unacceptable level.⁶⁵

B. The Merits

With these stipulations in mind, I will provide a brief overview of the numerous advantages that such a trial scheme might afford.

⁶³ FLA. STAT. § 921.141(3) (2009)

⁶⁴ *See, e.g.* Cantero & Kline *supra* note 60; Taylor-Thompson, *supra* note 27.

⁶⁵ For further discussion addressing the value of jury deliberations, see *infra* Part IV.C.

First, it gets rid of the need for death-qualification, and in so doing, eliminates many of the problems arising from this process. The State's worry about a lone death penalty opponent being able to undermine the will of the legislature by categorically refusing to impose the penalty could be put to rest, because it would take a plurality of the jury feeling that way for such a result to occur. Because this stated purpose for death-qualification would no longer exist, there would be no legitimate ground for excluding death penalty opponents based on their views, allowing for defendants to be tried and sentenced by juries better approximating the constitutional ideals of representativeness and impartiality.

Second, allowing the penalty to be determined by a supermajority of a jury on which all views are represented aligns with the idea that such a determination should reflect the "conscience of the community" much better than do other schemes. The proposals mentioned in Part III all fall far short of such an ideal in that each would still allow for this determination to be made by a group of people from which a significant portion of the community had been excluded. This is problematic in that, no matter the scheme employed by a given state, there is no objective right or wrong to the penalty determination: by continually upholding the unfettered right of the defense to introduce all and any evidence it wishes in mitigation,⁶⁶ and by maintaining that any death penalty statute should provide a vehicle for the jury to exercise mercy in sentencing,⁶⁷ the Court has ensured that the penalty determination is a largely subjective one. As such, the community's personal convictions and views should not only be permitted to play a role in the penalty determination, but should be viewed as essential ingredient for its validity.

Finally, while jury unanimity, as a general principle, has much to recommend it, it also carries with it some problems, which my approach could help resolve. One such problem is the

⁶⁶ See *Tennard v. Dretke*, 524 U.S. 274 (2004) (finding that there need not be a logical nexus between mitigating factors and the crime).

⁶⁷ See, e.g., *Lockett v. Ohio*, 438 U.S. 586; *Penry v. Johnson*, 532 U.S. 782.

issue of hung juries, which can cost considerable time and resources by requiring a new trial. Some critics might argue that a hung jury is preferable to a jury returning a verdict that has not obtained a consensus, but this argument falls flat when one considers that the disagreement at issue will still be resolved in one way or another, and no matter what, some of the jurors will not agree with the outcome. The only difference between this result and one determined by a nonunanimous jury is that in the latter case, we can at least be sure that the ultimate outcome will satisfy most, if not all, of its the members.

Furthermore, a unanimous verdict returned by a jury does not, in reality, necessarily mean that all jurors truly agreed. In order to discourage hung juries in the interests of judicial economy, a jury that cannot agree on a verdict is often given what is known colloquially as a “dynamite charge,” stern instructions aimed at pressuring them into reaching a decision.⁶⁸ Faced with tremendous pressure to agree, both from within the jury and without, many jurors may agree to go along with the majority in spite of their true convictions, creating only an “illusion of consensus” where none in fact exists.⁶⁹

The fact that jurors might be voting insincerely in order to achieve unanimity is especially concerning with regards to something like the penalty phase. The penalty determination is unique in that it tends to rely less on facts and the evidence, and more on the juror’s moral beliefs and convictions. While we might be able to regard the holdout juror who finally conforms to the majority on the issue of guilt or innocence as simply having given way to the strength of the evidence, an outcome that we can feel okay about, the holdout juror who conforms in the case of the penalty phase will more likely be giving way to the majority’s moral

⁶⁸ Edward P. Schwartz and Warren F. Schwartz, *And So Say Some of Us . . . What to Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 439 (2000).

⁶⁹ For a general overview of insincere voting and its implications, see Schwartz & Schwartz, *supra* note 67, at 439-42.

convictions against their own deeply-held views, something with which we might not feel quite so alright. That this sort of thing occurs might help explain why many jurors who serve on capital trials look back on it as a traumatic experience that they may be unwilling to discuss with researchers.⁷⁰ Relaxing the requirement of unanimity in the penalty phase might mitigate this problem by enabling divided juries to reach a verdict without necessarily requiring that anyone compromise on matters of personal conviction. Arguably, the trauma of being part of a jury that returns a verdict in opposition to one's personal beliefs would not be as extreme if one were at least allowed to stay true to those beliefs throughout the deliberations, rather than deny them in the interest of returning a verdict, as many jurors no doubt must do under the current scheme.

C. Some Counter-Arguments and Responses

Having presented some of the merits of my proposal, I will now address some of the arguments that might be brought up in opposition. First, some critics who oppose the relaxation of unanimity requirements of juries in general may oppose my proposal for many of the same reasons. One argument put forth in opposition of allowing juries to render nonunanimous verdicts is that it has been found to severely curtail or even eliminate jury deliberations,⁷¹ which may result in the minority view not being given adequate voice or consideration. This is a problem both because it reduces the possibility that a small, but factually correct, minority may have the opportunity to bring to light considerations which may end up convincing the

⁷⁰ Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 188 (1992).

⁷¹ See, e.g., Reid Hastie, Steven D. Penrod & Nancy Pennington, *INSIDE THE JURY* (1983). But see Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOL. 38, 50 (1977) (finding “no statistically significant difference between the groups assigned unanimity and those assigned majority rule” in a mock-jury experiment).

majority,⁷² and because, since both racial minorities and women⁷³ tend to constitute the minority on even non-death-qualified jurors, these voices in particular may be silenced as the result of majority-rule juries.⁷⁴

First and foremost, it is important to consider the uniqueness of the penalty phase in assessing the weight of such criticisms. In many if not most cases, deliberation will still be required to reach my proposed 9-3 majority because initial votes will not yield an outcome so heavily weighted in one direction, particularly with a jury representative of all views on the issue. If some cases in which the jury votes immediately, finds it already has the requisite majority, and abstains from further deliberations do occur, these cases, while not ideal, might not constitute such an evil as if this scenario were to occur in the guilt-innocence phase of a trial. This is for two reasons. First, chances are extremely slim that the 9-3 vote could turn into a 9-3 vote in the other direction,⁷⁵ and whereas the rare occasions in which a small minority triumphs over the majority may often be seen as an indication that the minority was correct in its judgment and must have persuaded the majority by presenting facts, evidence or other considerations that they missed—an indication, in other words, that truth prevailed—the triumph of the minority over the majority in the penalty phase may be viewed a bit differently. Being a necessarily more subjective determination, jurors' views on the appropriate penalty are more often informed by deep-seated moral convictions about justice and moral desert not likely to respond to reason. As

⁷² See Harry Kalven, Jr. & Hans Zeisel, *THE AMERICAN JURY* 490 (Univ. of Chicago Press 1971) (1966) (observing that initial minority succeeds in convincing the majority about 10% of the time).

⁷³ See, e.g., Randall Kennedy, *RACE, CRIME AND THE LAW* 232 (1997); Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 *NAT'L BLACK L.J.* 238, 264 (1994).

⁷⁴ See Taylor-Thompson, *supra* note 27, at 1264. This argument assumes of course that these groups hold in common some particular views, *id.* 1278-79.

⁷⁵ See Eisenberg, Garvey & Wells, *supra* note 34, at 303-305 (showing that out of 53 capital cases examined, an initial vote in which at least ten jurors with respect to penalty was determinative of the penalty ultimately selected 100% of the time).

such the triumph of the minority over the majority in such a determination might more accurately reflect the victory of particularly vocal, adamant, or persuasive minority over what would otherwise be the will of the majority. Since the will of the majority more accurately represents the conscious of the community, I am not convinced this possibility is something worth safeguarding, given the potential costs. Second, while the refusal of even a couple of jurors to agree on the conviction of a defendant considerably undermines the notion that the prosecution really did succeed in proving his guilt beyond a reasonable doubt (the logic being that if it was so obvious that no reasonable doubts should be entertained, why do not all the jurors agree?), the dissent of even three members of a jury with regards to the penalty should not be as concerning, since the appropriate penalty, unlike the more objective issue of whether or not a defendant committed a particular crime, is largely a matter of judgment. In a community composed of a diversity of viewpoints, it should not be worrying that not all its members can agree on such a determination.

Furthermore, this argument assumes that nothing can be done to foster jury deliberation apart from requiring unanimity. Judges can advise juries that part of their job is to listen to the viewpoints of one another, perhaps directing them to focus on the evidence presented in aggravation and mitigation and their initial leanings in the early stages of deliberation, while refraining from taking a vote until later on.⁷⁶

In the end, procedures designed to safeguard jurors' entitlement to be heard during deliberations, while important, should not exist to the exclusion of procedures that would safeguard citizens' entitlement to serve on a jury in the first place. If jury unanimity is at odds with allowing individuals representing a range of viewpoints onto the jury in the first instance,

⁷⁶ See, Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1191 (1995) (suggesting these among other possible reforms for encouraging deliberation in the absence of unanimity).

the former should be the one to yield.

The embedded concern, that if the need for juries to deliberate is reduced, it might hit women and racial minorities the hardest, merits due consideration. However, I believe that the fact that women and minorities are underrepresented is a problem in its own right that can and should be addressed through other measures, including, perhaps, severely limiting the peremptory challenges each side is allowed to exercise in jury selection. In the context of capital trials, furthermore, the elimination of the unanimity requirement at the penalty phase in exchange for the abolition of death-qualification should actually result on more women and minorities being able to serve on the jury than would otherwise, these groups being among those most frequently excludable under the procedure.

The other concern that might be voiced in opposition to my proposal might be that, although it addresses the State's interest with regards to ensuring that its death penalty statute is not invalidated by a lone holdout juror, it does not properly vindicate the State's interest in obtaining only jurors able to "follow the law" (despite the fact that such jurors would state that they could be impartial and unbiased with regards to guilt and innocence, as well as follow the judge's instructions). The argument behind this claim would be that the law implicitly requires that jurors' minds not be made up beforehand about any aspect of the trial, and that this includes the penalty.⁷⁷ Considering the personal and often deeply-held nature of beliefs about the appropriate penalty in any given case, however, one might question whether such a rule is appropriate with respect to this particular aspect. If mercy as a grounds for a penalty less than death is to be always an option available to the jury, without requiring further justification, why preclude that mercy from being a more generalized mercy to all perpetrators of heinous crimes,

⁷⁷ Some states might even do so explicitly. *See Adams v. Texas*, 448 U.S. 38, 100 (1980) (noting that the Illinois law in effect at the time of *Witherspoon v. Illinois*, 391 U.S. 510, (1968) "required the jury at least to *consider* the death penalty").

no matter the particular details of the case? Whether the reason for returning a verdict less than death comes from a conviction that the particular defendant on trial does not deserve to be killed at the hands of the state, or from a conviction that no human being deserves to be killed at the hands of the state, is not, in my view, particularly important given the nature of the determination and the leeway the jury is granted in making it.

V. CONCLUSION

Given the prolific body of evidence suggesting the limitations of death-qualification, the courts and legislatures should view it as a duty, notwithstanding the ruling of the Supreme Court, to consider alternatives. Because the problems of impartiality and unrepresentativeness of the death-qualified jury affect the defendant not only at the guilt phase, but also at the penalty phase of the capital trial, alternatives that eliminate the need for death-qualification at *both* stages should be afforded special attention. In this paper, I have presented one such possible approach. Though because of a dearth of research on the particular non-death-qualified, nonunanimous penalty jury that my approach would introduce necessitated that many of my arguments were speculative, I believe strongly that it holds promise, and hope that such a scheme may be the subject of further research and consideration in the future.