FATAL FLAWS

Revealing the Racial and Religious Gerrymandering of the Capital Jury

ACLU

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Contents

SUMMARY AND KEY RECOMMENDATIONS

To serve in a capital trial, potential jury members must declare that they are willing to impose the death penalty. This process, known as "death qualification," erases large swaths of otherwise jury-eligible adults from the jury box and results in death penalty decisions—including the threshold and vital question of guilty or innocent —being made by a skewed pool of jurors who do not represent our communities.

The Constitution requires juries to carefully weigh mitigating circumstances in a separate penalty phase of a trial when deciding between life imprisonment without parole and death. The Constitution also requires the jury's decision to express the "conscience of the community." But, because of death qualification (which the Constitution does not require), juries making these decisions do not accurately reflect our communities or their values. Even though a juror who is unwilling to impose a death sentence can still listen to the evidence, weigh the credibility of witnesses, deliberate and even find a defendant guilty and impose the lawful sentence of life imprisonment, death qualification prevents the approximately 40% of Americans who now oppose the death penalty from participating in this important part of our democracy.

Decades of empirical research shows that death qualification results in juries that are more likely to convict, and more likely to reach hasty decisions and ignore mitigating evidence the Constitution says must be considered. Death qualification also results in the disproportionate exclusion of groups that are more likely to oppose the death penalty, including Black people, especially Black women, other people of color, women, and followers of certain religions. The racial divide in support for the death penalty is consistently demonstrated in over thirty years of social science research.[1] The resulting capital juries, comprised predominantly of white men, are less likely to deliberate vigorously and more likely to convict and sentence a person to death, especially when the defendant is Black.

Recent studies from California, Duval County, Florida; Wake County, North Carolina; and Sedgwick County, Kansas confirm that death qualification results in the disproportionate exclusion of Black people, and especially Black women, from capital juries. These studies show that:

- In California, a recent survey from Solano County shows that 37% of jury-eligible Black people would likely be excluded through death qualification, compared to 20% of white eligible jurors. These disparities are consistent with an earlier survey in Alameda County, CA showing that death qualification would likely remove 25.5% of eligible Black jurors compared to 16.5% of all other races, and a California-wide study where racial minorities made up 18.5% of total respondents, but represented about 30% of those excludable because of their opposition to the death penalty.
- In Duval County, 39% of all otherwise-eligible Black potential jurors and 43% of otherwise-eligible Black women were removed from capital juries through death qualification, compared to just 17% of white potential jurors.

- In Wake County, death qualification resulted in the dismissal of 25% of potential Black jurors and 36% of Black women, but only 11% of white jurors. The Wake County study also found that religious jurors were significantly more likely to be removed by death qualification than non-religious jurors. The likelihood was even higher for Catholic jurors.
- In Sedgwick County, scientific polling revealed that jury-eligible Black people are approximately 50% more likely to be excluded by death qualification than their white peers, with 38% of surveyed Black people and 39% of Black women likely to be excluded, compared to 25% of white respondents.

Prosecutors in each of these counties continue to seek the death penalty. A capital jury's racial composition can make the difference between life or death. Research, for example, demonstrates that a jury with at least one Black male is dramatically less likely to impose a death sentence.[2]

Death qualification creates a vicious loop. Black people are often more likely to distrust the death penalty because of their experiences of discrimination in the criminal legal system and the death penalty's historical outgrowth from lynching. This distrust then leads to disproportionate exclusion, which in turn increases discrimination in our criminal legal system in the form of non-representative and biased juries more likely to err.

The jury should be drawn from the full community, not merely those who favor the government.

People have the power to halt this cycle of discrimination and distrust. Legislatures can pass laws banning the exclusion of jurors opposed to the death penalty, prosecutors can decline to death qualify jurors, and defense counsel can mount challenges to the practice by introducing evidence of its discriminatory effects.

The Constitution envisions the jury as a wall standing high and firm between the awesome powers of the government and individual persons. Passing over the wall requires persuading the jury. The jury should be drawn from the full community, not merely those who favor the government.

Executing a person is the most extreme punishment available in our criminal legal system. We must demand that any decision to apply the death penalty is made by a jury that truly represents the community and its values. Death qualification upends this standard and must be abolished.

BACKGROUND

What is Death Qualification?

Death qualification is a little-known part of selecting a jury in death penalty trials. Potential jurors are "death qualified" if they declare that they are willing to impose the death penalty. Death qualification is required before a person can serve on the jury that determines both the defendant's guilt or innocence and, if the defendant is found guilty, whether the defendant will be sentenced to death or life in prison. If a potential juror expresses doubts about their willingness to impose the death penalty, they are excluded from the jury.

The Role of Juries

Every person accused of a crime is entitled to be tried before a jury of their peers. The Constitution guarantees this fundamental right, and democracy depends on it.[3] The purpose of this right is to "prevent oppression by the Government."[4] Providing an accused person with the right to be tried by a jury of his peers "[gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[5]

The constitutional right to a jury of one's peers requires that the jury be selected from a group of people truly representative of the community without exclusion of distinctive groups.[6] This requirement is grounded in the assumption that a jury selected from a fair cross-section of the community will be impartial and that its determinations will reflect the "commonsense judgment of the community[,]"[7] or, in the context of death-penalty decisions, the "conscience of the community."[8]

Jurors also have the right as citizens to serve on criminal juries and may not be unfairly excluded from jury service because of characteristics like race or sex.[9] This right recognizes that serving on a jury, like voting, affords citizens a vital means of participation in our democracy.[10]

Criminal Jury Selection

Before all criminal trials begin, the judge and lawyers for the prosecution and defense select the jury from a pool of eligible potential jurors. The judge and attorneys ask a group of potential jurors (known as the "venire") questions to determine their suitability to serve. This is called "voir dire." Potential jurors are excluded, and the jury pool is narrowed, through "for cause" and peremptory strikes. A prospective juror may be removed for cause if there is some reason why they could not be fair and unbiased, for example because they have a relationship with one of the parties or lawyers or have a personal connection to the subject matter of the case that would make them unable to apply the law fairly. Attorneys for both the defense and the prosecution may also use a certain number of "peremptory" strikes, which allow exclusion of jurors without providing a reason, so long as the purpose is not to discriminate based on race, sex, or any other protected characteristic.

Unfortunately, attorneys have frequently abused the peremptory strike by employing it to exclude

jurors based on their race or sex, in violation of the Constitution.[11] While the U.S. Supreme Court has barred such discrimination, and issued precedent directing courts how to detect it, and to stop it, this precedent has utterly failed to stop discrimination in jury selection. Without smoking-gun evidence—like written notes showing an intent to exclude black jurors—these challenges are difficult to win and discrimination under race-neutral pretexts continues.[12] The racial discrimination often seen in the exercise of peremptory strikes combines with death qualification to make it exceedingly difficult for a Black juror to be selected and serve.

Capital Juries

When a person is accused of a crime for which a death sentence could be imposed, the voir dire process includes what is known as "death qualification." During death qualification, potential jurors are asked if they would be willing to impose a death sentence. If they answer yes, they are "death qualified" and may serve on the jury. If they answer no, they are dismissed from the jury pool.

During death qualification, jurors are asked a question similar to the following:

> "If you were selected to serve on a jury where the defendant faces the possibility of the death penalty, do you have such strong feelings about the death penalty that these sentiments would seriously affect you as a juror and prevent or substantially impair your performance in accordance with instructions from the court and your oath as juror? Answer 'No' if you would be able to objectively determine the defendant's guilt or innocence and would be willing to consider both life in prison without parole and the death penalty as possible sentences. Answer 'Yes' if you would be unable to do so."[13]

Capital trials include two phases: the guilt-innocence phase and the penalty phase. During the guilt-innocence phase, the jury decides whether the defendant is guilty or innocent of committing the accused crime. If the defendant is found guilty, the trial moves into the penalty phase, during which the jury decides whether the defendant should be sentenced to death or life imprisonment. The same jurors decide both guilt and penalty.

During death qualification, potential jurors are asked if they would be willing to impose death.

During the penalty phase, a person facing a capital sentence is entitled to present any relevant mitigating evidence in support of a sentence less than death. The jury is required under the Constitution to consider in good faith both aggravating and mitigating circumstances, including the defendant's background and character.[14] The jury's choice between death and a life sentence should incorporate jurors' own "appraisal of a [capital defendant's] moral culpability."[15]

When the government seeks a sentence of death, juries serve as an especially important check on this awesome exercise of power. Capital juries express the conscience of the community. As the U.S. Supreme Court has observed, "one of the most important functions any jury can perform in making [the penalty] selection is to maintain a link between contemporary community values and the penal system[.]""[16]

Obsolete Roots of Death Qualification

When death qualification was first employed, capital crimes carried mandatory death sentences and trials thus had only a single phase where the jury would decide guilt versus innocence. If a jury found a defendant guilty of the accused crime, they had no choice in whether the defendant was sentenced to death. Death qualification was born of the concern that if a juror's conscience would not allow them to impose death, they might not be able to reach a guilty verdict, even if the evidence proved guilt beyond a reasonable doubt. Death qualification ensured, in that era, that jurors could fairly apply the law and reach a verdict on guilt, regardless of the punishment that would follow.

This all changed in 1972. That year, in *Furman v. Georgia*, the Supreme Court held that the state and federal death penalty statutes then in force violated the Constitution.[17] In the years that followed, states amended their death penalty statutes to try to comply with *Furman*, including by narrowing the number of capital crimes, bifurcating the guilt and sentencing phases of trial, and requiring capital juries to consider aggravating and mitigating factors in sentencing.[18] Eventually, the death-penalty states made life imprisonment a lawful sentence for death-eligible crimes and, in nearly every state, the default punishment if a jury rejected death.[19]

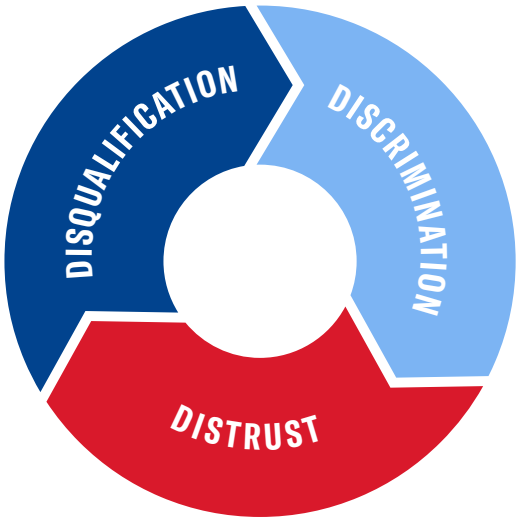
As a result, the original purpose of death qualification—to make sure jurors could return a lawful verdict—no longer applies. Now, a juror who will not consider a death sentence can still find a person guilty and apply one of the lawful sentences for death-eligible crimes (life imprisonment). Nevertheless, death qualification continues to be standard practice in death penalty cases.

LIFE V. DEATH QUALIFICATION

Potential jurors may also be excluded from a capital jury based on extreme death penalty support. This process, known as life qualification, protects the constitutional right to an impartial jury by excluding jurors who would automatically impose the death penalty if a person is found guilty. Automatic imposition of the death penalty violates the Constitution's requirements of due process, and that jurors consider aggravating and mitigating evidence when deciding between a death and life sentence.[20]

Racist Roots of Death Penalty

Death qualification and its effects on juries cannot be properly understood outside the context of this country's history of slavery, racial terror, and racial discrimination. Death qualification is part of a vicious cycle of systemic racial injustice: Black peoples' historical and current experiences of racial violence and discrimination contribute to their heightened distrust of the death penalty, which in turn leads to juror disqualification and then back to discrimination in the form of a non-representative and biased jury.



Black distrust of the death penalty is rooted in the fact that slavery, racial inequality, and violence shaped the formation of the modern death penalty. In fact, the Territory of Kansas enacted one of the first statutes excluding jurors opposed to execution—for "crimes" rebelling against slavery—in 1855. As part of a statute requiring execution for raising a rebellion or aiding in the rebellion of enslaved persons, the law stated: "No person who is conscientiously opposed to holding slaves, or who does not admit the right to hold slaves in this Territory, shall sit as a juror on the trial of any prosecution for any violation of any of the sections of this act."[21] Before and immediately after the Civil War, southern states imposed vastly different punishments for the same crimes, depending on whether the defendant was white or Black.[22] Black people were executed for even minor offenses like property destruction.[23]

After slavery was abolished, southern states turned to the criminal legal system to maintain the subordination of Black people. At the same time, the south's determination to maintain the regime of white supremacy "[l]ed to an era of lynching and violence that traumatized black people for decades."[24] During this era, most of the southern Black population had either witnessed a lynching in their own communities or knew someone who had.[25] Between 1877 and 1950, there were over 4,000 documented lynchings in 12 southern states.[26]

Over time, as lynchings became the subject of criticism and negative press, southern states increasingly turned to court-imposed capital punishment as a more palatable form of violence against Black people.[27] By 1915, court-ordered executions for the first time outpaced lynchings in former slave states.[28] Just as lynchings had, legal executions targeted Black people. Between 1910 and 1950, 75% of executions in the South were of Black people, though they made up only 22% of the population.[29] Black people were hastily tried and sentenced to death by all-white juries.[30] The continuity between lynchings and the death penalty is also evidenced by public executions used "to mollify the mob," even where state law outlawed such public displays.[31] Some states, including North Carolina, even used the term "legal lynchings" to refer to capital punishment.[32]

1898 execution of Edward Hinson by State of Florida photographed by Wisconsin Infantry Regiment member during Spanish-American War, photo courtesy of Wisconsin Veterans Museum (Madison, WI), Collection: Company F, 1st Wisc. Infantry Regiment Still Images (WVM.1407.1104).

Lynching and capital punishment inextricably link, with the latter gradually replacing the former. This link proves so strong that that the Supreme Court cited it to justify its 1976 decision re-approving death sentences. As the Court explained, "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law."[33]

And just as lynching did, the modern death penalty disproportionately kills Black people. Though Black people make up only 12% of the population, they represent 34% of all executions between 1976 and 2025[34] and 41% of the current death row population.[35]

It is unsurprising that the historical roots and modern application of the death penalty leave Black Americans distrustful of capital punishment. The practice of death qualification renders this distrust part of an endless cycle of discrimination: Exclude skeptical Black jurors, disproportionately condemn Black people to death with whitewashed juries, prompt distrust in a racist system, and repeat.

COMMUNITY VOICES

"Our work remains incomplete. The distrust of the police, the criminal justice system and other public institutions remain in our community. Just as that distrust and vigilance requires us to have 'the talk' with our Black children, it keeps us on guard whenever these institutions are purporting to act in the community's interest, including when the State asks Black potential jurors to consider certain types of punishments with historical ties to lynching, such as the death penalty. Until we are willing to acknowledge racism and terror, past and present, and reaching a state of reconciliation and healing, this distrust will remain."

— **Declaration of Dr. Kimberly Allen**
CEO 904ward
State v. Donald Banks, Duval County, Florida

"I am deeply troubled that our state, which also has a well-documented history of racialized violence and lynchings the State never policed or prosecuted, has condemned and executed more Black people than any other racial group. My distrust, based on the State's record of discrimination, influences my views on the death penalty. Because I cannot trust law enforcement, due to its actions past and present, I don't trust the death penalty. From my lifelong work in activism in this community, I know many others in my community feel the same.

Even more pernicious is the fact that my authentic position on the death penalty, and that of other Black Floridians, is born of my experience as a Black person in this state, and stems from law enforcement's own conduct and discrimination. My position means that I can be excluded from the most important cases heard in our courts, capital trials. This alienates me, and Black people in Northside Jacksonville, around Duval County, and in communities scattered across our state who are more than capable of listening to testimony, weighing evidence, deciding guilt or innocence, and selecting a lawful punishment."

— **Declaration of Benjamin Frazier**
(deceased in 2023)
State v. Donald Banks, Duval County, Florida

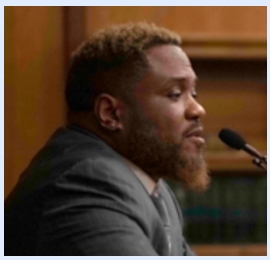
COMMUNITY VOICES

"[T]o create a jury that would exclude my voice is to create a problematic jury that might be more likely to convict a person in a harsh way and condemn them to death because they did not listen to voices like my own."

— 2022 Testimony of Reverend Doctor Rodney Sadler, Jr.
State v. Brandon Hill, Wake County, North Carolina

"[A]s a member of the community of Americans of African descent, I have additional reasons to oppose the death penalty. They go back to a history that started in 1619. That year, enslavers first brought Africans to this country in chains. This history of violence and dehumanization continued through failed Reconstruction, and then through racial-terror lynchings and violence, which were later replaced in large part by state executions (legal lynchings), disproportionately punishing Black people and people charged with killing, or in many cases, raping, white victims. This history continues today, as night from day, through unjust and inequitable policing and police violence against members of my community, and the continuing use of the death penalty in discriminatory ways."

— Declaration, Pastor Reginald Gundy
Pastor of Mt. Sinai Missionary Baptist Church, in Jacksonville
State v. Donald Banks, Duval County, Florida



Because of experiences with Wichita police, "my biases have come through in terms of how I've answered some questions on pre-jury selection, and I think that's probably disqualified me because I have some very, very strong biases on race and racial disparities."

— Dr. Kevin Harrison, Testimony
State v. Kyle Young, Wichita, Kansas, 2023

SKEWING JURIES

Death qualification skews capital juries. Death-qualified juries behave differently than those not. As decades of research shows, they convict more frequently and review evidence less thoroughly.[36] They are not only more likely to convict, but more white, more male, more biased, more likely to choose death over life imprisonment, and less religious and less religiously diverse.[37] Death-qualified juries thus do not reflect the diversity in our communities. They do not express our contemporary community values.

Changing views on the death penalty make the exclusionary effects of death qualification even more pronounced. As increasing numbers of Americans oppose the death penalty, death qualification will exclude an ever-growing portion of our communities. Recent polls show that, as of 2020, opposition to the death penalty is shared by 43% of Americans, as compared to just 16% in the early 1990s.[38] Only 47% of millennials and 42% of Generation Z now support the death penalty.[39] Today, therefore, death qualification shrinks the jury pool to a body unqualified to speak with the voice of the community. Decades ago, this shift would have been unforeseeable to the judges who initially approved death qualification under the belief that it would cut only a small fraction from the pool. Moving forward, ultimately, even if a majority of the population opposed capital punishment, minority rule would allow juries to continue returning death sentences, through the process of death qualification.[40] One could imagine hundreds of jurors being called down to the courthouse, with most excluded, until 12 willing to impose death could be assembled.

Research reveals that many death-qualified jurors hold beliefs incompatible with the Constitution's requirements. As compared to non-death qualified jurors, death-qualified juries are less likely to consider and properly value mitigating evidence and are more likely to overvalue aggravating factors.[41] In a study by the Capital Jury Project (CJP) involving interviews of approximately 1,200 people who had served on capital juries and had underwent death qualification, about half the jurors said they had made up their minds about whether to impose the death penalty before the penalty phase even began.[42] Seventy percent of them were "absolutely convinced" of this premature decision.[43] And more than half believed that death was the only acceptable punishment for certain crimes like premeditated murder.[44] Because mitigating evidence is not presented until the penalty phase, jurors who have made up their mind about punishment at the guilt phase cannot comply with the Constitution's requirement that jurors consider and give effect to all mitigating evidence before deciding to execute.

Mock jury studies have shown that death qualification disproportionately removes jurors of color.[45] This disproportionate exclusion is predicted by divergent views on the death penalty.[46] Research shows that Black Americans are substantially less likely to support the death penalty than white Americans. In 1974, only 39.9% of Black survey respondents supported capital punishment, as compared to 69.8% of white respondents.[47] Three decades later, views on the death penalty remained similarly divergent, with 41.7% of Black respondents to a 2004 survey supporting capital punishment compared to

72.5% of white respondents.[48] And even as death penalty support has declined overall, the Black-white divide persists. A 2018 survey found 36% of Black respondents favored the death penalty for those convicted of murder, compared to 59% of white respondents.[49] The outsized disqualification of jurors of color is troubling in itself, but, as explained below, it also amplifies the biases towards guilt and death, and against full and meaningful deliberation, inherent in the death qualification process.

Percent Support for Capital Punishment by Race Gallup Polls, 1972–2006[50]

Year	White	African American
1972*	57	27
1978	64	41
1981	70	42
1985*	77	52
1986-88*	78	52
1991-94*	80	56
1995-99	77	52
2000*	70	38
2001*	71	38
2002*	75	50
2003*	74	41
2004-5*	70	42
2006*	70	43

Race Affects Decisions

It should come as no surprise that race also affects juror decision-making. The racial composition of a jury, as well as the race of the defendant, can affect how a jury decides a case. White-dominated juries are more conviction-prone against non-white defendants compared to more diverse juries.[51] The quality of all-white jury deliberations also varies depending on the race of the defendant, with all-white mock juries shown to engage in lower-quality deliberations when considering a Black defendant than when considering a white defendant.[52] Conversely, where juries are more racially diverse, they engage in fairer and more fulsome decision-making. In one mock jury study, for example, jury groups composed of two Black jurors and four white jurors deliberated longer, discussed more facts from the case, and were less likely to assert inaccurate facts during deliberations compared to all-white groups.[53]

Whiter juries are also more likely to sentence a person to death.[54] Numerous studies show that when deciding what sentence to apply, white jurors are more likely than Black jurors to discount mitigating evidence and support a death sentence.[55] In one study, for example, researchers found that white jurors who served on South Carolina capital juries were more than twice as likely to vote for death at the sentencing stage than Black jurors.[56] In another study, of mock jurors, researchers found that "the higher the proportion of Whites on the jury, the more likely the jury was to favor death."[57]

Whiter juries are especially likely to choose death when the defendant is Black. Research shows that, among white people, support for the death penalty is highly correlated with anti-Black racial prejudice.[58] In one mock jury study, where the defendant was Black, the proportion of white people in the mock jury was a "significant predictor of death verdicts."[59] The same was not true, however, for white defendants.[60] Research on actual capital juries has shown that capital juries with five or more white men were dramatically more likely to impose a death sentence on Black defendants accused of killing white victims than juries with four or fewer white men.[61] In contrast, having at least one Black man on the jury reduced the likelihood of a death sentence in cases with Black defendants and white victims by almost thirty percent.[62]

Social science research thus shows that the racial composition of a capital jury can be the difference between acquittal and conviction and life or death. Yet, Black Americans are significantly more likely to be excluded from capital juries than white Americans because of their views on the death penalty.[63] Death qualification gives prosecutors who seek death an extraordinary tactical advantage: without dipping into allotted peremptory challenges, they can force the judge to exclude the jurors most likely to be skeptical of the State's case, reduce the racial diversity that promotes good deliberations, and more easily win convictions merely by seeking death.

KEY RACE STUDIES

Although many scientific studies demonstrate death qualification's racially discriminatory effects, this report highlights recent studies in four states, each for a unique reason.

California represents America's deep ambivalence about the death penalty. It has the largest death row in the nation by far, with over 587 prisoners condemned to death.[64] And yet California has not held an execution in nearly two decades; in 2019 its governor ordered a complete moratorium and that the execution chamber be dismantled.[65] While California law would require a referendum vote to abolish the death penalty once and for all, the governor retains additional clemency authority,[66] and its legislature has shown great interest in reforms to eradicate racial discrimination from the criminal legal system more broadly. These efforts include California's Racial Justice Act,[67] as well as its reform of the law policing racial discrimination in the use of peremptory strikes,[68] a topic both intertwined with and proximate to the racially discriminatory effects of death qualification. Due to the longstanding work of professors Craig Haney, Mona Lynch, and other researchers, the available studies in California are more developed and numerous than any state in the nation.

Florida tells a much different story. It continues to sentence new prisoners to death and to execute them on a regular basis, and has the second largest death-row population, of over 271.[69] In 2023, it reinstated a law (it had repealed in 2017) permitting non-unanimous juries to impose death sentences.[70] It did so despite recent U.S. Supreme Court precedent acknowledging that non-unanimous jury verdicts were designed to disenfranchise Black jurors and continue to have that effect.[71] Professor Jacinta Gau's study of death-penalty trials in Duval County explores the effects of death qualification in what is one of the most active death counties in both Florida and the United States.[72] The ACLU has challenged the practice of death qualification in this county, albeit unsuccessfully.[73] When the Legislature was debating the reinstatement of non-unanimous capital juries, one courageous legislator, Representative Michele K. Rayner, proposed an amendment to the bill that would bar death qualification due to its racially discriminatory effects and the need for capital juries to "be a cross section of our community."[74]

Both **North Carolina** (where the ACLU has previously challenged the practice) and **Kansas** (where the ACLU has recently challenged it) have unique state statutes that specifically bar the exclusion of jurors based on their race, as well as other characteristics including sex and religion.[75] In Kansas, responding to an amicus brief by the Legal Defense Fund raising the discriminatory effects of death qualification, that state's high court recently stated that "allegations" that racial discrimination is inherent in death qualification "most certainly warrant careful analysis and scrutiny."[76] The Court however found that the claim required factual development absent from the trial record of that case.[77] The ACLU has filed repeated motions in Kansas challenging the practice, based on studies in two different counties by Professor Mona Lynch.[78]

The studies from these jurisdictions uniformly illustrate the exclusionary effects of the death qualification process. The social scientists who conducted these studies concluded that death qualification disproportionately excludes Black people, and especially Black women. Some of the studies also suggest that religious people are disproportionately excluded by this process, a proposition more difficult to research because the religious practices of jurors are not available in many trial records. Each of these counties continues to use juries skewed by death qualification to sentence people to death.

California

Three studies of eligible jurors conducted between 1979 and 2016 in California demonstrate that death qualification likely disproportionately excludes racial minorities, especially Black people, from capital juries. Each study used surveys of jury-eligible adults in particular counties or state-wide to determine the likely effects of death qualification on juror composition.

Solano County

The most recent survey, conducted in 2016 by Professors Mona Lynch and Craig Haney, polled 500 jury-eligible adults in Solano County, CA.[79] Respondents answered a series of questions designed to assess their potential disqualification, their views on the death penalty more broadly, and how they would assess aggravating and mitigating factors. The results showed that Black people and women were more likely than their white or men counterparts to be excluded through death qualification.

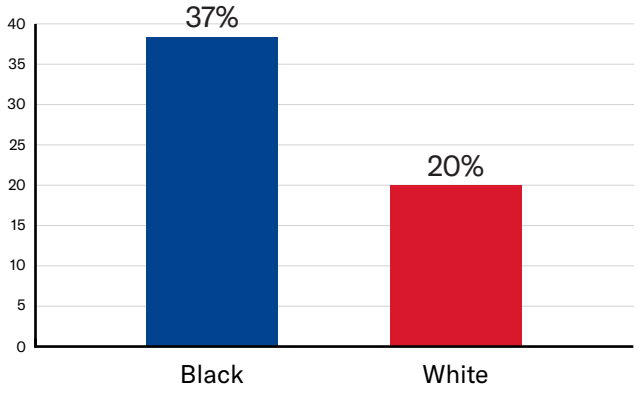
The survey's key findings include:

Death qualification is likely to disproportionately exclude Black people.

- 37% of Black respondents were excludable based on their opposition to the death penalty, compared to only 20% of white respondents.

FIGURE 1

Percentage Excludable by Race—Solano County

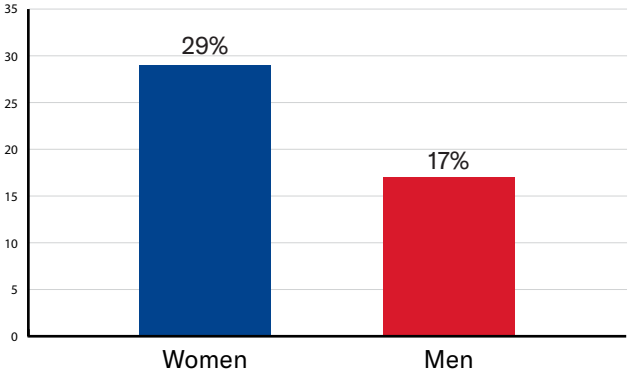


Death qualification is likely to disproportionately exclude women.

- 29% of women surveyed were excludable based on their opposition to the death penalty, compared with 17% of men.

FIGURE 2

Percentage Excludable by Gender—Solano County



- Women made up 49% of respondents for whom exclusion measures were available, but represented 63% of those excludable because of their opposition to the death penalty.

Views on the death penalty differ significantly by race and gender and death qualification is likely to increase the share of potential jurors who support capital punishment.

- 27% of Black respondents supported the death penalty, compared to 66% of white respondents.
- 55% of women supported the death penalty, compared to 65% of men.
- death qualification increased the percentage of eligible jurors who support capital punishment from 60% to 72.5%.

Alameda County

Over three decades earlier, a survey of 717 jury-eligible respondents in Alameda County, CA, reached similar results.[80] This study, conducted by Professors Robert Fitzgerald and Phoebe Ellsworth, found that death qualification would likely disproportionately remove Black people and women from jury pools and skew views in favor of the prosecution.

The study's key findings include:

- Death qualification would remove 25.5% of Black respondents, compared to 16.5% of all other races.
- Death qualification would remove 21% of women respondents, but only 13% of male respondents.
- Compared to respondents excluded through death qualification, death qualified respondents were more likely to hold views that are favorable to the prosecution, including being more punitive, less sensitive to procedural and constitutional safeguards, and less likely to view defense counsel as trustworthy.

California-Wide Survey

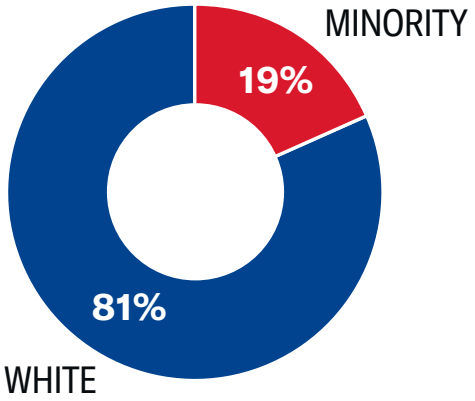
A 1989 state-wide survey of 498 Californians conducted by Professors Craig Haney, Aida Hurtado, and Luis Vega found that death qualification was likely to exclude racial minorities and affect juror attitudes towards mitigating and aggravating factors.[81]

The study's key findings include:

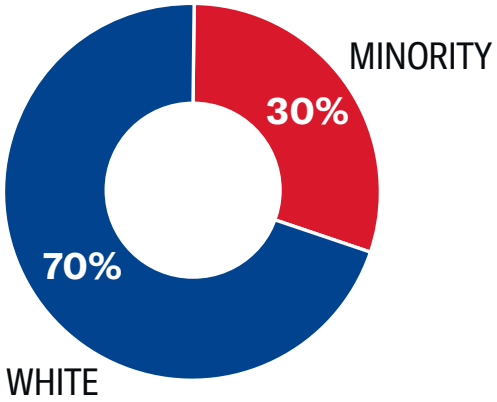
- About 30% of the respondents excludable because of their opposition to the death penalty were racial minorities, though they made up only 19% of all respondents.

FIGURE 3

Percentage of Respondents



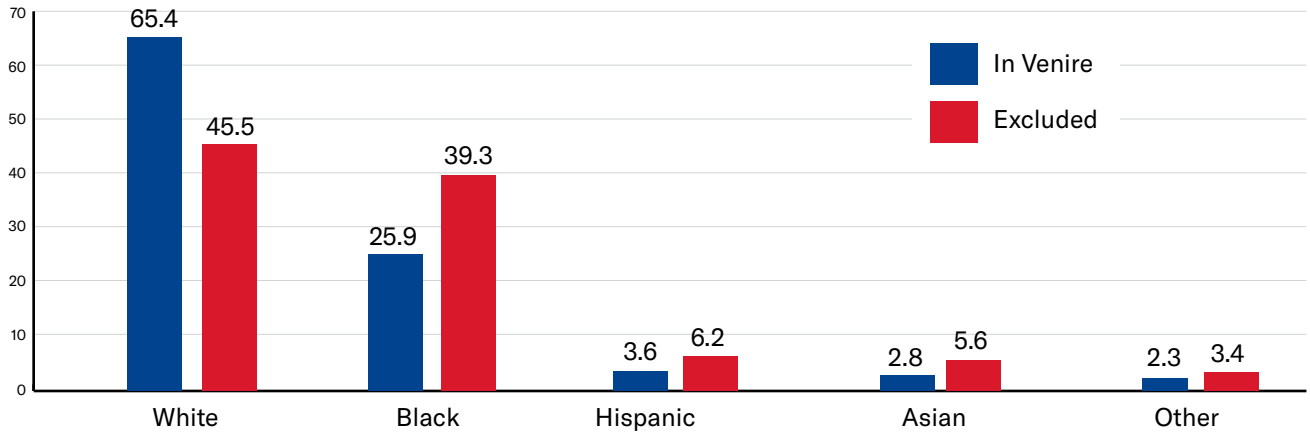
Percentage of Excluded



- Death-qualified respondents were significantly less responsive to mitigating factors and significantly more responsive to aggravating factors than excluded respondents.

FIGURE 4

Percentage in Venire v. Excluded—Duval County



Duval County, Florida

In this 2021 study by Professor Jacinta Gau, she analyzed data from twelve capital trials that took place between 2010 and 2018 in Duval County, Florida.[82] The results demonstrate that death qualification disproportionately excludes Black jurors, particularly Black women, and other jurors of color.

Figure 4 illustrates the percentage for each racial group in the *entire* venire versus their percentage amongst all excluded for death qualification.

The study's key findings include:

Death qualification disproportionately excluded Black jurors and other jurors of color.

- 25.9% of the people summoned for jury service were Black, but they accounted for 39.3% of death qualification dismissals.
- Jurors of color (including Black, Hispanic, and Asian potential jurors) comprised just 35% of the summoned jury pool, but made up a majority (54%) of the jurors removed through death qualification.
- In contrast, white people made up 65.4% of those summoned, but only 45.5% of those excluded by death qualification. *See* Figure 4, above.

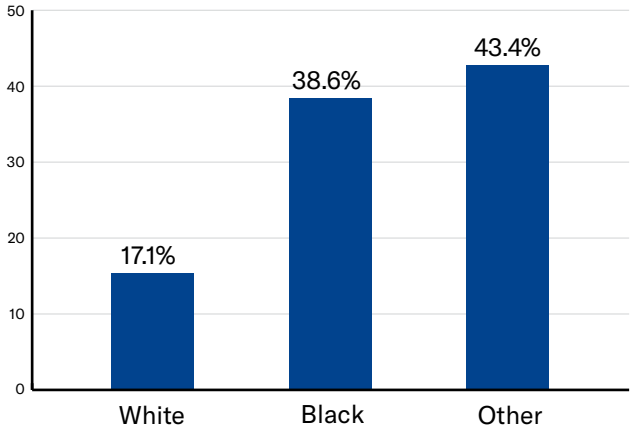
Black jurors and other jurors of color were far more likely to be excluded by death qualification than white jurors.

- In total, 27.1% of all Black potential jurors were removed through death qualification, compared to just 12.8% of white potential jurors.
- 32.4% of other potential jurors of color were removed through death qualification.
- After excluding potential jurors who were dismissed for other reasons, including hardship or "for cause" removals unrelated to death-penalty attitudes, death qualification resulted in:
  - Dismissal of 38.6% of otherwise-eligible Black jurors;
  - Dismissal of 43.4% of other jurors of color who were otherwise eligible; but
  - Dismissal of only 17.1% of otherwise-qualified white potential jurors. *See* Figure 5, below.

Figure 5, below, shows the percentage of otherwise eligible jurors dismissed through death qualification, by race.

FIGURE 5

Percentage Otherwise Eligible Jurors Death Disqualified by Race—Duval County



- Nearly one quarter of otherwise-qualified Black jurors were removed by prosecutors through peremptory strikes.
- The combination of death qualification and peremptory strikes removed 62% of eligible Black potential jurors, compared to only 34% of eligible white potential jurors. *See* Figure 6, below.

Peremptory strikes compounded the exclusion of Black jurors.

FIGURE 6

Percentage Removed by Death Qualification and Prosecutor Strikes by Race—Duval County

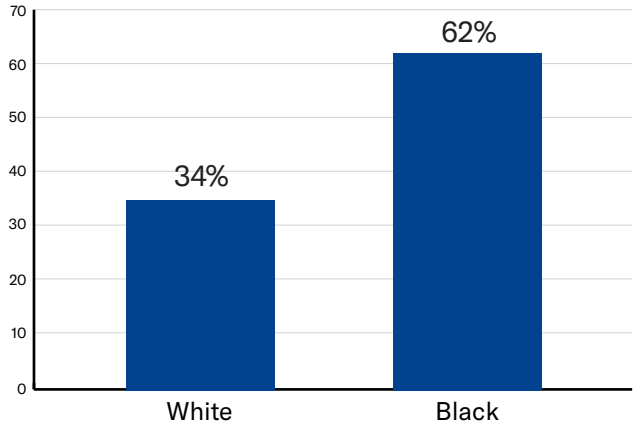


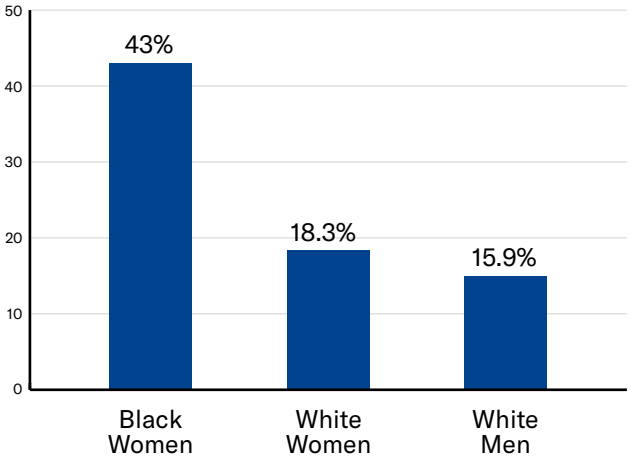
Figure 6 shows the proportion of otherwise-eligible Black and white jurors excluded by the combination of death qualification and peremptory strikes.

Black women were especially likely to be excluded.

- Death qualification removed nearly 43% of otherwise-qualified Black women, compared to 18.3% of otherwise-qualified white women, and 15.9% of otherwise-qualified white men.

FIGURE 7

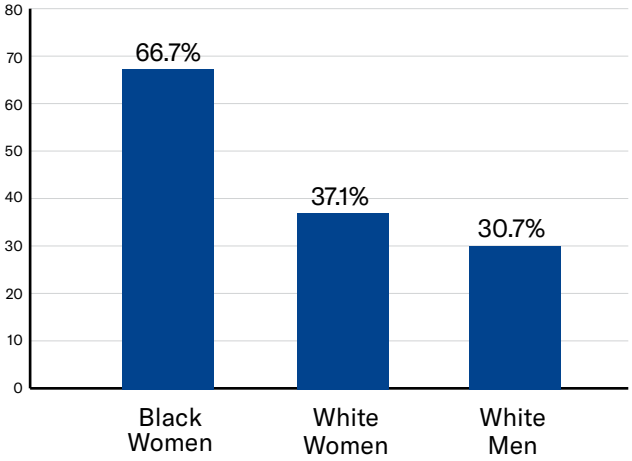
Percentage Black Women Removed by Death Qualification Compared to White Counterparts—Duval County



- The combination of prosecutors' peremptory strikes and death qualification excluded two-thirds (66.7%) of otherwise-qualified Black women, compared to 37.1% of otherwise-qualified white women and 30.7% of otherwise-qualified white men.

FIGURE 8

Perecentage Black Women Removed by Death Qualification and Prosecutor Strikes—Duval County



Wake County, North Carolina

A 2022 analysis by Professors Catherine M. Grosso and Barbara O'Brien of ten capital trials between 2008 and 2019 in Wake County, North Carolina, involving over 1,281 jurors, similarly demonstrates that death qualification disproportionately excludes Black potential jurors.[83] The study also shows that death qualification disproportionately excludes women, especially Black women, and religious jurors.

The study's key findings include:

Death qualification disproportionately excluded Black jurors.

- Death qualification eliminated 12% of white potential jurors, but over twice that share (27%) of their Black peers.

FIGURE 9
Percentage Disqualified Under Broader Definition—Wake County

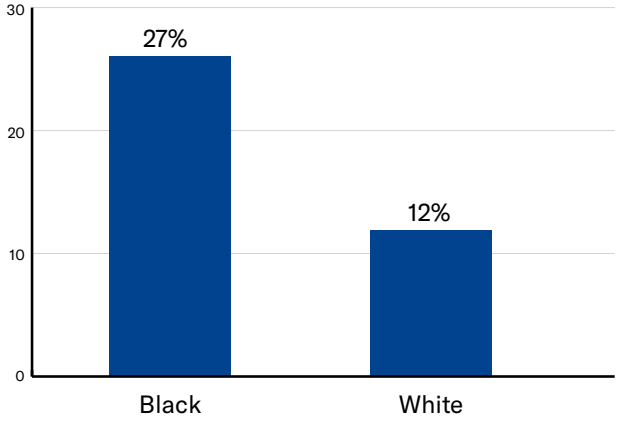


Figure 9 shows the percentage of all potential jurors removed through death qualification, by race.

After controlling for jurors who could have been removed for other reasons, 25% of Black potential jurors with no other basis for removal were eliminated through death qualification, compared to only 11% of similarly situated white jurors.

FIGURE 10
Percentage Disqualified Under Restricted Definition—Wake County

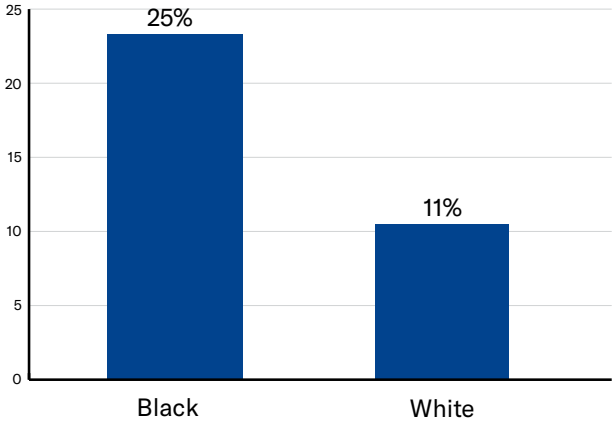


Figure 10 shows the percentage of all potential jurors with no other basis for removal who were removed through death qualification, by race.

Death qualification disproportionately excluded women jurors, especially Black women.

- Death qualification excluded 19% of women, compared to 11% of men
- 36% of Black women were dismissed through death qualification.

FIGURE 11
Percentage of Women and Black Women Death Disqualified—Wake County

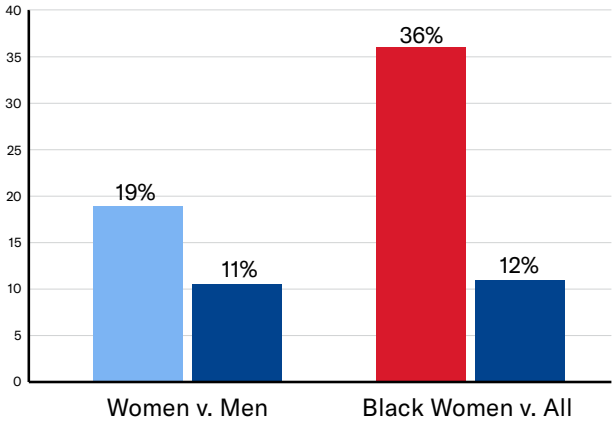


Figure 11 shows the percentage of all potential jurors removed through death qualification, by gender and the percentage of Black women removed through death qualification compared to all jurors.

Peremptory strikes exacerbated death qualification's discriminatory exclusion.

- Prosecutors used peremptory strikes to remove Black jurors at over twice the rate as white jurors, excluding 51% of eligible Black jurors, compared to 25% of eligible white jurors.
- 55% of eligible Black women were removed through prosecutors' peremptory strikes, compared to 28% of all other eligible venire members.
- Prosecutors' peremptory strikes combined with death qualification removed a total of 43% of Black potential jurors, over twice the rate at which white jurors were excluded by the same practices (21%).
- Although only 18% of all potential jurors were Black, they made up 32% of those jurors removed through either death qualification or by prosecutors' peremptory strikes.
- In comparison, white jurors made up 82% of all potential jurors, but only 68% of those removed through death qualification or by prosecutors' peremptory strikes.

See Figure 12 and Figure 13, below.

FIGURE 12
Prosecutor Strike Rates By Race—Wake County

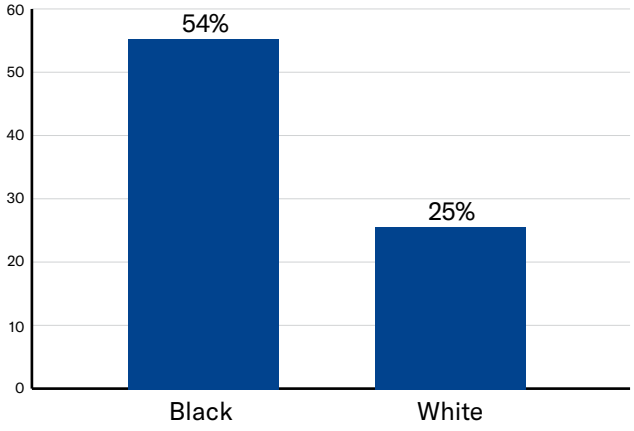


Figure 12 shows the percentage of eligible jurors removed through prosecutors' peremptory strikes, by race.

FIGURE 13
Prosecutor Strike Rates Black Women v. Others—Wake County

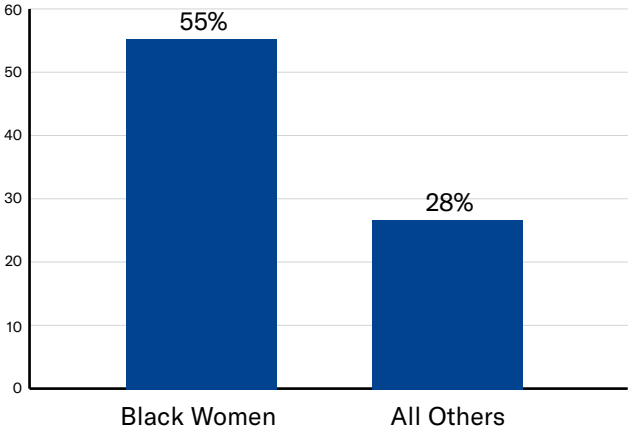


Figure 13 shows the percentage of eligible Black women jurors removed through prosecutors' peremptory strikes compared to all other eligible jurors.

Death qualification disproportionately excluded religious jurors.[84]

- 20% of religious potential jurors for whom religion data was available were removed through death qualification, compared to 12% of jurors who identified as not religious.
- 27% of Catholic potential jurors were removed through death qualification compared to 14% of all potential jurors.
- Even though they made up only 9% of the prospective jurors with a known religious affiliation, Catholics made up 14% of the jurors removed by death qualification. This disproportionate exclusion can be traced to Catholic doctrine, which strongly opposes the death penalty as "both cruel and unnecessary."[85]

See Figure 14, next page.

Figure 14 shows the percentage of religious potential jurors removed through death qualification compared to non-religious potential jurors and the percentage of Catholic potential jurors removed through death qualification compared to non-Catholic potential jurors.

FIGURE 14

Percentage Death Disqualified Pertaining to Religion—Wake County

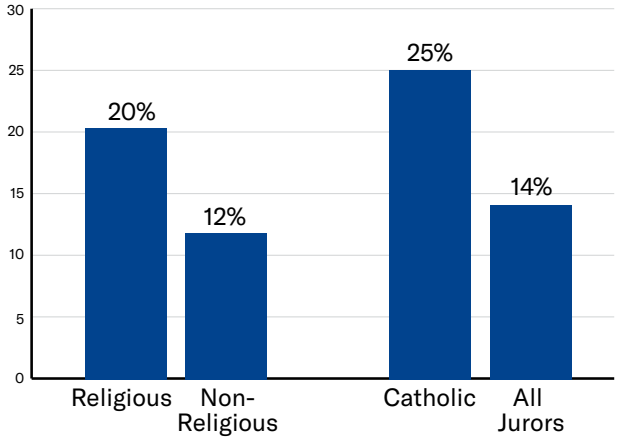


FIGURE 15

Percentage Opposition to Death Penalty by Race—Sedgwick County

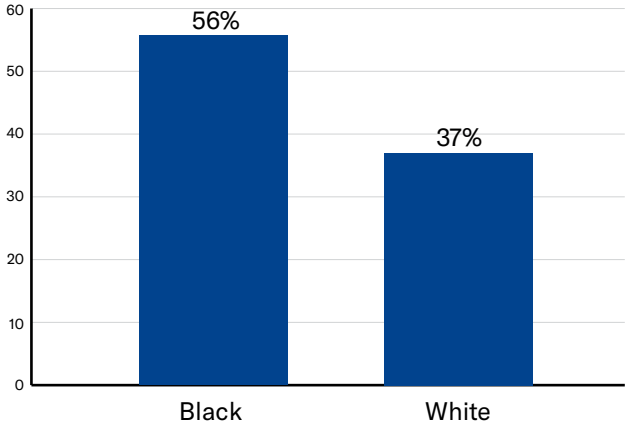
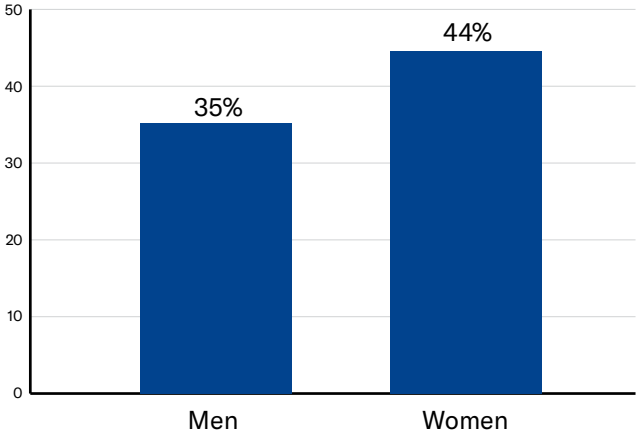


FIGURE 16

Percentage Opposition to Death Penalty by Gender—Sedgwick County



Sedgwick County, Kansas

As in California, researchers in Kansas have used surveys of jury-eligible adults to measure the likely effects of death qualification. A recent study conducted by Professor Mona Lynch in Sedgwick County demonstrates that death qualification is likely to disproportionately exclude Black people.

A 2021-2022 survey of over 500 jury-eligible adults in Sedgwick County, Kansas, confirmed that death penalty views differ widely by race and gender. The study used screening questions to examine the likelihood that respondents would be excluded from a capital jury because of death qualification. The results showed that death qualification would exclude Black people, and particularly Black women, at higher rates than their white peers.[86]

The study's key findings are:

Views on the death penalty differed substantially by race and gender.

- Over half (55.7%) of Black respondents opposed the death penalty, while only 36.6% of white respondents felt the same way.
- 34.8% of surveyed men opposed the death penalty, compared to 43.5% of women.

Death qualification is likely to disproportionately exclude Black people, especially Black women, from capital trials.

- Black respondents were approximately 50% more likely to be excluded from a jury because of death qualification than white respondents.
- 37.7% of all Black respondents were likely to be excluded through death qualification, compared to only 25.1% of white respondents.
- 39.3% of Black women respondents were likely to be excluded through death qualification, compared to 22.6% of white men respondents.

FIGURE 17

Percentage Respondents with Death Disqualifying Answers by Race—Sedgwick County

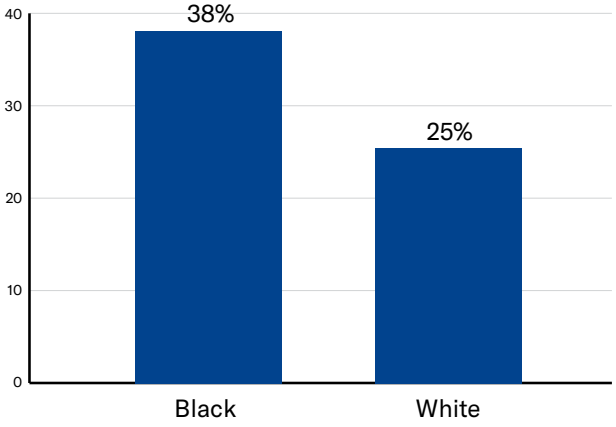
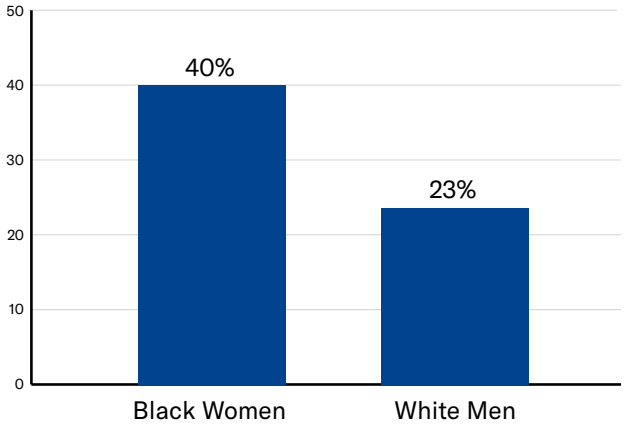


FIGURE 18

Percentage with Death Disqualifying Answers Black Woman vs. White Men—Sedgwick County



Additional Studies

The studies described above confirm numerous other studies showing that death qualification disproportionately excludes Black potential jurors from capital juries. These studies span the country and the decades temporally and geographically, and use various study methods converging on this same conclusion.

South Carolina Capital Trials Study

A study of South Carolina capital trials that occurred from 1997 to 2012 found:

- 32% of Black potential jurors were excluded based on their opposition to the death penalty, compared to only 8% of white potential jurors.
- When combined with peremptory strikes, death qualification resulted in the exclusion of 47% of Black potential jurors, compared to 16% of white potential jurors.
- Black jurors were seated on capital juries at roughly two-thirds the rate of white jurors.[87]

Louisiana Capital Trials Study

A study of Louisiana capital trials between 2009 and 2013 revealed that:

- Death qualification excluded 22.5% of all potential jurors, 20% of white potential jurors, and 36% of Black potential jurors.
- Black potential jurors were 1.8 times more likely to be excluded through death qualification than white potential jurors.[88]

Maryland

A 1983 Maryland survey of 610 adults in two counties found:

- 34.1% of Black respondents would be disqualified through death qualification, compared to 9.5% of white respondents.
- 66.7% of surveyed men supported the death penalty, compared to only 57.7% of women.
- Respondents who would likely be excluded through death qualification were less conviction-prone than those who would likely pass death qualification.[89]

2020 Mock Jury Study

A 2020 internet survey of 3,284 jury-eligible Americans found that Black mock jurors were significantly less likely to progress through the death qualification process than white mock jurors and that death qualification increased racial bias on juries. Findings include:

- 37% of Black respondents were excluded through death qualification compared to 25.4% of white respondents.
- Black respondents were 7.3% less likely to be death-qualified than white respondents, even after controlling for age, political views, income, sex, religiosity, and other factors.
- Mock jurors who were more racially biased, more politically conservative, and wealthier were more likely to pass death qualification.
- The process of death qualification increased the risk of selecting a mock juror who was racially biased by 8.4%.[90]

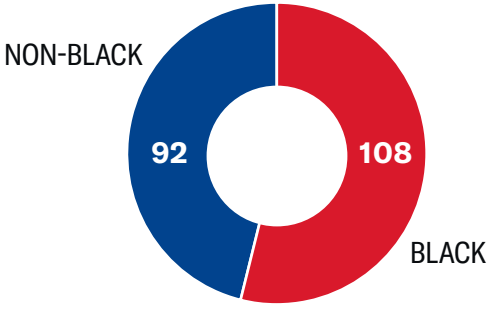
RACE DRIVEN ERRORS

Prosecutors have used death qualification to exclude jurors opposed to the death penalty likely as long as the American death penalty has existed.[91] Before the U.S. Supreme Court briefly paused the death penalty in 1972, Black people accounted for the largest percentage and number of executions in the United States. Since then, the discriminatory focus has changed to the race of the victim. Seventy-five percent of executions in the United States in this modern era have been for murders of white victims.[92] Researchers from the National Registry of Exonerations have found not only that Black people face a disproportionate risk of wrongful conviction but also that innocent people charged with killing white victims are more likely to be sentenced to death than those charged with killing Black victims.[93]

Meanwhile, 108 of the 200 innocent persons sentenced to death in the United States in the death penalty's modern era have been Black, and an additional 22 have been other people of color.[94] These discriminatory results are the yield not only of prosecutorial decisions, but also of death-qualified juries.

FIGURE 19

Innocent but Sentenced to Death in U.S. 1972–2025



Source: Death Penalty Information Center

WE CAN CHANGE

American prosecutors have been so successful in making death qualification a routine part of capital trials that it has become difficult for judges, prosecutors, and even defense attorneys to imagine a world without it. But death qualification does not have to be the norm.

Although prosecutors have used death qualification to exclude jurors opposed to capital punishment in many jurisdictions almost since the inception of the death penalty,[95] as some courts have recognized, the initial reason for the practice no longer applies: nowhere in America does execution remain the automatic punishment for findings of guilt (and in fact an automatic death sentence would be unconstitutional).[96] Therefore, jurors may find guilt, if proven beyond a reasonable doubt, and impose a statutorily prescribed sentence even if they hold conscientious scruples against the death penalty.

When states first began changing from automatically imposing execution for the guilty to a choice between execution and life (or some long term) of imprisonment, at least two courts recognized that the rationale of death qualification no longer survived.

In *State v. Garrington*, the South Dakota Supreme Court insightfully commented on a trial judge's rejection of the prosecutor's cause challenges of jurors morally opposed to the death penalty. The court explained that while a verdict of guilt under its prior law "necessarily involved the death of the accused, and conscientious scruples against capital punishment precluded a juror from finding a defendant guilty[,] . . . as the law now stands[,] the entertaining of such opinions does not have that effect, and is not a cause for challenge."[97] The court went on to approve of the trial court having permitted prosecutors to ask questions about jurors' death penalty views and use peremptory challenges (limited in number) to remove jurors of concern.[98] Notably, even though the prosecutor had been deprived of the benefit of death qualification in that case, the defendant was still sentenced to death.

Similarly, in *State v. Lee*, the Iowa Supreme Court found error in the prosecutor's removal of three potential capital jurors with conscientious scruples against the death penalty. The court reached this conclusion because Iowa's statue permitting cause challenges did not include a provision for removing jurors opposed the death penalty and "the state has no right to a trial by jurors who have no objection against inflicting the death penalty, except as it can secure them by challenging peremptorily those who have such objections."[99] The court noted that scruples against the death penalty had previously been a statutory basis for cause removal (when the state required execution upon a finding of guilt), but no longer was.[100]

Today, at least nine states that permit death qualification do so without specific statutory authority, but based merely upon statutes or court rules permitting cause challenges for "bias."[101] Courts in those states are following a practice that has become routine, but to which the state "has no right."

And in the states that do have specific provisions requiring death qualification, legislators may easily introduce legislation withdrawing a prior authorization for death qualification that is no longer justified, as Representative Rayner did in Florida.[102] As discussed below, when this is not possible, litigation may also be needed.

Attorneys needn't worry that this would mean an end to questioning about death penalty views. Both the defense and state would be free to consider these responses in their exercises of peremptory strikes, but death penalty opposition would no longer be the basis for cause exclusion. Jurors could still be asked about their death-penalty views (as the courts in Iowa and South Dakota affirmed), and those who could never consider mitigation or a life sentence would be excluded to honor the defendant's constitutional rights.[103]

Courts that have permitted death qualification for decades will no doubt be uncomfortable changing course. But death qualification has become a routine practice without any current justification. Moreover, as data now reveal, it dishonors our democracy by discriminating based on race, gender, and religious beliefs.

CONSTITUTIONAL VIOLATIONS

The U.S. Supreme Court has so far rejected challenges to the constitutionality of death qualification. In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court rejected a constitutional challenge to death qualification, finding that the empirical evidence presented in that case did not sufficiently demonstrate that removal of jurors opposed to the death penalty resulted in an unrepresentative jury. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court rejected the defendant's argument that death qualification resulted in a more conviction-prone jury during the guilt stage of trial, in violation of the fair cross-section requirement and the right to trial by a fair and impartial jury, again discrediting the empirical evidence presented.

However, these decisions do not foreclose challenges to the practice of death qualification. And, within the last several decades, new empirical studies demonstrating that this practice excludes jurors based on race, gender, and religion continue to undermine its purported constitutionality.

With this evidence in mind, strong arguments exist that death qualification, even if required under a particular jurisdiction's law, violates a number of Constitutionally protected rights.

- Because death qualification disproportionately excludes Black jurors, it injects "the infusion of race into proceedings," in violation of the Eighth Amendment.[104]
- Because of the abundant evidence that death qualification produces conviction-prone juries, it violates the Sixth Amendment "right to a speedy and public trial, by an impartial jury [.]"[105]
- By disproportionately excluding Black people, other people of color, women, and religious people from juries and producing juries that are predisposed to convict and render a death verdict, death qualification infringes on the Sixth Amendment right to be tried by a "petit jury selected from a fair cross section of the community."[106] Similarly, as increasing numbers of Americans oppose the death penalty, death qualification excludes a greater percentage of prospective jurors, which also infringes on a defendant's right to a "judgment of his peers interposed between himself and the officers of the state who prosecute and judge him[.]"[107]
- Death qualification violates the Eighth Amendment right of defendants to be free from cruel and unusual punishment that is informed by "evolving standards of decency." Because death qualification eliminates a large portion of the population that disagrees with the morality of the death penalty, it prevents jury verdicts from accurately reflecting the stance of the community on whether the death penalty is cruel and unusual. As such, a decision to execute a defendant by a death-qualified jury would not accurately reflect "contemporary community values,"[108] and would constitute an arbitrary outcome forbidden by the Eighth Amendment.
- Because studies show that death-qualified jurors are more likely to devalue mitigation

and overvalue aggravation, the practice violates the Eighth Amendment's requirement that sentencers "must consider all relevant mitigating evidence."[109] By preventing jurors from using their moral judgment, including their religious beliefs, death qualification violates the requirement that "the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime.'"[110]

- Death qualification also violates the Fourteenth Amendment rights of both the defendant and the jurors to equal protection and to participate in our democracy because it disproportionately excludes Black people, women, and certain religions from capital juries.
- Regardless of whether the U.S. Supreme Court would find death qualification violates the U.S. Constitution, the U.S. Constitution is only the floor in the most frequent venue for capital proceedings—the state courts. In a variety of contexts, state courts have interpreted state constitutional provisions to provide greater protection than the U.S. Constitution, including basic rights of citizenship such as voting and sitting on a jury.[111] Challenges to death qualification under these provisions, based on the new evidence set out in this report, are today ripe for litigation.

CONCLUSION AND RECOMMENDATIONS

Death qualification is a seldom-discussed but insidious part of our death penalty system. The practice produces a jury that is less likely to take all evidence into consideration, more likely to convict, and more likely to sentence a person to death. It creates juries that do not represent the community. It excludes a growing proportion of Americans who oppose the death penalty and disproportionately excludes Black people, especially Black women, and certain religions. Under our modern death penalty procedures, which require life imprisonment to be a legal sentence for all death-eligible crimes, it serves no legitimate purpose. Instead, it unfairly assists prosecutors in obtaining death sentences through biased juries.

But we are not powerless. Lawmakers, prosecutors, and defense attorneys can prevent death qualification from continuing to taint our criminal legal system. In particular:

- State legislatures should pass laws preventing jurors from being disqualified from serving on capital juries because of their opposition to the death penalty.
- Courts should reexamine the justification for death qualification, particularly when state law does not require it, in light of bifurcated capital trials and lawful sentences of life imprisonment.
- Prosecutors should decline to question capital juries about whether they oppose the death penalty during voir dire, and/or decline to challenge jurors for cause based on opposition to the death penalty.
- Defense attorneys should challenge the use of death qualification and submit evidence to the court showing its discriminatory effects.

Acknowledgements

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Endnotes

1 James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment,* 37 Crime & Just. 45, 54–56 (2008).

2 William J. Bowers, Benjamin D. Steiner & Marla Sandy, *Death Sentencing in Black and White, an Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 259 (2001).

3 *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) ("Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."); *Glasser v. United States*, 315 U.S. 60, 86 (1942) ("the proper functioning of the jury system, and, indeed, our democracy itself, re-quires that the jury be a [body] truly representative of the community").

4 *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

5 *Id.* at 56.

6 *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

7 *Id.*

8 *Witherspoon v. Illinois.,* 391 U.S. 510, 519 (1968).

9 *Lockhart v. McCree*, 476 U.S. 162, 175 (1986); *see also Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 329 (1970) ("People excluded from juries … are as much aggrieved as those indicted and tried by juries chosen under a system" of discrimination).

10 *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (recognizing that for "most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process").

11 *See Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *Foster v. Chatman* 578 U.S. 488, 513-514 (2016) (holding that prosecutors illegally excluded jurors on the basis of race when they used their peremptory strikes to remove all of the potential black jurors); *North Carolina Racial Justice Act Litigation (North Carolina v. Hasson Bacote*, Am. C.L. Union, https://www.aclu.org/cases/north-carolina-v-hasson-bacote (last updated June 28, 2023) ("[T]he race of Black prospective jurors played an impermissible role in jury selection, specifically the prosecutor's use of peremptory strikes.").

12 Kim Chavis, *The Supreme Court Didn't Fix Racist Jury Selection,* The Nation, May 31, 2016, available at https://www.thenation.com/article/archive/the-supreme-court-didnt-fix-racist-jury-selection/ (describing numerous studies indicating that prosecutors use peremptory strikes on Black jurors far more often than on white jurors).

13 Matthew A. Gasperetti, *Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions*, 76 U. Mia L. Rev. 525, 562-63 (2022); *see also Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (explaining the standard "for determining when a prospective juror may be excluded" because of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'").

14 *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982); *Morgan v. Illinois*, 504 U.S. 719, 720 (1992).

15 *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

16 *Witherspoon v. Illinois.,* 391 U.S. 510, 519 n.15 (1968) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

17 *Furman v. Georgia*, 408 U.S. 238 (1972).

18 Sherod Thaxton, *Un-Gregg-Ulated: Capital Charging and the Missing Mandate of* Gregg v. Georgia, 11 Duke J. Const. L. & Pub. Pol'y 145, 149–153 (2016).

19 In 1976, the Supreme Court held that Georgia's revised capital statute satisfied *Furman* and was thus constitutional. *See Gregg v. Georgia*, 428 U.S. 153, 155 (1976). Most other states modeled their statutes on the Georgia procedure (itself based on the then Model Penal Code), and the Court has generally approved of such procedures.

20 *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Lockett v. Ohio*, 438 U.S. 586, 603-604 (1978).

21 Kansas (Ter.) Laes, Stat., An act to punish offences against slave property (Shawnee 1855), https://lccn.loc.gov/2020783734.

22 *See* Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 35 (2007); Theodore Brantner Wilson, The Black Codes of the South, 97, 105-06 (1965); *Luke v. State*, 5 Fla. 185, 192 (1853) ("A careful review of the legislation of the State must lead to the conclusion that it was intended to establish and preserve a distinction between the punishments to be inflicted on slaves and free persons of color, and those on white persons for the same violations of the criminal law.").

23 Stuart Banner, The Death Penalty: An American History, 8-9 (Harv. U. Press 2002) (documenting state statutes targeting Black persons with capital punishment for minor property crimes such as burning or destroying grain).

24 Bryan Stevenson, *A Presumption of Guilt*, N.Y. Rev. of Books 8 (July 13, 2017), http://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/.

25 Isabel Wilkerson, The Warmth of Other Suns: The Epic Story of America's Great Migration, 37-38 (Vintage 2010).

26 Equal Just. Initiative, Lynching in America: Confronting the Legacy of Racial Terror (3rd ed. 2017), https://lynchinginamerica.eji.org/report/.

27 *Id.* at nn.282-283.

28 *Id.* at n.289.

29 *Id.*at n.291.

30 *Id.* at nn.278-79.

31 *Id.* at 6.

32 Seth Kotch, *The Death Penalty is Lynching Dressed Up in the Clothes of Law and Order*, Racist Roots, https://racistroots.org/section-2/lynching-dressed-up-in-the-clothes-of-law-and-order/; Randall Kennedy, Race, Crime, and the Law, 88 (1997).

33 *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citation and quotation marks omitted).

34 *Execution Database*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/database/executions?defendant-race=Black (last accessed June 4, 2025) (as of June 4, 2025, 552 of 1626 executions since 1976 and 2025 were of Black people).

35 *Death Penalty Census Database*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/facts-and-research/data/death-penalty-census/sentences?case-status=Active+Death+Sentence (last accessed June 10, 2025) (as of June 10, 2025, 843 of 2,081 people incarcerated on death row were Black).

36 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 L. & Hum. Behav. 53 (1984); Rick Seltzer, Grace M. Lopes, Marshall Dayan & Russell F. Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 573, 604 (1986); Mike Allen, Edward Mabry & Drue-Marie McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 L. & Hum. Behav. 715, 724-25 (1998).

37 *See* Gasperetti, *supra* note 13 at 582.

38 *See also* Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP (Nov. 19, 2020), https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx.

39 Jeffrey M. Jones, *Drop in Death Penalty Support Led by Younger Generations*, Gallup (Nov. 14, 2024), https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations.aspx.

40 Likewise, partisan gerrymandering, which the U.S. Supreme Court has held to be a non-justiciable political problem, can allow laws to remain on the books in states in which the legislature, and its actions, do not reflect the wishes of the electorate. *See Rucho v. Common Cause*, 588 U.S. 684, 714 (2019).

41 *See* Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & Hum. Behav. 481, 486 (2009) (finding that between 14 and 30% of pro-death jurors on a death-qualified panel "actually weighed mitigating evidence as favoring a death sentence," interpreting this evidence as aggravation instead); Brooke M. Butler & Gary Moran, *The Role of Death-qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 L. & Hum. Behav. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances.").

42 *Kansas v. Kyle Young,* 20 CR 879, Foglia Decl. 10-12 ¶¶ 17-21, available at https://www.aclu.org/cases/kansas-v-kyle-young?document=Declaration-of-Wanda-Foglia-; *see also* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51, 56 (2003); William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 Cornell L. Rev. 1476, 1488 (1998) (finding similar results in study involving data from 916 capital jurors in eleven states).

43 Bowers & Foglia, *supra* note 42 at 58.

44 *Kansas v. Kyle Young,* 20 CR 879, Foglia Decl. 13-14: ¶¶ 23-24.

45 Justin D. Levinson, Robert J. Smith & Danielle M. Young, *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 553, 558 (2014) (finding in study of 445 jury-eligible citizens from six leading death penalty states that "white participants were significantly more likely to be death-qualified (83.2%) than non-White participants (64.3%)"); Alicia Summers, R. David Hayward & Monica K. Miller, *Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. App. Soc. Psych. 3218, 3224-25, 3228 (2010) (finding in study of mock jurors that "racial minority members were more than twice as likely as were white mock jurors to be excluded by the death-qualification item"); Craig Haney, Eileen L. Zurbriggen & Joanna M. Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 Psych., Pub. Pol'y, and L. 1, 11 (2022), advance online publication, https://doi.org/10.1037/law0000335 (hereafter *Continuing Unfairness*) (reporting on detailed "death qualification" survey in California, New Hampshire, and Florida: "African American respondents in Florida were significantly more likely than Whites (specifically) to be Excludable, and significantly more likely to be Excludable compared with all other racial groups combined"); Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 L. & Hum. Behav. 619, 630 (1994) (finding in survey of adult California residents that 26.3% of the group excluded by death qualification were racial minorities, "so that death qualification (even when it included strong death penalty proponents) resulted in the loss of 27.1% of [the] minority respondents"); Seltzer, Lopes, Dayan & Canan, *supra* note 36 at 573, 604 (finding in 1983 Maryland public opinion survey that 34.1% of black respondents would be disqualified through death qualification, compared to 9.5% of white study participants); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & Hum. Behav. 31, 46 (1984) (finding that "[b]lacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%)"); Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. Crim. L. & Criminology 379, 386 (1982) (finding that 55.2% of black respondents were "Witherspoon-excludable" compared to 20.7 % of white respondents).

46 Divergence by race on death penalty support aligns with divergence on fairness in the criminal justice system. *See, e.g.,* Jon Hurwitz & Mark Peffley, *Explaining the Great Racial Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. Pol. 762, 768, 769 (2005) (74% of Black survey participants did not agree that the justice system treats people fairly and equally, compared to only 44.3% of white participants); John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*. Pew Rsch. Ctr. (May 21, 2019), https://www.pewresearch.org/short-reads/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/ (87% of Black

respondents said Black people are generally treated less fairly by the criminal justice system than white people, compared to 61% of white respondents).

47 Unnever, Cullen & Johnson, *supra* note 1 at 37.

48 *Id.*

49 J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, Pew Rsch. Ctr. (June 11, 2018), https://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/.

50 Unnever, Cullen & Johnson, supra note 1 at 56.

51 Marian R. Williams, & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. Crime & Just. 149, 164 (2008) (finding in an analysis of felony trial outcomes that "juries with a higher percentage of Whites serving on them were more likely to convict black defendants," after controlling for legally relevant case factors); *see* also Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials,* 127 Q. J. of Econ. 1017, 1019 (2012) (examining 731 non-capital criminal trial outcomes in two Florida counties, and finding that conviction rates for Black and White defendants did not differ from each other among juries when there were Black potential jurors in the jury pool, but Black defendants were convicted at a higher rate when no Black citizens were in the pool).

52 Liana Peter-Hagene, *Jurors' Cognitive Depletion and Performance During Jury Deliberation as a Function of Jury Diversity and Defendant Race*, 43 L. & Hum. Behav. 232 (2019).

53 Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Pers. & Soc. Psych. 597, 604-606 (2006).

54 Bowers, Steiner, & Sandys, *supra* note 2 at 193, (finding that "[t]he presence of five or more white male jurors dramatically increased the likelihood of a death sentence").

55 William J. Bowers, Thomas W. Brewer & Marla Sandys, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim in Whit*e, 53 DePaul L. Rev. 1497, 1513 (2004) (finding that "black and white males differ substantially, not only with respect to strong aggravating and mitigating considerations, such as dangerousness, remorse, and lingering doubt, but also in the ways they see the crime (i.e., vicious versus not cold-blooded) and in the degree to which they personalize the defendant and identify with him and his family"); Bowers, Steiner, & Sandys, *supra* note 2 at 207 (finding that black jurors were "far and away the most likely to have lingering doubts and to regard such doubts as important in making the punishment decision"); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26, 47 (2000) (finding that Black jurors are more likely than white jurors to differentiate between the crime and the defendant when deciding penalty).

56 Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude toward the Death Penalty,* 30 J. of Legal Stud. 277, 286 (2001).

57 Lynch & Haney, *supra* note 41 at 485.

58 Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases*, 1997-2012, 9 Ne. L.J. 299, 307-08 (2017).

59 Lynch & Haney *supra* note 41 at 485.

60 *Id.*

61 Bowers, Steiner & Sandy, *supra* note 2 at 193 (describing the study, which involved interviewing former capital jurors from hundreds of systematically selected capital trials in fourteen states).

62 *Id.* (finding that "[i]n the absence of black male jurors, death sentences were imposed in 71.9% of the cases, as compared to 42.9% when one black male was on the jury").

63 *See Continuing Unfairness supra* note 45 at 11.

64 *Condemned Inmate List* Cal. Dep't of Corr. & Rehab., (last updated June 9, 2025), https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/.

65 *Governor Gavin Newsom Orders a Halt to the Death Penalty in California,* Governor Gavin Newsom (Mar. 13, 2019), https://www.gov.ca.gov/2019/03/13/governor-gavin-newsom-orders-a-halt-to-the-death-penalty-in-california/.

66 At the close of 2024, President Biden commuted the death sentences of 37 of 40 people on federal death row to life imprisonment without parole, and North Carolina Governor Roy Cooper did the same for 15 men on that state's death row. Death Penalty Information Center, *In Wake of President Biden's Federal Commutations, North Carolina Governor Cooper Grants Clemency to 15 Death-Sentenced Prisoners, the Largest Grant of Capital Clemency in State History*, Death Penalty Information Center (Jan. 2, 2025), https://deathpenaltyinfo.org/news/in-wake-of-president-bidens-federal-commutations-north-carolina-governor-cooper-grants-clemency-to-15-death-sentenced-prisoners-the-largest-grant-of-capital-clemency-in-state-history. Concerns over racial discrimination centered both clemency campaigns.

67 Cal. Pen. Code, § 745; Assem. Bill No. 2542.

68 Cal. Code of Civ. Proc., § 231.7; Assem. Bill No. 3070, § 1.

69 Florida Dep't of Corr., *Corrections Offender Network: Death Row Roster*, https://pubapps.fdc.myflorida.com/OffenderSearch/deathrowroster.aspx .

70 Law of March 13, 2017 Fla. Laws Ch. 2017-1, § 1, (repealed 2023) (requiring unanimity for death); *See* Fla. Stat.§921.141(2)(c) (2023); Fla. Stat. § 921.142(3)(c) 2023. (requiring vote of only eight jurors).

71 *Ramos v. Louisiana*, 590 U.S. 83, 87 (2020) ("Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to 'establish the supremacy of the white race").

72 Times-Union Ed., *Troubling report on death penalties in Duval*, Fla. Times Union (Aug. 24, 2016), https://www.jacksonville.com/story/opinion/editorials/2016/08/24/troubling-report-death-penalties-duval/15722031007/ ("Duval may only possess 5 percent of the

state's population, but it leads all Florida counties in sending people to Death Row").

73 *State of Florida v. Luther Douglas & State of Florida v. Donald Banks*, Am. C.L. Union (last updated Apr. 12, 2023) https://www.aclu.org/cases/state-of-florida-v-luther-douglas-state-of-florida-v-donald-banks.

74 Fla. S. Comm. on Crim. Just., transcript of proceedings, at 27 lines 1-14 (Mar. 6, 2023), (https://www.aclu.org/documents/senate-committee-on-criminal-justice) (discussing and voting on Representative Rayner's amendment); Fla. SB. 450 (2023).

75 Kan. Stat. Ann. § 43-156; N.C. Const. art. I, § 26.

76 *State v. Carr*, 502 P.3d 546, 583 (Kan. 2022).

77 *Id.*

78 *Kansas v. Kyle Young*, Am. C.L. Union (last updated last visited June 10, 2025) https://www.aclu.org/cases/kansas-v-kyle-young; Challenging Death Qualification and the Death Penalty in Kansas: Kansas v. Fielder, Am. C.L. Union (last visited June 10, 2025) https://www.aclu.org/cases/challenging-death-qualification-and-the-death-penalty-in-kansas?document=Motion-Challenging-Capital-Punishment-in-Kansas-as-Unconstitutional-Under-State-and-Federal-Constitutions.

79 Mona Lynch & Craig Haney. *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries.* 40 L. & Pol'y.148, 153-159 (2018). The results of this survey were presented in a 2018 paper alongside an earlier survey from Solano County, conducted by the same researchers in 2014, that produced similar results. *Id.*

80 Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & Hum. Behav. 31, 45, 46 (1984).

81 Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 L. & Hum. Behav. 619, 628, 630 (1994).

82 Jacinta M. Gau, *Racialized Impacts of Death Disqualification in Duval County, Florida,* Am. C.L. Union, 2 (2021) (accessible at https://www.aclu.org/legal-document/study-dr-jacinta-gau). At the time, these were the only known capital trials in Duval County, Florida from 2010 to September 2021 with publicly available data about the racial makeup of the venire and juries.

83 *See* Barbara O'Brien & Catherine M. Grosso, *The Costs to Democracy of a Hegemonic Ideology of Jury Selection*, 22 Ohio St. J. Crim. L. 63 (March 2025).

84 See Barbara O'Brien & Catherine M. Grosso, *Revised Report on Wake County Jury Selection Study* (Sept. 11, 2022), https://assets.aclu.org/live/uploads/publications/revised_death_qualification_jury_study_report_w_apps_11_september_2022.pdf. This report was an early version of the published study referenced in the prior endnote. Because the published study ultimately did not address the question of religious exclusion, the initial 2022 report is cited here.

85 *The Church's Anti-Death Penalty Position*, U.S. Conf. of Cath. Bishops (2019), http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm (last visited June 10, 2025).

86 *State v. Young*, No. 20 CR 879 (Sedgwick Co..), Def.'s Mot. Challenging Death Qualification, Ex. A, at 10, 14-16, https://www.aclu.org/cases/challenging-death-qualification-and-the-death-penalty-in-kansas?document=Exhibit-A-Mona-Lynch-Expert-Report-Death-Qualification-in-Sedgwick-County.

87 Eisenberg, *supra* note 58 at 342, 344 (2017).

88 Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 Ind. L.J. 113, 137 (2016).

89 Rick Seltzer, Grace M. Lopes, Marshall, Dayan & Russell F. Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 603, 604 (1986).

90 Gasperetti, *supra* note 38 at 532, 533, 575, 577, 604 (2022).

91 *See, e.g., People v Damon*, 13 Wend. 351, 354-355 (N.Y. Sup. Ct. 1835); *Commonwealth v. Lesher*, 17 Serg. & Rawle 155 (1828).

92 *Race of Victims Since 1976*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim#Vic (last accessed June 10, 2025).

93 Nati'l Registry of Exonerations, Race and Wrongful Convictions in the United States 2 (Samuel R. Gross et al. eds. Sept. 2022), accessible at https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf.

94 *Innocence Database*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/facts-and-research/data/innocence?race=Black (last accessed June 10, 2025).

95 *See, e.g., People v Damon*, 13 Wend. 351, 354-355 (N.Y. 1835); *Commonwealth v. Lesher*, 17 Serg. & Rawle 155 (1828).

96 *See Woodson v. North Carolina*, 428 U.S. 280, 280-281 (1976).

97 *State v. Garrington,* 76 N.W. 326, 327 (S.D. 1898).

98 *Id.* Without explanation or acknowledgment of its precedent in *Garrington*, the same court later denied a challenge to death qualification that a trial court had permitted notwithstanding the prior (apparently forgotten) precedent. *See State v. McDowell*, 391 N.W.2d 661, 664 (S.D. 1986).

99 *State v. Lee* 60 N.W. 119, 120–21 (Iowa 1894).

100 *Id.* Iowa abolished the death penalty altogether in 1965. But the *Lee* ruling appeared to remain the law of the state until that time. *See State v. Wilson*, 11 N.W.2d 737, 752 (Iowa 1943) (applying *Lee* and granting relief due to error in excluding juror for cause); *Iowa*, Death Penalty Info. Ctr. https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/iowa. (last accessed June 10, 2025).

101 Ariz. Rev. Stat. Ann.16A Rules Crim. Proc, Rule 18.4 (2022) .; Kan. Stat. Ann. § 22-3410(2)(i) (1970); Ky. Rev. Stat. Ann. Rules Crim. Proc. 9.36 (West 1963); Miss. Code Ann. § 13-5-79; Mo. Rev. Stat. § 494.470; N. R. Cr. Pr. 17; Or. Rev. Stat. Ann. § 136.210; Or. R. Civ.

P. 57(D)(1)(g); S.D. Codified Laws § 23A-20-13-1; Tenn. Code. Ann. § 22-1-105.

102 *See* Fla. S. Comm. on Crim. Just. *supra* note 73.

103 *Morgan v. Illinois*, 504 U.S. 719, 733, 744 (1992).

104 *Buck v. Davis*, 137 S. Ct. 759, 779 (2017).

105 U.S. Const. amend. VI cl. 1; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (applying this right); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (same).

106 *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979).

107 *Apodaca v. Oregon*, 406 U.S. 404,411 (1971).

108 *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

109 *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982).

110 *California v. Brown*, 479 U.S. 538, 542 (1987), *overruled on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

111 *Cf. State v. Carr*, 502 P.3d 546, 583 (Kan. 2022) (acknowledging potential claim against death qualification under Kansas Constitution).