

DEATH QUALIFICATION OF JURIES AS A VIOLATION OF THE SOCIAL CONTRACT

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“Our Constitution is a remarkable, beautiful gift. But it’s really just a piece of parchment. It has no power on its own. We, the people, give it power. We, the people, give it meaning. With our participation, and with the choices that we make, and the alliances that we forge.”¹

ABSTRACT

Trial by a jury of one’s peers is a hallmark of the United States judicial system. The protection a jury trial is supposed to ensure, however, is severely compromised by current case law. Death qualification excludes potential jurors whose views on the death penalty “would prevent or substantially impair the performance of his duties as a juror.” This Note argues that the current practice of “death qualifying” juries in capital murder cases violates the social contract. In the past few years, citizen support for the death penalty reached its lowest point since it was temporarily abolished by the Supreme Court in 1972. These citizens deserve to express their views on the death penalty through jury service. Criminal defendants deserve to be sentenced by a jury of their peers, reflecting the community consensus on the ultimate question of life or death. The practice of death qualification delegitimizes the State’s use of capital punishment, and harms both the excluded jurors and the criminal defendant.

INTRODUCTION

This Note argues that the current practice of “death qualifying” juries in capital murder cases violates the social contract. The practice of death qualification delegitimizes the State’s use of capital punishment, and harms both the excluded jurors and the criminal defendant.

Social contract theorists generally posit that from a “state of nature” or “original position,” citizens give up some of their natural rights and unregulated freedom in order for the State or collective to govern and

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1. President Barack Obama, Farewell Address to the American People (Jan. 10, 2017) (transcript available at <http://obamawhitehouse.archives.gov/farewell>) [<https://perma.cc/AHJ4-E9ZM>].

protect them.² Society is formed because people agree to be governed, calculating they will be better off than they were without any political authority. “Social contract theories seek to legitimate civil authority by appealing to notions of rational agreement.”³ Social contract theorists believe that punishment can only be a legitimate use of force by the State when it is based on principles that all citizens would agree are reasonable, rational, and just, knowing that they themselves determine the conduct which might subject them to such punishment.⁴ It has long been accepted that the framers relied upon social contract theory during the formation of the Declaration of Independence and the Constitution.⁵

The framers of the Constitution viewed juries as a prerequisite to majoritarian self-government.⁶ Federalists assuaged the fears of Democratic Republicans about the new Constitution by ensuring additional protections for the institution of juries with the Fifth, Sixth, and Seventh Amendments.⁷ Trial by a jury of one’s peers is a hallmark of the United States judicial system. The right to a trial by jury is important because “juries represent the layman’s common sense, the ‘passional elements in our nature,’ and thus keep the administration of law in accord with the wishes and feelings of the community.”⁸ This protection is all the more important in criminal cases and

2. See generally THOMAS HOBBS, *THE LEVIATHAN* (Penguin Classics reprinted ed. 1985) (1651); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Hackett Pub. Co. ed. 1980) (1690); JOHN-JACQUES ROUSSEAU, *The Social Contract*, in *THE ESSENTIAL ROUSSEAU* (New American Library printed ed. 1983); and JEAN-JACQUES ROUSSEAU, *The Discourse On Inequality*, in *THE ESSENTIAL ROUSSEAU* (New American Library printed ed. 1983). See also Eli L. Levine, Note, *Does the Social Contract Justify Felony Disenfranchisement*, 1 WASH. UNIV. JUR. REV. 193–94 (2009) (“Social contract theorists like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau envision a compact wherein citizens consent to be governed by and submit to the laws of society in return for the protections and benefits that an organized governmental structure provides.”) (footnote omitted).

3. Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2 (1999).

4. Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004); see also JOHN RAWLS, *A THEORY OF JUSTICE: REVISED EDITION* 11 (1999) (“Among the essential features of this [original position] is that no one know his place in society, his class position or social status, nor does he know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance.”).

5. ALLEN, *supra* note 3, at 2-3.

6. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995).

7. *Id.* (citing Herbert J. Storing, *WHAT THE ANTI-FEDERALISTS WERE FOR* 19 (1981); Akhil R. Amar, *Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182-90 (1991); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 668-69 (1973); Alan H. Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 148 n.26 (1991)).

8. *Id.* at 219 n.99 (quoting *Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 343–44 (1979) (Rehnquist, J., dissenting) (citing Oliver W. Holmes, *COLLECTED LEGAL PAPERS* 237 (1920))).

can be of no greater importance than when a person's life is at stake. However, for defendants being tried for capital murder and facing the death penalty, the protection that a trial by jury is supposed to ensure is severely compromised by current case law. Most capital murder trials are bifurcated – that is, the guilt and sentencing phases are separate.⁹ This is done so that the guilt or innocence of the defendant can be determined according to strict evidentiary rules. If the defendant is then found guilty, the sentencing body may hear evidence relevant to whether or not the defendant deserves to die, evidence that might have been deemed irrelevant or prejudicial if offered during the earlier phase at trial.¹⁰ Bifurcation itself does not weaken the protection that a jury offers criminal defendants facing the death penalty. Instead, the danger primarily stems from death qualification of juries.

Juries are “death qualified,” or culled of potential jurors who would never impose the death penalty, through a series of targeted questions during voir dire. “Death qualification is a procedure that occurs during the jury selection phase of capital trials. During death qualification, potential capital jurors are questioned closely about their views on the death penalty, and those whose views are considered incompatible with the duties of capital jurors are excluded from the jury.”¹¹ Three Supreme Court cases make up the governing law of death qualification: *Witherspoon v. Illinois*,¹² *Lockhart v. McCree*,¹³ and *Wainwright v. Witt*.¹⁴

In *Witherspoon v. Illinois*, the Court held that although there was no evidence that excluding jurors morally opposed to capital punishment created a jury biased in favor of guilt, such exclusion still violated the requirement of an impartial arbiter of punishment established by the Sixth and Fourteenth Amendments.¹⁵ In *Witherspoon*, the Court set out the

9. COUNCIL OF THE AMERICAN LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INST. ON THE MATTER OF THE DEATH PENALTY 9 (Apr. 15, 2009) (“Although the Court has never held that bifurcated proceedings (separate guilt and sentencing phases) are constitutionally required, post-*Furman* statutes have made bifurcation the norm, and it would likely be held to be a constitutional essential today, should the issue ever arise.”).

10. *Gregg v. Georgia*, 428 U.S. 153, 191 (1976) (citing ALI, Model Penal Code § 201.6, cmt 5, pp. 74-75 (Tent. Draft No. 9, 1959)).

11. William C. Thompson, *Death Qualification After Wainwright v. Witt and Lockhart v. McCree*, Vol. 13 No. 2 L. & HUM. BEHAV. 185 (1989) (citing Susan D. Rozelle, *The Utility of WITT: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677 (2002) (“Death qualification is the process by which prospective jurors are questioned at voir dire regarding their attitudes toward the death penalty. Those who indicate they are so opposed to capital punishment that they either (1) would not find the defendant guilty regardless of the evidence, or (2) would not consider death as a possible sentence regardless of the circumstances of the crime, are excused for cause. They are not “death qualified” and may not sit”)).

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

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

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

15. *Witherspoon*, 391 U.S. at 517-18. In *Witherspoon*, the petitioner was convicted under an

standard that jurors could be excluded for cause if they “made unmistakably clear” either “that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them,” or if they “made unmistakably clear” that “their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.”¹⁶ The Court in *Witherspoon* deliberately left open the questions of whether a jury so selected might be less neutral, and thus improper, with respect to guilt and whether a bifurcated trial could protect both the State’s interest in an impartial sentencing jury and the defendant’s interest in an impartial guilt jury.¹⁷

In *Lockhart v. McCree*, the Court addressed these open questions and held that prosecutors may exclude, “prior to the guilt phase of a bifurcated capital trial...prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair their performance of their duties as jurors at the sentencing phase of the trial.”¹⁸ The Court held that such “death qualification” did not violate the defendant’s Sixth and Fourteenth Amendment rights.¹⁹ The Court reasoned that the fair cross-section requirement did not apply to the selection of a petit jury, and because, even if it applied, “‘Witherspoon-excludables’ do not constitute a ‘distinctive group’ for fair-cross-section purposes.”²⁰ Further, the removal of “Witherspoon-excludables” did not “slant the jury towards conviction” in the eyes of the Court.²¹

In *Wainwright v. Witt*, the Court lowered the standard established in *Witherspoon* for death qualification. The Court held that the standard is “whether the juror’s views” on the death penalty “would prevent or

Illinois statute that provided: “In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.” *Id.* at 512.

16. *Id.* at n.21.

17. *Id.* at n.18.

18. *Lockhart*, 476 U.S. at 165.

19. *Lockhart*, 476 U.S. at 173-77.

20. *Id.* at 177.

21. *Id.* at 177 (“McCree’s ‘impartiality’ argument apparently is based on the theory that, because all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial jury can be constructed only by ‘balancing’ the various predispositions of the individual jurors. Thus, according to McCree, when the State ‘tips the scales’ by excluding prospective jurors with a particular viewpoint, an impermissibly partial jury results. We have consistently rejected this view of jury impartiality, including as recently as last Term when we squarely held that an impartial jury consists of nothing more than ‘jurors who will conscientiously apply the law and find the facts.’ *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (emphasis added).”).

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”²²

In the past few years, citizen support for the death penalty reached its lowest point since it was temporarily abolished by the Supreme Court in 1972.²³ Gallup reported that 55% of American adults favored the death penalty for convicted murderers in 2017,²⁴ while Pew Research Center reported that 49% favored the death penalty for convicted murderers in 2016.²⁵ This is consistent with the downward trend of annual death sentences and executions ever since the 1970s.²⁶ This Note argues that, especially during a time when the country is divided on the propriety of the death penalty, excluding citizens who will not impose the death penalty from jury service in capital murder trials delegitimizes the use of capital punishment. This exclusion violates the rights of both the defendant and the excluded jurors under social contract theory. A juror’s duty is to “express the conscience of the community.”²⁷ But how can the true conscience of the community be expressed if dissenting voices are silenced? By death qualifying the jury, the State is imposing the ultimate punishment without the consent of the governed and depriving the excluded jurors of their right to renegotiate and reaffirm the social contract.

Part I of this Note is a discussion of social contract theory, mainly focusing on its history and central theses. Part II examines the influence and presence of social contract theory in American law. Part III explains the governing cases that establish the practice of “death qualifying” juries in capital murder trials. Part IV argues that the death qualification of jurors delegitimizes capital punishment under social contract theory and rebuts common arguments against this Note’s position.

22. *Wainwright*, 469 U.S. at 424 (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

23. Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP (Oct. 26, 2017), <https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx> [<https://perma.cc/LSD2-R8VB>].

24. *Id.*

25. *Id.*; Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RESEARCH CENTER (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/> [<https://perma.cc/CCC9-TVXJ>].

26. Brandon Garrett, Daniel Krauss & Nicholas Scuirich, *Capital Jurors in an Era of Death Penalty Decline*, 126 *Yale L.J. F.* 417 (2017) (citing *Death Sentences in the United States from 1977 By State and By Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-1977-present> [<https://perma.cc/4K4K-N8G2>] (describing data on death sentences from 1977 to 2016)).

27. *Witherspoon*, 391 U.S. at 519 (“Guided by neither rule nor standard, ‘free to select or reject as it [sees] fit,’ a jury that must choose between life imprisonment and capital punishment can do little more -- and must do nothing less -- than express the conscience of the community on the ultimate question of life or death.”) (citations omitted).

I. SOCIAL CONTRACT THEORY

Social contract theory explores how society started. How did individuals, living in a “state of nature” or “original position” come together and form a governing body? What rights did they gain? What rights did they give up? How are the rules governing society made?²⁸

The idea of a social contract was first attributed to Socrates.²⁹ Plato’s dialogue *Crito* narrates Socrates’ explanation of the social contract, with Socrates using himself as an example. Socrates is in prison, facing death.³⁰ Plato urges him to flee.³¹ Socrates replies that the State could not exist if every individual “set aside or overthr[ew]” the decisions of law.³² Socrates goes on to explain: the State has provided for him his entire life: by enforcing the marriage of his parents, ensuring that he was nurtured and educated as a child, “given [Socrates] and every other citizen a share in every good that [the State] had to give.”³³ What’s more, when Socrates came of age, the State gave him the choice to leave Athens, or remain in the city and “enter[] into an implied contract that he will do as we command him.”³⁴ Because Socrates agreed to be governed by the laws of Athens, “in deed, and not in word only,” he will uphold his side of the contract and stay in jail, instead of fleeing as his friend Crito urges him to do.³⁵

Thomas Hobbes was the first philosopher to deeply define and explore social contract theory.³⁶ Hobbes “start[ed] from an assumed ‘state of nature.’- a political blank paper.”³⁷ Hobbes’ version of the state of nature was a state of constant warfare between men.³⁸ Hobbes theorized that humans are rational and “naturally and exclusively self-interested.”³⁹ If left

28. This Note does not look at social contract theory from a critical race theory or feminist theory perspective. Future research can and should be done on whether social contract theory is even an appropriate lens through which to justify our legal system, considering that African Americans, Native Americans, and women were excluded from the original social contract.

29. Celeste Friend, *Social Contract Theory*, *The Internet Encyclopedia of Philosophy* (2006), <https://www.iep.utm.edu/soc-cont/> [<https://perma.cc/5L8Y-8YJQ>].

30. PLATO, CRITO, translated by Benjamin Jowett, <http://classics.mit.edu/Plato/crito.html> [<https://perma.cc/F26L-S83A>].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. PLATO, *supra* note 30.

36. Levine, *supra* note 2, at 204 (citing Friend, *supra* note 29).

37. Frederick Pollock, *Hobbes and Locke: The Social Contract in English Political Philosophy*, 9 J. SOC’Y COMP. LEGIS. 107, 109 (1908).

38. *Id.*

39. Friend, *supra* note 29, at 2(a) (“Hobbes also infers from his mechanistic theory of human nature that humans are necessarily and exclusively self-interested. In addition to being exclusively self-interested, Hobbes also argues that human beings are reasonable. They have in them the rational capacity to pursue their desires as efficiently and maximally as possible.”).

alone in a “state of nature,” life would be an endless battle of distrust and brutal warfare, as everyone would solely be trying to maximize their own self-interest.⁴⁰ People would have “no capacity to ensure the long-term satisfaction of their needs or desires.”⁴¹ While Hobbes believed that men would recognize certain laws of nature because they are rational,⁴² they lacked any enforcement mechanism to effectively protect the rights of individuals.⁴³ Therefore, according to Hobbes, rational people “will choose to submit to the authority of a Sovereign in order to be able to live in a civil society, which is conducive to their own interests.”⁴⁴ Specifically, all members of a society must “collectively and reciprocally renounc[e] the rights they had against one another in a State of Nature,” agree to live in peace under a set of laws, and entrust some Sovereign with the power to enforce the social contract.⁴⁵

John Locke also theorized a social contract emerging from a “state of nature,” but his “state of nature” was of a different kind.⁴⁶ Scholars such as Celeste Friend have observed that Locke’s “state of nature” is “pre-political,” like Hobbes’, “but it is not pre-moral.”⁴⁷ Locke thought that

40. Friend, *supra* note 29, at 2(a)

In the State of Nature, every person is always in fear of losing his life to another. They have no capacity to ensure the long-term satisfaction of their needs or desires. No long-term or complex cooperation is possible because the State of Nature can be aptly described as a state of utter distrust.

41. *Id.* at 2(a).

42. *Id.* at 2(a).

43. Levine, *supra* note 2, at 206.

44. Friend, *supra* note 29, at 2(a) (“According to Hobbes, the justification for political obligation is this: given that men are naturally self-interested, yet they are rational, they will choose to submit to the authority of a Sovereign in order to be able to live in a civil society, which is conducive to their own interests.”).

45. *Id.* at 2(a)

First, they must agree to establish society by collectively and reciprocally renouncing the rights they had against one another in the State of Nature. Second, they must imbue some one person or assembly of persons with the authority and power to enforce the initial contract. In other words, to ensure their escape from the State of Nature, they must both agree to live together under common laws, and create an enforcement mechanism for the social contract and the laws that constitute it.

46. *Id.* at 2(b)

For John Locke, 1632-1704, the State of Nature is a very different type of place, and so his argument concerning the social contract and the nature of men's relationship to authority are consequently quite different. While Locke uses Hobbes' methodological device of the State of Nature, as do virtually all social contract theorists, he uses it to a quite different end.

47. Friend, *supra* note 29 at 2(b)

The State of Nature, although a state wherein there is no civil authority or government to punish people for transgressions against laws, is not a state without morality. The State of Nature is

people are at complete liberty but are still bound by the law of nature handed down by God.⁴⁸ Therefore, Locke's "state of nature" is peaceful where Hobbes' is brutal.⁴⁹ However, property rights are limited in the "state of nature." Because there is no political authority, there is no way to stop war once it begins.⁵⁰ Thus, Locke posited that families form the social contract when they "give up the executive power to punish those who transgress the Law of Nature, and hand over that power to the public power of the government."⁵¹

It is important to note that because Locke's "state of nature" was not as violent as Hobbes', Locke imagined scenarios in which citizens could decide to revoke the social contract with their civil government, calculating that they would actually be better off in a state of nature.⁵² As Friend observes:

When the executive power of a government devolves into tyranny, . . . then the resulting tyrant puts himself into a State of Nature, and specifically into a state of war with the people, and they then have the same right to self-defense as they had before making a compact to establish society in the first place.⁵³

Jean-Jacques Rousseau also believed that all men are created equal, with "no one having a natural right to govern others, and therefore the only justified authority is the authority that is generated out of agreements or covenants."⁵⁴ Rousseau wrote of a normative social contract,⁵⁵ which is

pre-political, but it is not pre-moral. Persons are assumed to be equal to one another in such a state, and therefore equally capable of discovering and being bound by the Law of Nature. The Law of Nature, which is on Locke's view the basis of all morality, and given to us by God, commands that we not harm others with regards to their "life, health, liberty, or possessions" (par. 6). (citation omitted).

48. *Id.* at 2(b). For example, Friend notes that Locke's state of nature includes "conjugal society. These societies are based on the voluntary agreements to care for children together, and they are moral but not political." *Id.* (internal citation omitted).

49. Pollock, *supra* note 37, at 110 ("For Locke the State of Nature is not a state of war until there is actual hostility, but only a state in which peace is not secure.") (internal citation omitted).

50. Friend, *supra* note 29, at 2(b) ("Since the State of Nature lacks civil authority, once war begins it is likely to continue.")

51. "Civil society is formed by every man giving up his natural power; not to a sovereign but 'into the hands of the Community' or 'to the publick.' [sic]. The authority so conferred upon the society is granted only to be used for the public good." Pollock, *supra* note 37, at 110 (internal citation omitted).

52. Friend, *supra* note 29 at 2(b). Locke wrote specifically to refute the divine power of a monarch to rule.

53. Friend, *supra* note 29, at 2(b).

54. *Id.* at 2(c).

55. *Id.* at 2(c) ("The second is his *normative*, or idealized theory of the social contract, and is meant to provide the means by which to alleviate the problems that modern society has created for us, as laid out in the *Social Contract*.").

meant to eliminate the inequalities caused by the creation of property rights.⁵⁶ Rousseau theorized that people can live together in peace, without becoming subject to force, coercion, or inequality, by accepting that the “will” of society, as expressed through agreement of all citizens, must supersede each individual’s personal will.⁵⁷

Agreement appears in Locke’s, Hobbes’s, and Rousseau’s theories of civic society. Levine wrote, “A common element for social theorists is the ‘foundation of the true or authentic body politic is held to be a pact or agreement made by all the individuals who are to compose it.’”⁵⁸ However, he noted, “Hobbes, Locke and Rousseau had very different conceptions of the political and judicial system to be created through the social contract.”⁵⁹ Specifically, the three theorists had different ideas of how much power citizens would retain. For Hobbes, upon citizens giving up their natural rights to the sovereign, the sovereign was “all-powerful, bound only by the laws of nature.”⁶⁰ The sovereign did not answer to the citizens - “[t]here is not actual voting in Hobbes’s social contract and citizens do not have any influence over public policy.”⁶¹ In contrast, Locke envisioned that once families gave up their natural rights and placed them “into the hands of the Community,” society would “establish[] a government with legislative and executive organs by the decision of the majority.”⁶² Finally, Rousseau imagined a “society ruled by the collectivist general will of the people,” with no distinction between ruler and subject.⁶³

John Rawls, a twentieth-century American philosopher, focused more on the limits of how the social contract should be negotiated.⁶⁴ Rawls started with the “original position”: a “highly abstracted version of the State of Nature.”⁶⁵ The original position imagines people in a hypothetical situation, debating what their new society will require of its citizens and what it will owe to them.⁶⁶ People are limited by the veil of ignorance—they lack any particular knowledge of their circumstances, such as gender, race, particular

56. *Id.* at 2(c) (“For Rousseau the invention of property constitutes humanity’s ‘fall from grace’ out of the State of Nature.”).

57. *Id.* at 2(c).

58. Levine, *supra* note 2, at 205 (quoting THE SOCIAL CONTRACT FROM HOBBS TO RAWLS 37 (David Boucher & Paul Kelly eds., 1994)).

59. *Id.* at 206.

60. *Id.* at 207.

61. *Id.* at 208.

62. Levine, *supra* note 2, at 207.

63. *Id.* at 206-07.

64. Friend, *supra* note 29, at 3(a).

65. *Id.* at 3(a).

66. *Id.* at 3(a).

talents or disabilities, age, or social status.⁶⁷ They are also assumed to be rational and disinterested in one another's well being.⁶⁸

Rawls posited that parties in the original position are equal.⁶⁹ Two "principles of justice" would control bargaining over the social contract in the original position according to Rawls: first, that "each person have an equal right to the most extensive total scheme of equal basic liberties compatible with a similar system of liberty for all."⁷⁰ Second, that "social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged...and (b) attached to positions and offices open to all under conditions of fair equality of opportunity."⁷¹ Because the principles of justice that will go on to form the terms of the social contract should be agreed upon under these fair conditions, Rawls called his theory "justice as fairness."⁷²

Rawls also discussed civil disobedience in the framework of social contract theory. Specifically, Rawls called civil disobedience "a crucial test case for any theory of the moral basis of democracy."⁷³ Rawls defined civil

67. *Id.* at 3(a).

68. *Id.* at 3(a).

69. RAWLS, *supra* note 4, at 17.

70. *Id.* at 52-53.

71. *Id.* at 52-53.

72. Friend, *supra* note 29. *See also* Dolovich, *supra* note 4, at 314-15, n.16

Rawls argues that political power is legitimately exercised by the state over its citizens only when it is exercised on the basis of a collective agreement 'the essentials of which all citizens may reasonably be expected to endorse' under fair deliberative conditions. As he sees it, such fair deliberative conditions are those that allow consideration of the terms of state power from a 'suitably general point of view', which he defines as the perspective from which no participant to the deliberative process knows anything about the particulars of his or her own personal identity or social position. *Id.* at n.16 On Rawls's view, that is, if state power is to be legitimate, agreement as to the terms of its exercise must come from citizens who do not know the first thing about their own situation and who must therefore accord due consideration to the perspectives of all members of society.

Id. at n.16. *See also* JOHN RAWLS, POLITICAL LIBERALISM 217 (1993). This is the idea behind what Rawls refers to as the "liberal principle of legitimacy," that "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational."

73. RAWLS, *supra* note 4, at 319

As I have already indicated, this theory [of civil disobedience] is designed only for the special case of a nearly just society, one that is well-ordered for the most part but in which some serious violations of justice nevertheless do occur. Since I assume that a state of near justice requires a democratic regime, the theory concerns the role and the appropriateness of civil disobedience to legitimately established democratic authority...The problem of civil disobedience, as I shall interpret it, arises only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution. The difficulty is one of a conflict of duties. At what point does the duty to comply with laws enacted by a legislative

disobedience as a “public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”⁷⁴ Rawls argued that civil disobedience is justified when the principle of equal liberty is being violated and when “normal appeals to the political majority have already been made in good faith and that they have failed.”⁷⁵ Rawls noted that civil disobedience challenges a system to change, while accepting the legitimacy of the system. “By acting within the confines of the system, the civil disobedient reveals his acceptance of the social contract... A common modern formulation [of the social contract] is that citizens, by their political participation, consent to properly enacted laws.”⁷⁶

Social contract theory, specifically normative contractarianism, contends that punishment by the State is only legitimate when exercised in accordance with principles that all citizens believe to be just.⁷⁷ Scholars argue that normative contractarianism springs logically from Rawls’s

majority (or with executive acts supported by such a majority) cease to be binding in view of the right to defend one’s liberties and the duty to oppose injustice?

74. *Id.*

75. *Id.* at 326-28

Since civil disobedience is a last resort, we should be sure that it is necessary. Note that it has not been said, however, that legal means have been exhausted. At any rate, further normal appeals can be repeated; free speech is always possible. But if past actions have shown the majority immovable or apathetic, further attempts may reasonably be thought fruitless....

76. Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1190 n.90 (1987), citing R. DWORKIN, A MATTER OF PRINCIPLE 105 (1985); J. PLAMENATZ, CONSENT, FREEDOM, AND POLITICAL OBLIGATION 170-71 (2d ed. 1968).

77. Claire Finkelstein, *A Contractarian Argument against the Death Penalty*, 81 N.Y.U. L. REV. 1283, 1311 n.56 (2006).

Contractarian theories regard the major rules and institutions of civil society as legitimate insofar as they can be thought of as based on an agreement among the individuals who must submit to their authority. There are two dominant strains in the contractarian tradition, what we might call ‘normative contractarianism,’ on the one hand, and ‘rational choice contractarianism,’ on the other. Although normative contractarianism descends from Kant, it covers a variety of views, the most influential of which in recent years has been John Rawls’s. According to Rawls, we can best discern intuitions about justice in a liberal society by asking what principles of justice would be selected by individuals entering into a political arrangement with one another, prior to the existence of social institutions of any sort. Rawls assumes that in this original position of choice, the contractors are selecting principles of justice without any knowledge of the particular circumstances they will inhabit in society or what their personal characteristics will be. Rational choice contractarianism, by contrast, descends from Hobbes. It asks what form of social organization rational agents seeking to maximize their own welfare would choose to improve their positions relative to their presocial [sic] baselines. To the extent the contractarian tradition has been brought into legal theory, it has almost entirely been of the normative variety.

conception of justice as fairness.⁷⁸ Specifically, Professor Claire Finkelstein cited Rawls to argue that a system of punishment is legitimate only if citizens consent to it, “based on a perception that they will be better off under such a system than they would be in its absence.”⁷⁹ The State gains the power to punish through the social contract because citizens give up their right to individually enforce natural law against fellow citizens. Individuals enter into this social contract because they believe that their personal and property rights will be better protected by civil society than through their own individual efforts. However, if citizens believe that the security provided by the deterrent effect of a punishment does not outweigh the harm they would suffer should they themselves be subject to the punishment, they would not agree to include the punishment as an option available to the sovereign or collective.⁸⁰ Finkelstein put it this way:

Since the death penalty is only one in a range of possible punishments, including incarceration and fines, the question the contractors face is: Does the marginal increase in personal security due to the death penalty, when compared with other possible punishments, deter murder so much that it outweighs the marginal loss of personal security a person subject to that penalty would suffer? Here we can see that even in the unlikely event that each application of the death penalty deterred eight additional murders, the marginal value of that added deterrence would likely be outweighed by the marginal cost of the death penalty. The contractors therefore would reject it.⁸¹

This Note submits that one way the contractors would, and should be able to, reject the death penalty is through serving on death penalty juries and refusing to impose the death penalty.

II. SOCIAL CONTRACT THEORY IN AMERICAN LAW

William Blackstone incorporated social contract theory into English common law,⁸² and the framers of our Constitution drew from this source,

78. Rawls wrote that a society organized around his principle of justice as fairness would come “as close as a society can to being a voluntary scheme, for it meets the principles which free and equal persons would assent to under circumstances that are fair. In this sense its members are autonomous and the obligations they recognize self-imposed.” RAWLS, *supra* note 4, at 13.

79. Finkelstein, *supra* note 77, at 1329.

80. *Id.* at 1323.

81. *Id.* at 1323-24.

82. Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 L. & INEQ. 1, 18-19 (1992) (“American civil rights theory derives in part from 17th century ‘social

as well as from the work of John Locke and other social contract theorists.⁸³ United States courts have frequently cited social contract theory in order to legitimize the legal system's authority.⁸⁴ Indeed, the idea of a sovereign being "ordained and established" through the assent of the people was explicitly relied on in *McCulloch v. Maryland*.⁸⁵

Thomas Jefferson, author of the Declaration of Independence and a "central figure in the early development of American democracy,"⁸⁶ did not believe that the social contract was cemented after first being entered into. Rather, he believed it would be "periodically renewed."⁸⁷ Jefferson thought renewal should happen every generation, specifically in the form of an opportunity for revision of fundamental law every nineteen years.⁸⁸ "Since conditions change and men change, there must be opportunity for corresponding change in political institutions, and also for a renewal of the principle of government by consent of the governed."⁸⁹

This is relevant because social contract theory was relied on in creating the United States political and judicial system, and it is still considered an underlying justification for both systems today. Professor Allen, in an exhaustive and admirable effort, notes that social contractarian rationales

contract' tradition which was translated into English common law by William Blackstone and found expression in the U.S. Constitution.").

83. See ALLEN, *supra* note 3, at 2-3. See also Levine, *supra* note 2, citing Brenneke, *supra* note 82 at 18-19 ("American civil rights theory derives in part from 17th century 'social contract' tradition which was translated into English common law by William Blackstone and found expression in the U.S. Constitution.").

84. Levine, *supra* note 2, at 209.

85. "The government proceeds directly from the people; is 'ordained and established' in the name of the people...the people were at perfect liberty to accept or reject [the Constitution]; and their act was final." *McCulloch v. Maryland*, 17 U.S. 316, 403-04 (1819).

86. C. E. Merriam, Jr., *The Political Theory of Jefferson*, 17 POL. SCI. Q. 24, (Mar. 1902).

87. *Id.* at 26.

Government is established, however, by the 'consent of the governed,' or at least a just government is so supported. What, then, is the nature of this consent, and how is it to be made effective amid constantly changing conditions? Jefferson was not satisfied with a contract made once and for all, like that of Hobbes, or with a merely hypothetical contract, or even with a presumption of tacit consent from the fact of residence. He looked upon the contract as a necessary foundation for legitimate government, and he considered that the agreement should have historical as well as logical validity. The principle of the social contract must be sacredly preserved in the life of the people, and Jefferson proposed two ways of insuring this end: first, by revolution; second, by periodical renewal of the agreement.

88. *Id.* at 28-29

The earth belongs in usufruct to the living; the dead have neither powers nor rights over it.' It follows, then, that no generation of men can pass any law binding for a period longer than the lifetime of that generation, because their law-making power ceases with their existence. If one generation could bind another, the dead and not the living would rule.

89. *Id.*

and/or rhetoric appears in “[j]udicial opinions relating to matters as varied as sovereignty,⁹⁰ slavery,⁹¹ alienage,⁹² the negligence rule,⁹³ criminal incarceration,⁹⁴ Congressional nondelegation,⁹⁵ land use,⁹⁶ the law of

90. Allen, *supra* note 3, at 6 n.17

See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“Some doubts have been expressed as to the source of the immunity of a sovereign [sic] power from suit without its permission, but the answer has been public property since before the days of Hobbes. (Leviathan, C. 26,2.)”); *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978) (“In their external relations, sovereigns are bound by no law, they are like our ancestors before the recognition or imposition of the social contract.”); *Carl Marks & Co. v. USSR*, 665 F. Supp. 323, 333 (S.D.N.Y. 1987) (“The classic expression of the doctrine of absolute immunity in our courts was offered, in language resonant of Thomas Hobbes by Chief Justice Marshall in *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 137, 3 L.Ed 287 (1812).

91. *Id.* at 6 n.18 (“See *Scott v. Sandford*, 60 U.S. 393 (1856); *State v. Post*, 20 N.J.L. 368 (1845) (blacks are outside of the social contract).”).

92. *Id.* at 6 n.19

See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1231-33 (9th Cir. 1988). Courts sometimes describe each nation of the world as having its own social contract. See, e.g., *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 447 (S.D.N.Y. 1980) (finding that a new social contract in a foreign nation does not give rise to claims for compensation for bad investments abroad). So, while aliens may be excluded from our social contract, they have the possibility of inclusion in their own.

93. *Id.* at 6 n.20 (“See *Losee v. Buchanan*, 51 N.Y. 476 (1873).”).

94. *Id.* at 6 n.21 (“See *Baker v. Cuomo*, 58 F.3d 814 (2d Cir. 1995) (stating that New York statutes disenfranchising incarcerated felons were rationally related to social contract principles). *Cf. Imprisoned Citizens Union v. Sharp*, 473 F. Supp. 1017, 1027 (E.D. Pa. 1979) (finding that prisoners’ rights were supported by the social contract).”).

95. Allen, *supra* note 3, at 6 n.22

See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (stating that Locke was opposed to legislative delegation); *United States v. Williams*, 691 F. Supp. 36, 44 n.5 (M.D. Tenn. 1988) (“[The nondelegation doctrine is derived from the contractarian view that ‘laws derive their legitimacy from the consent of the governed and, in the American polity, the constitutional delegation of lawmaking power to the Congress establishes this consent.’” (quoting Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 5 (1982)).

96. Allen, *supra* note 3, at 6 n.23 (“*Cf. Sarasota County Anglers Club, Inc. v. Bums*, 193 So. 2d 691, 693 (Fla. 1st DCA 1967) (stating “that the public interest demands that there be some impairment of the individual citizen’s right to enjoy absolute freedom in the use of public” lands).”).

finds,⁹⁷ public health,⁹⁸ self-incrimination,⁹⁹ civil forfeiture,¹⁰⁰ debt collection,¹⁰¹ and the right to privacy.^{102,103} Courts across the United States have relied on social contract theory, either as the basis for their decision, or as a rhetorical device to give their decision legitimacy, or both. It stands to reason that the laws of the United States, therefore, ought to be created and enforced in a way consistent with social contract theory.

III. DEATH QUALIFICATION OF JURIES

Currently, Supreme Court precedent allows prosecutors to “death qualify” capital murder juries by excluding all citizens “whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial.”¹⁰⁴ Death qualifying the jury is standard practice in every capital murder trial.

The Supreme Court held in *Witherspoon v. Illinois* that while jurors who stated that they would never impose the death penalty could be excluded, the exclusion of jurors who were personally opposed to the death penalty

97. *Id.* at 6 n.24

Cf. *Texaco, Inc. v. Short*, 454 U.S. 516, 526 n. 19 (1982) (“right to appropriate a derelict... existed in a State of Nature”); *Hener v. United States*, 525 F. Supp. 350, 353 (S.D.N.Y. 1981) (involving a dispute over rights to salvage silver from a sunken barge and stating that “[t]he common law of finds treats property that is abandoned as returned to the State of Nature”).

98. *Id.* at 6 n.25

See *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (holding that state police powers extend to compulsory vaccinations and citing a phrase from the Massachusetts Constitution “that laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for ‘the common good’”); *cf.* *Munn v. Illinois*, 94 U.S. 113, 124 (1876) (finding that the state may regulate the maximum charges allowed for the storage of grain); *Home Tel. & Tel. Co. v. City of Los Angeles*, 155 F. 554, 568-69 (C.C.S.D. Cal. 1907) (power to regulate telephone charges); *City & County of Denver v. Denver & Rio Grande R.R.*, 167 P. 969, 969-70 (Colo. 1917) (ordering removal of certain railroad tracks in town); *Board of Barber Examiners v. Parker*, 182 So. 485, 504-05 (1938) (power to regulate barbers).

99. *Id.* at 6-7 n.26 (“*See* *Phelps v. Duckworth*, 772 F.2d 1410 (7th Cir. 1985) (“Even Thomas Hobbes, staunch defender of authoritarian government” defended the right against self-incrimination.)”).

100. *Allen*, *supra* note 3, at 7 n.27 (“*See* *United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 402 (2d Cir. 1993) (“The true reason for permitting forfeiture, according to Blackstone, was that it is part of the price a citizen must pay for breaking the social contract by violating the law.”).”).

101. *Id.* at 7 n.28 (“*See* *Davis v. Richmond*, 512 F.2d 201, 204-05 (1st Cir. 1975) (distrain of lodger’s property).”).

102. *Id.* at 7 n.29 (“*See* *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905).”).

103. *Id.* at 5-7.

104. *Lockhart v. McCree*, 476 U.S. 162, 174 (1986); *see also* *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

—but who would be willing to consider it as a punishment if instructed on the law by the court—would violate the defendant’s right to an impartial jury established by the Sixth and Fourteenth Amendments.¹⁰⁵ Put simply, a personal opposition to the death penalty would not disqualify a prospective juror, but refusing to consider aggravating and mitigating factors would.¹⁰⁶ The Court began its analysis by rejecting the scientific evidence offered by the petitioner that death qualified jurors are more prone to convict.¹⁰⁷ The Court reasoned that while eliminating any juror that opposed the death penalty on principle would result in a jury “uncommonly willing to condemn a man to die,” excluding only those who stated they “would not even consider returning a verdict of death” results in a neutral jury.¹⁰⁸ This class of potential jurors became known as “*Witherspoon*-excludables.”¹⁰⁹

This holding did not result in neutral juries. Death qualification continues to create the conviction-prone juries that the Court feared in *Witherspoon*. Through the exercise of peremptory strikes, prosecutors often eliminate jurors who admit during *voir dire* that they have “serious reservations” about the death penalty but who would not be excludable under *Witt*.¹¹⁰ This occurrence, along with death qualification, leads to juries that are “stripped of all opponents of capital punishment.”¹¹¹

The Court in *Witherspoon* deliberately left open the questions of whether a jury so selected might be less neutral concerning guilt and thus

105. *Witherspoon*, 391 U.S. at 520-21.

106. *Id.* at 520-21.

107. *Id.* at 517-18.

The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.

108. *Witherspoon*, at 520–21. The petitioner challenged an Illinois statute allowing challenges for cause of any juror who stated that he had “conscientious scruples against capital punishment, or that he is opposed to the same,” without even attempting to find out if those scruples would cause the juror to invariably vote against the death penalty. The Court notes that “[t]he trial judge said early in the voir dire, ‘Let’s get these conscientious objectors out of the way, without wasting any time on them.’ In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty.” Only 5 jurors would have actually been excludable based on their answers. *Id.* at 514. The Supreme Court: 1) refused to find or take judicial notice that excluding jurors opposed to capital punishment results in a conviction-prone jury; 2) found that with respect to punishment, the defendant was denied his Sixth and Fourteenth Amendment rights to an impartial jury; 3) held that a “jury from which all opponents of the death penalty have been excluded cannot express the conscience of the community on the ultimate question of life or death;” and 4) a death sentence returned by a jury that is “organized to return a verdict of death” cannot be carried out.

109. *See, e.g., Lockhart*, 476 U.S. at 167 n.1.

110. Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118, 121 (2016).

111. *Id.*

improper and whether a bifurcated trial could protect both the State's interest in an impartial sentencing jury and the defendant's interest in an impartial guilt jury.¹¹²

In *Lockhart v. McCree*, the Supreme Court addressed these open questions and held that "removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial" is constitutional.¹¹³ The Court rejected the defendant's argument that such "death qualification" violated his Sixth and Fourteenth Amendment rights.¹¹⁴ The Court determined that the fair cross-section requirement did not apply to the selection of a petit jury.¹¹⁵ The Court reasoned that even if the requirement applied, the prospective jurors that were excluded did not constitute "a distinctive group that may not be systematically excluded from juries."¹¹⁶ The Court further reasoned that the removal of the prospective jurors did not "slant the jury toward conviction."¹¹⁷ The interpretation of the Sixth and Fourteenth Amendments in *Lockhart v. McCree* cemented the practice known as "death qualification" of capital murder juries and seems to have closed off any legal challenge to death qualification based on the fair cross-section requirement.¹¹⁸

The Court in *Lockhart* also dismissed the petitioner's social science data. The Court explained that it felt "constrained to point out what we believe to be several serious flaws in the evidence" relied upon by the lower courts.¹¹⁹ The Court said that the fifteen social science studies the lower courts relied upon to conclude that death qualified juries were more conviction-prone

112. *Witherspoon*, 391 U.S. at 520 n.18.

113. *Lockhart v. McCree*, 476 U.S. at 162, 165 (1986). Petitioner was sentenced to life imprisonment without the possibility of parole after all "*Witherspoon*-excludables," or those venire members who stated that they could not ever vote for imposition of the death penalty, were removed for cause. Petitioner alleged that "death qualification of his jury violated his Sixth and Fourteenth Amendment rights to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community." The Supreme Court held that the right to "an impartial jury and the fair-cross-section requirement were not violated by the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial." The Court went on to note that their decision would not change even "assuming, arguendo, that the social science studies introduced in the courts below were adequate to establish that 'death qualification' in fact produces conviction prone juries."

114. *Id.* at 173-77.

115. *Id.* at 177-83.

116. *Id.*

117. *Id.* at 177-83.

118. *See, e.g., Buchanan v. Kentucky*, 483 U.S. 402 (1987) (summarizing and applying *Lockhart*, 476 U.S. 162).

119. *Lockhart*, 476 U.S. at 168.

were “too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.”¹²⁰ The Court also expressed concern that the studies had been based on individuals who were not actual jurors sworn under oath and had “serious doubts about the value of these studies in predicting the behavior of actual jurors.”¹²¹

In *Wainwright v. Witt*, the Court lowered the standard it established in *Witherspoon* for when a prospective juror may be excluded for cause based on her views on the death penalty. The Court held that the standard 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.’”¹²²

Recent data suggests that support for the death penalty in 2016 and 2017 reached a four-decade low,¹²³ the lowest support for the death penalty has been since the Supreme Court temporarily abolished the death penalty in 1972.¹²⁴ A 2017 Gallup poll found that only 55% of Americans favored the death penalty for convicted murderers.¹²⁵ A 2016 Pew Research Center poll found that only 49% of Americans favored the death penalty for convicted murderers.¹²⁶ The polls showed that support was lowest among women and racial minorities.¹²⁷ These poll results mean that a large number of prospective jurors are excludable under *Wainwright* and *Lockhart*.¹²⁸

120. *Id.* at 170.

121. *Id.* at 171.

122. *Wainwright*, 469 U.S. at 424. (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

123. Jones, *supra* note 23. The last time support had dipped below 60% was in 1972. Three months before the Court’s ruling in *Furman v. Georgia*, *infra* note 124, support was at 50%. Four months after that decision, support was at 57%. Jones, *supra* note 23. According to Pew Research Center, support slightly increased to 54% in 2018. Oliphant, *supra* note 25.

124. The Supreme Court case that suspended the death penalty in 1972 was *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). *Furman* combined three challenges and presented the question: “Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” The Court, per curiam, held that it did. Justices Marshall and Brennan found the death penalty to be unconstitutional per se. Justices Douglas and Stewart found the death penalty to be unconstitutional when, as in Petitioners cases, it is applied in a discriminatory or capricious manner. Justice White found that as administered in the cases at hand, the death penalty was so infrequently imposed that it was “too attenuated to be of substantial service to criminal justice.”

125. Jones, *supra* note 23.

126. Oliphant, *supra* note 25.

127. Oliphant, *supra* note 25. Specifically, the 2016 Pew Research Center poll found that 55% of men supported the death penalty as compared to 43% of women. 57% of whites supported the death penalty as compared to 29% of blacks and 36% of Hispanics. 72% of Republicans supported the death penalty while only 34% of Democrats did. 44% of Independents supported the death penalty.

128. See Garrett, *supra* note 26. Surveys of jurors in previous decades had suggested that 10-20% would be excludable under *Wainwright*. However, this study found that 35% or more of jurors reporting for jury service in Orange County, California were *Witherspoon/Witt* excludable. Roughly 25% of those sampled identified as a nullifier, or someone who would be reluctant to find a person guilty

Death qualifying juries results in racially prejudiced,¹²⁹ conviction-prone juries¹³⁰ but results in no significant deterrent effect.¹³¹ The reasons traditionally given to justify the death penalty and death qualification of juries¹³² fall flat in the face of empirical data. The Supreme Court in *Witherspoon* and *Lockhart* concluded that the social science available at the time was fragmentary, unreliable, and of questionable value in court cases.¹³³ Modern statistics, however, show that the death penalty has a marginal deterrent impact and is often applied in an arbitrary and capricious manner—or worse, upon racial lines (based on the race of the defendant and/or the race of the victim).

The Capital Jury Project was founded in 1990 to answer the Supreme Court's call for more reliable social science research.¹³⁴ One of the Capital Jury Project's missions is to generate "a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions."¹³⁵ Interviews were conducted with 1198 jurors from 353 capital murder trials in 14 states.¹³⁶ This methodical research, designed to address the Court's concerns in *Lockhart v. McCree*, supports the same conclusion as the research cited in 1986: Death qualification results in juries that are "uncommonly willing to find guilt, and uncommonly willing to mete out

of capital murder if they knew the death penalty was a possibility. *Id.* at 419-20.

129. See Robert L. Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment*, 25 *DEVIANT BEHAVIOR* 151, 161 (2004) (summarizing research and finding that "racially prejudiced beliefs have a direct influence on the preference for convicting innocent defendants over acquitting guilty defendants and, therefore, both a direct and an indirect influence on support for the death penalty.").

130. See William J. Bowers, *The Capital Jury: Is it Tilted Towards Death?*, 79 *JUDICATURE* 220 (Mar.-Apr. 1996) (finding that jurors misunderstand how the capital sentencing decision should be made, what factors they are permitted to consider, what level of proof is needed, and how to weigh aggravating and mitigating factors, all in a way that skews them towards guilt and a mandatory death sentence); Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 *ARIZ. ST. L.J.* 769 (2006) (summarizing research and concluding that "[f]or over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death.").

131. See Raymond Bonner and Ford Fessenden, *ABSENCE OF EXECUTIONS: A Special Report; States with No Death Penalty Share Lower Homicide Rates*, *N.Y. TIMES* (Sept. 22, 2000), <https://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html> [<https://perma.cc/9WZK-TZH2>]; Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 *J. CRIM. L. & CRIMINOLOGY* 489 (2009).

132. See *Witherspoon*, 391 U.S.; *Lockhart*, 476 U.S.; and *Wainwright*, 469 U.S.

133. *Witherspoon*, 391 U.S. at 517-18; *Lockhart*, 476 U.S. at 168-173.

134. Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 *ARIZ. ST. L.J.* 769, 784 (2006).

135. *Id.*

136. What is the Capital Jury Project? *School of Criminal Justice, University at Albany, State University of New York*, <https://www.albany.edu/scj/13189.php> [<https://perma.cc/MED9-DC4G>].

death.”¹³⁷ “Capital jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution.”¹³⁸ Death qualification research suggests is actively harming criminal defendants.

IV. ARGUMENT

A. Death Qualification of Jurors Delegitimizes Capital Punishment Under Social Contract Theory

At a time when the country is split right down the middle on the death penalty, it cannot be said that death is a punishment to which all citizens consent, “based on a perception that they will be better off under such a system than they would be in its absence.”¹³⁹ If half of the country opposes the death penalty for convicted murderers, that sentiment should be reflected in the social contract. This Note argues that jury service is one way in which the social contract that forms the basis of our political and judicial system is constantly renegotiated and reaffirmed. If the jury’s purpose is truly to “express the conscience of the community on the ultimate question of life or death,”¹⁴⁰ then “removal from the jury of a ‘significant segment of that community, identified solely by its view of the very subject on which the jury is expected to speak,’ clearly invalidates the integrity of the enterprise.”¹⁴¹

During the founding of our country, “death qualification” of juries did not exist.¹⁴² G. Ben Cohen and Robert J. Smith write:

Modern ‘death-qualification’ jurisprudence frustrates the Framers’ understanding as to the role of the criminal jury. Whereas the jury envisioned by the Framers had the power to rule on the

137. Rozelle, *supra* note 134, at 784-85.

138. *Id.* at 785 (citing BENJAMIN FLEURY-STEINER, JUROR’S STORIES OF DEATH: HOW AMERICA’S DEATH PENALTY INVESTS IN INEQUALITY 24–25 (2004)).

139. Finkelstein, *supra* note 77, at 1329.

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

141. Susan D. Rozelle, *The Utility of WITT: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 691 (2002) (citations omitted).

142. G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 90 (2008)

Though the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution, it is now a de facto component of capital proceedings. The Supreme Court has authorized the lower courts to wander from the historical basis of the Sixth Amendment.

constitutionality of the death penalty-though the force of any ruling applied only to the particular case on which they sat-a prospective juror today cannot even sit on a capital jury unless she promises that she would be able and willing to impose a sentence of death.

The practical effect of ‘death-qualification’ is to expose the capitally accused to increased odds of receiving the death penalty, and to eliminate the voices of citizens who would opt to ‘check’ the government's decision to inflict this penalty.¹⁴³

Cohen and Smith argue, as does this Note, that death qualification of juries undermines the legitimacy of capital punishment. Citizens who serve as jurors shape the law through their application of law to facts. If citizens believe a law allowing for punishment by death is cruel and unjust, they should be allowed to express that through jury service. Even though courts applied the death penalty when the Constitution and Bill of Rights were written, the authors still anticipated some members of the community having a moral opposition to the death penalty and expressing that opposition through jury service. By excluding those who do not consent to the death penalty as an appropriate punishment, the State is not using force with the consent of the governed – it is using force with the consent of those who consent to the use of force.

At the time of the founding, jury service was viewed, and should still be viewed, as way to express ongoing consent to the law of society.¹⁴⁴ Professor Vikram David Amar argues that jury service should be viewed as political participation equivalent to voting.¹⁴⁵ “[Jury service] is an amalgam of a right, a duty, and a badge of community membership.”¹⁴⁶ Professor

143. *Id.* at 89.

144. See Cohen & Smith, *supra* note 142.

145. Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995)

Constitutional history provides strong support for the Supreme Court's recognition, in *Powers* and *Edmonson*, of the link between jury service and other rights of political participation. Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government. Indeed, one of the sharpest attacks anti-federalists could make on the new Constitution was that it did not go far enough in the protection of the institution of juries. The federalists took this charge seriously and ultimately responded by, among other things, enacting the Fifth, Sixth, and Seventh Amendments.... As the anti-federalist historian Herbert Storing has eloquently stated, ‘[t]he question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government.’ (citations omitted).

146. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 121, 124

Amar notes that originally, “the jury’s function in the federal constitutional scheme was not limited to the protection of individual litigants. Rather, the jury was an essential democratic institution because it was a means by which citizens could engage in self-government.”¹⁴⁷ Professor Amar further argues that the founders expected juries to shape the law itself by their application of law to facts.¹⁴⁸ Today, nearly 50% of Americans believe that laws permitting punishment by death are unjust as applied to any facts¹⁴⁹. Excluding those citizens whose opposition to the death penalty “would prevent or impair the performance of their duties” as jurors during the sentencing phase violates their right to self-government.¹⁵⁰ This undermines the legitimacy of the use of force by the State, and violates the civil rights of the criminal defendant and the excluded jurors.¹⁵¹

Justice Kennedy observed in *Powers v. Ohio*¹⁵² that, “with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”¹⁵³ Witherspoon-excludable jurors are still citizens who have given up their natural rights into the hand of the sovereign/collective. They have not done anything to forfeit their rights as citizens, and they deserve to voice their discomfort with the “ultimate punishment.”

Some social contract theorists have argued that even forbidding ex-felons from serving on juries delegitimizes punishment.¹⁵⁴ In the current death qualification scheme, we are excluding people who have never violated the social contract. This is problematic because, were we to place these people in Rawls’ original position today, they might very well decide not to give their new society the power to take life as punishment.

(2003)

This is the essence of democratic self-government. Having a group of citizens decide who is guilty of a crime or liable for damages—as opposed to having elites decide — is perhaps the most feasible way to have cases decided by the community. For all of their learning and training, judges — even elected ones — do not represent the community as well as a jury. To be representative, a jury must stand for the whole community, not just subsets of it.

147. Amar, *supra* note 145, at 218.

148. *Id.* at 219.

149. Jones, *supra* note 23.

150. See Cohen, *supra* note 144, at 90.

151. See Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1 (2005-2006) (arguing that death qualification excludes jurors from a fundamental right simply for holding a belief widely shared domestically and internationally).

152. *Powers v. Ohio*, 499 U.S. 400 (1991).

153. *Id.* at 407.

154. Levine, *supra* note 2.

A common justification for death qualifying juries, whether spoken or unspoken, is to avoid jury nullification.¹⁵⁵ Jury nullification occurs when jurors who disagree with a law or its punishment find a defendant not guilty, even if the evidence is otherwise.¹⁵⁶ However, jury nullification is completely justified under social contract theory.¹⁵⁷ “Jury nullification allows the jury to find a defendant guilty, but to refuse to impose the statutorily enumerated punishment when it contradicts the community’s belief.”¹⁵⁸ Matthew K. Suess argues that punishment is only justified under Locke’s social contract theory when its source is “the open condemnation of the community. This is evidenced by Locke’s belief that every individual had a right, and even a duty, to participate in punishment. Not only did the community judge an individual’s guilt or innocence, but the community also determined the extent of punishment.”¹⁵⁹ If this is true, then jury nullification should be permitted, even encouraged. Jury nullification is part of a “longstanding American willingness to use citizens as a buffer between the defendant and the harsh and sometimes arbitrary enforcement of the law.”¹⁶⁰ Jury nullification, and by extension ceasing the practice of death qualification of juries, enables a jury to truly act as the conscience of the community.

B. The United States Cannot Rely on the Political Process to Reflect the Will of the People

Opponents may argue that if allowed to serve, these death-opposed jurors would violate the social contract by refusing to impose a punishment authorized by law. Indeed, this is the argument advanced in *Lockhart v. McCree*. However, because jury service is one way in which the social contract is renegotiated and reinforced, this concern is misplaced. The problem with this view is it rests on the premise that the social contract, entered into at the founding of this country, is unchanging and immutable. This is simply inconsistent with the vision that Thomas Jefferson had for our democracy.¹⁶¹ The death penalty should not be the law if it does not have the support of even a majority of citizens. Yes, citizens could change the law through the political process. But citizens can and should also

155. Clark, *supra* note 151, at 8.

156. Rozelle, *supra* note 141.

157. See Matthew K. Suess, *Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America*, 7 WASH. U. JUR. REV. 367, 395-96 (2015).

158. *Id.*

159. *Id.*

160. Bauer & Eckerstrom, *supra* note 76, at 1186.

161. See Merriam, *supra* note 86.

change the law by refusing to impose the punishment at the sentencing phase of trials.

We cannot remain inactive and assume the political process will remedy this defect. This Note argues that it follows from Rawls' views on civil disobedience that allowing *Witherspoon*-excludables to serve on juries and vote their conscience, against the death penalty, would be justified. Twenty-nine states have legislatively abolished or judicially overturned the death penalty, and an additional four have a gubernatorial moratorium on death sentences.¹⁶² While this does not show that normal means of changing the law have failed, as Rawls identified as a condition necessary for civil disobedience, it does show 1) that the general nationwide trend is towards abolishment of the death penalty, and 2) the case law regarding jury service has failed to respond to this reality. Thus, under Rawls' theory, jurors should be allowed to advocate for a change in law by serving on juries and voting their conscience, even when the law of the jurisdiction says that death is a legal option for punishment. The death penalty is never a mandatory punishment.¹⁶³ There is a wide space in the jury deliberation room for arguments and compromises with regard to punishment. No juror is forced to choose between death and letting the defendant go free. All voices should be heard in the deliberations.

In addition, Professor Sharon Dolovich notes the problems with relying solely on political means to justify and/or change the legal status of the death penalty. Dolovich points out that it raises normative problems to say that state punishment can be completely legitimized by appealing to democratic majoritarianism. Nothing inherent in the majoritarian standard ensures that legislators consider the interests of all people when legislating. In fact, by appealing to voters as being "tough on crime," or "for law and order," legislators are often incentivized to pass laws without considering the harm those laws can work on politically disenfranchised minorities.¹⁶⁴

As a practical matter, the very people who are excluded from jury service are also more often prevented from voting or impeded in their efforts to vote.¹⁶⁵ It is possible that their voices could be silenced both in the jury

162. Death Penalty Information Center, *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (2019), <https://deathpenaltyinfo.org/states-and-without-death-penalty> [<https://perma.cc/C22X-MCSV>].

163. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

164. Dolovich, *supra* note 4, at 313.

165. Gretchen Frazee, Laura Santhanam, "What the Supreme Court's Gerrymandering Decision Means for 2020," *PBS News Hour* (June 28, 2019) <https://www.pbs.org/newshour/nation/what-the-supreme-courts-gerrymandering-decision-means-for-2020> [<https://perma.cc/7VU6-UUEE>]. See also Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997-2012*, 9. N.E. U. L.J. 299, 308 (2017) ("All else being equal, white jurors are more

box and at the ballot box. Furthermore, the very fact that they are Witherspoon-excludables could decrease their political efficacy. Clark notes that death qualification essentially sends a message that all those who are categorically opposed to the death penalty are “unable to follow the law or the jurors’ oath. This in turn puts a certain amount of stigma on the abolitionist juror.... It is difficult to win a political battle as a group that is branded as unable to follow the law.”¹⁶⁶ Accordingly, the defenses of death qualification that say that social contract theory compels jurors to follow the law, or that excluded jurors should simply vote to repeal the death penalty, do not solve the problem.

C. The Social Contract Is Not Static

A common justification for capital punishment is that the death penalty cannot be in any way contrary to the Constitution because it was lawful when the Constitution was written. Proponents of the death penalty correctly point out that punishment by death is contemplated in the Constitution.¹⁶⁷ When social contract theory is considered, they might argue that the original contractors weighed the benefits of the punishment with the risk that they themselves would be subjected to it and consented to the use

apt to vote for death than are black jurors.”). Support for the death penalty could be lowest among women and minorities because they know that the laws will not always be applied equally, so they are not comfortable giving up this right/allowing the State this liberty. *See Dolovich, supra* note 4, at 366-68

[U]nder the conditions of a partially compliant society, there is no basis for the parties to be confident that those who will face state punishment as convicted offenders will necessarily be guilty of the crimes charged. To the contrary, in a social context in which the institutions and operations of the criminal justice system are flawed and untrustworthy and known to be so, the parties will know that some (indeterminate) number of convicted offenders incarcerated by the state will in fact be innocent... if the parties are to ensure the greatest protection of their security and integrity, they must instead assume that they could wind up, through no fault of their own, facing state punishment as convicted offenders... And because, as we have seen, the parties lack the information that would allow any estimating of probabilities as to their own chances of being innocents wrongfully targeted for state punishment, the parties must consider what it would mean for anyone to be so treated...

This is precisely why they should be allowed to express this non-consent through jury service. *See Cover, supra* note 110, at 119

Although some argue that the current Supreme Court law on death qualification has been erroneously interpreted to exclude too many death-averse prospective jurors, the practical result of the Supreme Court’s death-qualification jurisprudence has been to enable some prosecutors to strike for cause virtually any juror with serious reservations about his or her ability to impose the death penalty.

166. Clark, *supra* note 151, at 39.

167. “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...” U.S. CONST. amend V, cl. 1.

of deadly force by the State. However, evolving standards of decency have made it now so that a majority of citizens, if they were in a state of nature negotiating a social contract into which they would enter tomorrow, would never surrender into the hands of the sovereign/collective the power to take a life in punishment for a crime. This change is possibly due to a growing awareness by United States citizens that the death penalty's application in the United States is not an effective deterrent, presents a significant risk of executing innocents, and is disproportionately enforced on racial minorities.¹⁶⁸

Thomas Jefferson did not believe that the social contract was cemented after first being entered into; rather, he believed it would be "periodically renewed."¹⁶⁹ Just because the death penalty was contemplated in the Constitution does not mean that it is forever within a society's standard of decency. "Since conditions change and men change, there must be opportunity for corresponding change in political institutions, and also for a renewal of the principle of government by consent of the governed."¹⁷⁰

D. Life-Qualifying Juries Does Not "Cancel Out" the Problems Caused by Death Qualification

Although courts also allow permit defendants to "life-qualify" juries, it does not remedy the harm caused by death qualification. *Morgan v. Illinois* held that "a capital defendant may challenge for cause any prospective juror who will automatically vote for the death penalty" if the defendant is found guilty.¹⁷¹ This is sometimes called "life-qualification." Professor Aliza Plener Cover refutes the argument that death qualification should be tolerated just because potential jurors who would refuse to consider a life sentence for convicted murderers are also disqualified. First, Cover points

168. "Less Support for Death Penalty, Especially Among Democrats." Pew Research Center (Apr. 16, 2015), <https://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/> [<https://perma.cc/E7BG-C43L>].

169. Merriam, *supra* note 86, at 26

Government is established, however, by the 'consent of the governed,' or at least a just government is so supported. What, then, is the nature of this consent, and how is it to be made effective amid constantly changing conditions? Jefferson was not satisfied with a contract made once and for all, like that of Hobbes, or with a merely hypothetical contract, or even with a presumption of tacit consent from the fact of residence. He looked upon the contract as a necessary foundation for legitimate government, and he considered that the agreement should have historical as well as logical validity. The principle of the social contract must be sacredly preserved in the life of the people, and Jefferson proposed two ways of insuring this end: first, by revolution; second, by periodical renewal of the agreement.

170. Merriam, *supra* note 86.

171. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

out that because a death verdict must be unanimous in most jurisdictions, a single seated juror who fundamentally opposes the death penalty can play a decisive role in the verdict.¹⁷² The same cannot be said for automatic-death, *Morgan*-excludable jurors. Death qualification has a more direct impact on the verdict reached. Second, judges are more likely to dismiss potential jurors for cause based on their opposition to the death penalty.¹⁷³ Therefore, life-qualification of juries under *Morgan* does not even come close to canceling out the damage done by death qualification.

Research done by the Capital Jury Project supports Cover's position. Over 70% of actual jurors from actual capital murder trials interviewed responded that "death 'was the only acceptable punishment' for murders committed by a defendant with a prior murder conviction."¹⁷⁴ "Almost 60% agreed that death was the only acceptable punishment for 'planned or premeditated murder.'"¹⁷⁵ It is obvious that many potential jurors do not understand mitigating factors or the law they will be required to apply at sentencing, yet they are seated on capital juries despite being excludable under *Morgan*.

CONCLUSION

Death qualifying juries in capital murder trials delegitimizes capital punishment because it violates the social contract. Social contract theory influenced the drafters of our Constitution and has been explicitly invoked in judicial opinions as both a basis for decisions and as a rhetorical device to lend legitimacy to decisions. Many social contract theorists argue that punishment is only a legitimate use of force by the State when it is based on principles that all citizens would agree to as reasonable, rational, and just, knowing that they themselves control the conduct that might subject them to such punishment. If the United States is going to rely on social contract theory to give its laws legitimacy, then its laws ought to be created, enforced, and applied on a basis that is consistent with social contract theory.

Serving on a jury is one of the ways in which the social contract is constantly renegotiated and reaffirmed. Excluding those citizens whose

172. Cover, *supra* note 110, at 122.

173. *Id.* ("[W]hile some-but few-genuinely "death-disqualified" (or automatic-life) jurors ultimately serve on capital juries, there is strong empirical evidence that a large number of 'life-disqualified' (or automatic-death) jurors make it into the jury box.").

174. Rozelle, *supra* note 134, at 788 (citing William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 62 (2003)).

175. *Id.*

“opposition to the death penalty would prevent or impair the performance of their duties as jurors”¹⁷⁶ during the sentencing phase of a capital murder trial imposes punishment to which not all citizens have consented. Instead of the consent of the governed, the State is using force with the consent of those who consent. We have seen that a large number of citizens are excluded, and the number is constantly growing. This is bad for society, not just the individual defendant or the excluded jurors. It is unjust.

The Supreme Court has rejected the legal argument against death qualification based on the fair cross-section requirement of the Sixth and Fourteenth Amendments. *Witherspoon v. Illinois*, *Lockhart v. McCree*, and *Wainwright v. Witt* have firmly established the practice of death qualifying juries. However, at a time when the country is split right down the middle on the death penalty, it cannot be said that death is a punishment to which citizens consent, “based on a perception that they will be better off under such a system than they would be in its absence.”¹⁷⁷ If half of the country opposes the death penalty for convicted murderers, that sentiment should be reflected in the social contract.

The voices kept out of the jury room are also the voices commonly kept out of the ballot box and out of office, so we cannot simply rely on legislatures to repeal the death penalty. As President Barack Obama once said, “Our Constitution is a remarkable, beautiful gift. But it’s really just a piece of parchment. It has no power on its own. We, the people, give it power. We, the people, give it meaning.”¹⁷⁸ It’s time for the United States to give the people back their power, and let them give meaning to the words written in the Constitution. Let them sit on juries, let them apply laws to facts, and let them nullify laws if they see fit. The United States needs to stop death qualifying capital juries, or else we will be imposing the ultimate punishment without the consent of the governed in a way that conflicts with the foundations of our judicial system.

176. *Wainwright*, *supra* note 14, at 424 (citing *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

177. Finkelstein, *supra* note 77, at 1329.

178. Obama, *supra* note 1.

