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I. INTRODUCTION

Many observers were shocked when the district attorney prosecuting Andrea Yates, the Texas mother who drowned her five children in a bathtub, announced his intent to pursue the death penalty against her.[2] Obtaining capital punishment for a woman with known psychiatric problems who is accused of killing her children is almost unheard of.[3] The decision was met by some defense attorneys, however, with little surprise: "They may just be trying to get a death-qualified jury . . . to ensure a conviction."[4] Sure enough, once prosecutors secured a conviction, their aggressive pursuit of the death penalty transformed into an endorsement of a life sentence instead.[5]

Prosecutorial preference for death-qualifying a jury—preemptively removing potential jurors who "would *automatically* vote against the imposition of capital punishment"[6] or would otherwise be unable to perform their sentencing duties as jurors in a capital case—is well recognized among criminal law scholars and practitioners.[7] Since the imposition of the death penalty requires a unanimous jury, prosecutors

1. 343 F. Supp. 2d 23 (D. Mass. 2004).

2. Lisa Teachey, *DA Will Seek to Put Yates on Death Row/Mom Pleads Insanity in Children's Drownings*, HOUSTON CHRON., Aug. 9, 2001, *available at* 2001 WL 23620392.

3. *Id*.

4. *Id*.

5. *See* CBS News, *Death May Not Be Prosecution's Aim* (Mar. 15, 2002), *at* http://election.cbsnews.com/stories/2002/03/14/news/opinion/courtwatch/main50378.
shtml. Similar theories arose when the Justice Department sought the death penalty against Zacarias Moussaoui in connection with the September 11th terrorist attack—an unusual move since Moussaoui was not a direct participant in the attacks; *See* Philip Shenon & Neil A. Lewis, *A Nation Challenged: The 20th Hijacker; France Warns it Opposes Death Penalty in Terror Trial*, N.Y. TIMES, Mar. 28, 2002, at A14, *available at* 2002 WLNR 4438802. "Legal scholars said a decision to seek the death penalty would be highly unusual if not unprecedented in a case in which the defendant is charged with conspiracy and not with direct involvement in the acts that resulted in death," but speculated that the prosecution wanted a death-qualified jury to increase the likelihood of a conviction. *Id*.

6. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

7. *See* David Lindorff, *Aiming for a Conviction*, NATION, *at* http://www.thenation.com/doc.mhtml?i=20020513&s=lindorff20020502 (May 2, 2002).

are entitled to strike potential jurors whose very presence would foreclose the possibility of obtaining a death sentence. Many contend, however, that once death penalty opponents are purged from a jury, the remaining jurors are more likely to find guilt. Since the same jury—a "unitary jury"—generally hears both the guilt and penalty phases of a trial, death-qualification results in not only a sentencing jury able to carry out its duties but also a guilt jury predisposed to convict. Thanks to death-qualification, "capital juries are more likely to be white, older, predominantly male, Protestant, and less educated[8] than other criminal juries, and than the society from which they were picked."[9] Critics argue that such juries are also more inclined to believe the prosecution, less sympathetic to the defendant, and more likely to take a harder "law and order" stance than death penalty opponents.[10] Consequently, a prosecutor who wants a conviction also wants a death-qualified jury. Illustrating this point, prosecutors may initially seek the death penalty in order to death-qualify the jury, even if the imposition of the death penalty is not actually the ultimate goal.[11] However, such a predisposition for conviction raises significant fairness concerns for those potentially facing execution.

8. These are precisely the demographics of those most supportive of the death penalty. *See* Joseph Carroll, *Gallup Poll: Who Supports the Death Penalty?* (Nov. 16, 2004), *at* http://www.deathpenaltyinfo.org/article.php?scid=23&did=1266.

9. Lindorff, *supra* note 7.

10. *See* Carroll, *supra* note 8. Similarly, more men than women support the death penalty, as well as more Protestants in comparison to other religions. *See id*. Other concerns include judicial economy since the process of death-qualification is much lengthier than that of normal jury selection and may be rendered unnecessary in the event of a "not guilty" verdict. *See, e.g.*, Craig M. Cooley, *Forensic Individualization Sciences and the Capital Jury: Are* Witherspoon *Jurors More Deferential to Suspect Science than Non-*Witherspoon *Jurors?*, 28 S. ILL. U. L.J. 273 (2004); Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y & L. 577, 594–97 (2004); James R.P. Ogloff & Sonia R. Chopra, *Stuck in the Dark Ages: Supreme Court Decision Making and Legal Developments*, 10 PSYCHOL. PUB. POL'Y & L. 379, 391 (2004) ("[D]eath-qualified juries may be more disposed toward guilty verdicts than juries that include [death penalty opponents] because jurors who are not opposed to the death penalty may be more generally conviction prone than [death penalty opponents].") (citing Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984)); Jill M. Cochran, Note, *Courting Death: 30 Years Since* Furman*, Is the Death Penalty Any Less Discriminatory? Looking at the Problem of Jury Discretion in Capital Sentencing*, 38 VAL. U. L. REV. 1399 (2004). The method is controversial because, as many argue, a death-qualified jury may be more likely to render a guilty verdict. Further, given the demographics between races regarding support and opposition to the death penalty, a death-qualified jury is logically more likely to be predominately white and male. Whereas most whites support the death penalty, most blacks oppose it.

11. Lindorff, *supra* note 7.

Despite arguments that the voir dire practice of death-qualifying a jury creates a predisposition toward finding guilt, the Supreme Court has held the practice constitutional.[12] While the Court has affirmed that the prosecution is entitled to death-qualify the sentencing jury,[13] and that death-qualifying a guilt jury[14] does not violate a defendant's rights *per se*,[15] the Court has *not* mandated that a guilt jury be death-qualified before the initial guilt phase of the trial or that the same, unitary jury hear both phases. Thus, courts are given the discretion to death-qualify the jury—with an eye towards the sentencing phase—before the guilt phase has been conducted, or to seek some other alternative such as a bifurcated jury instead. Although the Supreme Court has not declared the practice of death qualifying the guilt jury unconstitutional, that does not necessarily mean that such an approach is the "fairest" approach. As a result, it seems logical to determine whether there is a better approach that can accommodate the prosecution's right to a death-qualified sentencing jury, without trying the defendant in front of a guilt jury predisposed to convict him.

Facing concerns of fairness as well as judicial economy in *United States v. Green*, the U.S. District Court for the District of Massachusetts proposed two possible solutions to the death-qualification dilemma: (1) impaneling one unitary jury and the maximum number of alternates to hear the guilt phase without death-qualifying any of them, then death-qualifying that same jury and as many of the alternates as necessary *after* a guilty verdict, but *before* the punishment phase; or (2) initially impaneling a guilt jury that is not death-qualified, then, in the event of a conviction, discharging that jury and impaneling a new, death-qualified jury exclusively for the punishment phase.[16] The defendant in *Green*

12. *See* Lockhart v. McCree, 476 U.S. 162, 165 (1986); Wainwright v. Witt, 469 U.S. 412, 429 (1985).

13. Since it requires unanimity to impose the death penalty, the inclusion of jurors who would always be unwilling to vote for death, regardless of the circumstances, would serve to nullify the jury process and render the imposition of the death penalty impossible. Consequently, the prosecution is entitled to death-qualify the jury before the sentencing phase of the trial. *See Lockhart*, 476 U.S. at 165.

14. In *Gregg v. Georgia*, the Court mandated a bifurcated trial in which the guilt or innocence is first determined. 428 U.S. 153, 163, 195 (1976). Then, if a guilty verdict is rendered, the second phase—or penalty phase—is conducted to determine the sentence. *Id.* at 163. A unitary jury exists when the same jury presides over both phases of the trial, in contrast to separate juries being used. *See* United States v. Green, 343 F. Supp. 2d 23, 25 (D. Mass. 2004).

15. *See Lockhart*, 476 U.S. at 165.

16. United States v. Green, 324 F. Supp. 2d 311, 331 (D. Mass. 2004).

rejected the first option.[17] Despite the prosecution's opposition to both of the alternatives that were presented, the court chose the latter option of impaneling, if necessary, two separate juries.[18]

The *Green* court's decision fails to provide many of the benefits provided by a traditional unitary jury—such as residual doubt—while also failing to fully satisfy concerns of judicial economy.[19] In contrast, the first option of impaneling a single jury and then death-qualifying *that* jury after a guilty verdict initially appears to approach a more ideal balance, but upon closer analysis, it creates additional, more severe problems, particularly as to the shifting context of the jurors being death-qualified. Rather than supporting the death penalty in the abstract, jurors would be supporting the death penalty relative to a specific defendant. This Note contends that although the court's first option was actually the lesser of the two evils in *Green*, a modification of the first option—asking questions necessary for purposes of death qualification in advance, but not actually using the resultant information until a guilty verdict is rendered—would come closer to resolving the many concerns regarding capital juries.

Part II of this Note discusses the jurisprudence of bifurcated procedures in capital cases and the evolution and controversy of death-qualifying the jury. Part III explains *United States v. Green* and the court's unique rationale for impaneling two juries. Part IV.A analyzes the necessary evil presented by death-qualifying a jury and the seemingly unsolvable problems that virtually all approaches present, and Part IV.B explains why the first option proposed by the *Green* court achieves a better balance of the divergent interests than the second option but is poisoned by a fatal flaw. Part IV.C proposes another—albeit still imperfect—solution that comes *closer* to achieving a proper balance of the divergent interests by selecting a guilt jury and alternates that have not been death-qualified and then asking them the death-qualifying questions before the trial commences. The information acquired in the death-qualifying process can later be applied to modify the jury composition, satisfying the prosecution's right to a death-qualified sentencing jury, if a penalty phase proves necessary. Finally, Part V offers a brief conclusion.

17. *Green*, 343 F. Supp. 2d at 25.

18. *Id.*

19. *See infra* section IV.A.

II. BACKGROUND ON THE DEATH-QUALIFICATION PROCESS

Bifurcated capital trials and the practice of death-qualifying prospective jurors evolved through various cases during the last fifty years, the chronology of which provides a useful context for this Note's analysis.

A. Supreme Court Jurisprudence[20]

The evolution of the death-qualification process began with courts having wide discretion in striking death penalty opponents from juror pools and was later narrowed dramatically by the Supreme Court, only to be broadened once again—though never to the earlier degree. For several decades, states permitted "[t]he broad exclusion of veniremen with conscientious scruples against capital punishment."[21] The Supreme Court abruptly contracted that practice, however, in *Witherspoon v. Illinois*.[22] In a particularly egregious example of when death-qualifying a jury exceeds constitutional bounds, the *Witherspoon* trial judge commenced the proceedings declaring, "'[l]et's get these conscientious objectors out of the way, without wasting any time on them.'"[23] The trial court then proceeded to disqualify forty-seven veniremen, only five of whom explicitly said they could not apply the death penalty under any circumstances.[24] The others acknowledged "'conscientious or religious scruples'" against the death penalty and were summarily dismissed

20. Also relevant to this discussion are various state court decisions in which the practice of death-qualification is interpreted under applicable state laws and state constitutions, rather than the U.S. Constitution. Because the present case, *United States v. Green*, is a federal case, this Note will focus *primarily* on Supreme Court jurisprudence in an effort to streamline the analysis. However, the applicable state cases generally mirror the Supreme Court cases in terms of outcome and analysis. *See, e.g.*, Rector v. State, 659 S.W.2d 168 (Ark. 1983) (supporting the use of a unitary jury); People v. Carpenter, 935 P.2d 708 (Cal. 1997) (finding that impaneling the guilt and penalty juries concurrently and having both sit for the full trial did not violate the defendant's rights); Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980); State v. Kilgore, 771 S.W.2d 57 (Mo. 1989) (holding that denial of a defendant's motion for bifurcated jury did not violate his rights as afforded by Missouri statute); State v. Williams, 565 S.E.2d. 609 (N.C. 2002) (finding that a capital defendant is not entitled to a bifurcated jury); State v. Alvarez, 872 P.2d 450 (Utah 1994) (holding that death-qualification does not violate the defendant's constitutional rights); State v. Young, 853 P.2d 327 (Utah 1993).

21. *Green*, 343 F. Supp. 2d at 28 (citing Michael W. Peters, Comment, *Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury?*, 26 WASHBURN L.J. 382, 382 n.16 (1987)).

22. 391 U.S. 510 (1968).

23. *Id.* at 514.

24. *Id.*

without inquiry as to whether they could nevertheless vote for the death penalty in certain circumstances.[25]

The Supreme Court in *Witherspoon* declared such a death-qualification process unconstitutional. The Court explained that just as a State cannot entrust the determination of a man's guilt or innocence to a tribunal organized specifically to convict him, it similarly cannot "entrust the determination of whether [he] should live or die to a tribunal organized to return a verdict of death."[26] Acknowledging the government's interest in not impaneling a jury incapable of imposing a death sentence, the Court clarified that the extent of questioning must be limited to excluding only those jurors completely unable to return a verdict of death.[27] The elimination of a juror would necessitate "unmistakably clear" evidence that the juror would automatically vote against death, regardless of the circumstances.[28] The Court reasoned that striking all who express scruples against capital punishment or oppose it in principle[29] would produce "a jury uncommonly willing to condemn a man to die."[30]

Eight years after deciding *Witherspoon*, the Supreme Court in *Gregg v. Georgia* required courts to bifurcate the punishment and guilt portions of the trial, postponing sentencing until after guilt had been determined.[31] In the absence of bifurcation, a court would have had to choose between excluding evidence relevant to sentencing but otherwise prejudicial as to guilt,[32] or including that prejudicial evidence but

25. *Id*. at 514–15.

26. *Id*. at 521.

27. *See id*. at 522 n.21.

28. *Id*.

29. The Court later included as "excludables" those who also would never vote for life imprisonment over the imposition of the death penalty (i.e., "life-qualifying"). *See infra* note 36.

30. *Witherspoon*, 391 U.S. at 521. Less than four years after *Witherspoon*, the Supreme Court declared the death penalty unconstitutional in *Furman v. Georgia*, citing inconsistencies and discrimination in the penalty's application. 408 U.S. 238 (1972). When the Court revisited the issue four years later in *Gregg v. Georgia*, it allowed for the use of the death penalty, upon the condition that states implement various safeguards to protect against the inconsistencies and discrimination seen in *Furman*. 428 U.S. 153 (1976).

31. 428 U.S. at 190–92.

32. An excellent example of such potentially volatile material would be a defendant's prior criminal history. While certainly relevant in setting forth punishment, such information—unless used for purposes of impeachment or other enumerated exceptions— may not be considered by the jury in weighing guilt or innocence for the specific crime charged. *See id.* at 190. Instructions to the jury that they should disregard that information in determining guilt is inadequate since jurors would likely still have the residual knowledge of such history, weighing against true impartiality for the defendant.

admonishing the jurors to ignore that information in determining guilt or innocence.[33] Such a request, however, would have required the jury to perform a nearly impossible feat—to temporarily purge their minds of any residual effects of that information—to avoid being improperly prejudiced against the defendant.

Gregg drew a clear division between the guilt and penalty phases of a capital trial but failed to address whether both phases needed to be conducted by a common, unitary jury or whether it would be proper to impanel a different, death-qualified jury solely for the penalty phase. This question has taken on greater significance over past decades in the wake of ever-increasing empirical evidence suggesting that a death-qualified jury is also more likely to return a guilty verdict.[34]

In *Wainwright v. Witt*, the Court broadened the criteria of "unmistakably clear" evidence that jurors would "*automatically* vote against . . . capital punishment"[35] to include whether a juror's "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[36] However, while the Court lowered the threshold required for a trial court to exclude potential jurors, the Court again failed to state whether the requirement of a bifurcated proceeding allows for—and perhaps even demands—a bifurcated jury as well, or whether a death-qualified unitary jury is the only option. The Court finally addressed that question in *Lockhart v. McCree.*

In *Lockhart*, the Court held that death-qualifying a unitary jury before the guilt phase of the trial did not violate the defendant's constitutional rights.[37] The defendant had challenged the practice on the basis of both the Sixth and Eighth Amendments, claiming that it

33. *See id*.

34. *See infra* notes 54–59 and accompanying text.

35. *Witherspoon*, 391 U.S. 510, 522 n.21 (1968).

36. Wainwright v. Witt, 469 U.S. 412, 420 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (alteration omitted). A unique nuance in the *Witherspoon* line of cases is *Morgan v. Illinois*, in which the Court asserted that in addition to the government's right to death-qualify a jury, the defense is entitled to "life-qualify" the jury. 504 U.S. 719, 724–25 (1992). The Court also referred to the process as "reverse-*Witherspoon*." *Id.* at 724. A trial court's refusal to inquire into whether potential jurors would automatically impose the death penalty upon a murder conviction, regardless of mitigating factors, is inconsistent with the Due Process Clause of the Fourteenth Amendment. *Id*. Just as a juror automatically voting against the death penalty would constitute juror nullification, so too would a juror automatically imposing death. The Court reasoned that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Id*. at 729.

37. 476 U.S. 162, 165 (1986).

infringed upon his right to a jury selected from a representative cross section of the community, as well as his right to an impartial jury.[38] In the Court's opinion, "groups defined solely [by] shared attitudes that would prevent" them from performing their duties as jurors are not "distinctive groups."[39] Even if the death-qualified jury is indeed "slanted" towards conviction, such an inclination does not necessarily prevent a jury from being impartial.[40] Instead, an impartial jury is "nothing more than '*jurors* who will conscientiously apply the law and find the facts.'"[41] The defendant presented ample empirical evidence suggesting a predisposition toward guilty verdicts among death-qualified juries, but the Court found the evidence unpersuasive.[42] Nevertheless, the Court assumed the information to be accurate for the sake of argument in reaching its conclusions.[43]

The *Lockhart* Court also addressed the propriety of the unitary jury in capital trials. Reasserting its unwillingness "'to say that there is any one right way for a State to set up its capital sentencing scheme,'"[44] the Court found no constitutional violation in death-qualifying a unitary jury prior to the guilt phase but expressly left open the possibility of alternative capital sentencing schemes.[45] Alluding to the rationales behind a unitary jury—judicial economy, the concept that responsibility should be shouldered by those who convict to also fix the punishment, and particularly the concern that the defendant should be able to benefit from any residual doubts that the jury may still harbor from the guilt phase—the Court declared that while it will uphold a unitary system

38. *Id.* at 167.

39. *Id*. at 174. *But see* United States v. Green, 343 F. Supp. 2d 23, 33 (D. Mass. 2004). In *Green*, the question arose of whether a shared attitude was so polarized according to race and other factors that excluding that attitude also constituted the virtual exclusion of certain races and other demographics. While 48% of black people oppose the death penalty nationally, only 22% of whites oppose it. *Id.* Consequently, in an area such as the Eastern Division of Massachusetts, where just 7.8–9.1% of residents are black, death-qualifying a jury runs a high risk of "significantly deplet[ing] the already paltry number of *minority* jurors in the Eastern District." *Id*. (emphasis added); s*ee also* State v. Ramseur, 524 A.2d 188, 252 n.54 (N.J. 1987) (discussing the consequent exclusion of women and minorities).

40. *See Lockhart*, 476 U.S. at 177.

41. *Id*. at 178 (quoting *Wainwright*, 469 U.S. at 423).

42. *Id*.

43. *Id*.

44. *Id*. at 180 (quoting Spaziano v. Florida, 468 U.S. 447, 464 (1984)).

45. *Id*.

against challenges, it does not preclude other systems, such as the use of two juries, from being used.[46]

In contrast to the majority's opinion in *Lockhart*, Justice Marshall in his dissent argued strenuously against the propriety of death-qualifying jurors for the guilt phase: "Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions."[47] Foreshadowing the *Green* case, Justice Marshall suggested the propriety of using two separate juries, calling the majority opinion's justification for a unitary jury "unconvincing" and "offensive."[48] Rather, Justice Marshall argued that a two-jury system would actually encourage greater judicial economy.[49] He also left open the option of impaneling a single jury but not death-qualifying it until the penalty phase, at which time some jurors could be replaced with alternates if necessary.[50]

While the Court has consistently upheld the constitutionality of death-qualifying a unitary jury for both the guilt and penalty phases in a capital trial, it has been careful not to preclude the use of alternative trial structures by lower courts that are persuaded by arguments against death-qualifying the guilt jury.[51] The Court's cases leave open, however, the questions of (1) whether the arguments against death-qualifying the guilt jury are sufficiently compelling even if they do not rise to an unconstitutional level, and (2) what the best structure is to address those concerns while also accommodating the government's right to death-qualify the penalty jury.

46. *Id*.

47. *Id*. at 188 (Marshall, J., dissenting) (citing Grigsby v. Mabry, 569 F. Supp. 1273, 1283, 1293, 1304 (E.D. Ark. 1983)).

48. *Id*. at 204 (Marshall, J., dissenting). Specifically, Justice Marshall found the fear of having to repeat the guilt phase unconvincing and deemed offensive the argument that the defendant should not escape the unitary system because of its benefit to the defendant. *Id*. After all, if the concern is really what is best for the defendant, should he not have the option of selecting the system he believes serves him best?

49. *Id*. "In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase." *Id.* Marshall also suggested that rather than retrying the entire guilt phase for the benefit of the penalty jury, "stipulated summaries of prior evidence [could] save considerable time." *Id.* at 205.

50. *Id*. at 204.

51. *See supra* notes 44–45 and accompanying text.

B. The Debate: Are Death-Qualified Jurors Predisposed to Find Guilt?

The theory that death-qualified jurors are predisposed to find guilt has gained strength through recent studies,[52] yet the Supreme Court has made it clear that such a predisposition is constitutionally permissible so long as jurors are still capable of applying the law.[53] In holding the practice of death-qualifying a unitary jury constitutional, the *Lockhart* Court assumed for the sake of argument the accuracy of the data put forth by the appellant suggesting a predisposition of such jurors to find guilt.[54] Though the Court echoed its findings from *Witherspoon* that the data presented was "'too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution,'"[55] observers can nevertheless assume that the Court's ruling would not change even in the face of more complete, persuasive data since the Court rendered its ruling despite accepting that data at face value. Essentially, the Court's view that the information was insufficient was little more than dicta: even if the information were persuasive,  would still be their decision. So long as a jury "will conscientiously apply the law and find the facts,"[56] the jury is deemed sufficiently impartial, and a perceived leaning in either direction will not affect that determination. Thus, with the notable exception of "jury nullifiers,"[57] the Court will not likely be swayed by increasingly strong evidence that death-qualified juries are predisposed towards finding guilt.[58] An inclination of jurors

52. *See* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 30 CRIM. L. BULL. 51, 55–56 (2003); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984) [hereinafter Haney, *Examining Death Qualification*]; Craig Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619 (1994) [hereinafter Haney et al., *Modern Death Qualification*]; Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984) [hereinafter Haney, *On the Selection*].

53. *See Lockhart*, 476 U.S. at 178.

54. *Id.* at 173 ("[W]e will assume for purposes of this opinion that the studies are methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries.").

55. *Id*. at 170 (quoting Witherspoon v. Illinois, 391 U.S. 510, 517 (1968)).

56. *Id*. at 178 (quoting Wainwright v. Witt, 469 U.S. 412, 423 (1985)).

57. *See* Morgan v. Illinois, 504 U.S. 719 (1992). A jury nullifier is an individual whose vote is predetermined by personal view, regardless of juror instructions or the law itself, thus "nullifying" the jury process. *See id.*

58. *See* Bowers & Foglia, *supra* note 52, at 56; Haney, *Examining Death Qualification*, *supra* note 52; Haney et al., *Modern Death Qualification*, *supra* note 52; Haney, *On the Selection*, *supra* note 52.

towards conviction is acceptable to the Court so long as the jurors are able and willing to apply the law.[59] While such reasoning may satisfy courts, however, a jury's inclination towards conviction seems tremendously unfair to a defendant whose life potentially hangs in the balance. Since the Court has resisted dictating a specific manner for impaneling a jury,[60] the principle that death-qualifying a jury prior to the guilt phase of the trial is constitutional does not preclude lower courts from applying alternative approaches to jury selection in the pursuit of greater fairness.[61]

Despite the Supreme Court's assertions otherwise, various studies have demonstrated that the characteristics of death-qualified juries are markedly different demographically from other juries. Furthermore, death-qualified juries are apparently more prone to finding guilt, have higher conviction rates than other juries, and are clearly favored by many prosecutors in their pursuit of convictions.[62]

A death-qualified jury is different demographically from a regular jury, particularly with regard to African Americans and women.[63] A demographic disparity between death-qualified juries and the general public is not surprising, however, given the disparity between different demographics regarding their death penalty views. According to the most recent Gallup Poll, there are substantial differences between whites and blacks in their support for capital punishment.[64] The data shows that

59. *See Lockhart*, 476 U.S. at 178.

60. *See id.* at 180.

61. Significantly, the decision in the present case, *United States v. Green*, 343 F. Supp. 2d 23 (D. Mass. 2004), was justified by issues of judicial economy and by the difficulty of impaneling a diverse jury. *See id*. at 30. The court chose its unique approach of impaneling two separate juries without needing to reach the question of conviction-prone juries. *See id*. at 31.

62. *See* Mike Allen et al., *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715 (1998); Haney, *Examining Death Qualification*, *supra* note 52; Haney et al., *Modern Death Qualification*, *supra* note 52; Haney, *On the Selection*, *supra* note 52; *infra* note 116. Several qualitative studies have also found that jurors who were exposed to the potential punishment during jury selection had a propensity to believe the subtext of the voir dire was about appropriate punishment, rather than guilt or innocence. *See* Cochran, *supra* note 10; Maury Albon Hubbard III, Note, Lockhart v. McCree*: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional*, 66 N.C. L. REV. 183, 197 (1987). However, this concern has not received as much discussion as the concerns explained in the main text.

63. ROGER HOOD, THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE 149 (3d ed. 2002); *see also* Cochran, *supra* note 10, at 1445. Death penalty juries are often underrepresented by women and African Americans. *See* HOOD, *supra*, at 149.

64. Joseph Carroll, *Americans and the Death Penalty: Gallup Reviews Public Opinion on the Death Penalty in Wake of Scott Peterson Case*, The Gallup Organization (Dec. 15, 2004), *at*

71% of whites support the death penalty, compared with only 44% of blacks.[65] This stark difference may be attributed to the ongoing debate about the overrepresentation of blacks on death rows across the country.[66] The Bureau of Justice Statistics reports that there were 3374 prisoners on death row in 2003, of whom 1418 were black and 1878 were white.[67] Blacks represent 42% of the inmates on death row, but only 12% of the nation's population.[68] While the contrast is not as sharp between genders, men are much more likely to support the death penalty than are women.[69] More than seven in ten men (74%) support the death penalty, compared with 62% of women.[70] A 1994 study reported that while minorities accounted for 18.5% of the people in California jury pools the study examined, they represented 26.3% of those excluded from jury panels through the death-qualifying process.[71] A study conducted in 1980 and 1981 demonstrated that at that time, death-qualification would exclude only 20.7% of whites but 55.2% of blacks.[72]

Perhaps as a consequence of the different demographics, death-qualified juries are also more likely to consider the defendant guilty at the outset of the trial.[73] "In telephone surveys of registered voters regarding conclusions they had drawn about actual, ongoing capital trials in the interviewees' county, 'death-qualified subjects were more likely to say they thought the defendant was probably guilty' (48.3% versus 37.4%)."[74] Furthermore, "death qualification would exclude 54.2% of those who thought the defendant was probably not guilty, but only 22.8% of those who thought the defendant was probably guilty."[75]

http://www.gallup.com/poll/content/login.aspx?ci=14371. Results are based on telephone interviews with 6498 national adults, aged 18 and older, conducted Feb. 19–21, 2001; May 10–14, 2001; Oct. 11–14, 2001; May 6–9, 2002; Oct. 14–17, 2002; May 5–7, 2003; Oct 6–9, 2003; May 2–4, 2004; and Oct. 11–14, 2004. For results based on the total sample of national adults, one can say with 95% confidence that the maximum margin of sampling error is ±2 percentage points. *Id.*

65. *Id*.

66. *Id*.

67. *Id*.

68. *Id.*

69. *Id.*

70. *Id*.

71. Haney et al., *Modern Death Qualification*, *supra* note 52, at 630.

72. Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 386 (1982).

73. Susan D. Rozelle, *The Utility of* Witt*: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 692 (2002).

74. *Id.* (quoting Jacoby & Paternoster, *supra* note 72, at 386).

75. *Id*.

Another survey concluded that whether because of race or merely the alignment of one's social views, there are significant differences in the attitudes of jurors who are death-qualified and those who are not towards concepts of how the justice system should work.[76] Regarding the maxim of "innocent until proven guilty," 55.1% of the death-qualified subjects agreed that "[p]eople accused of crimes should be required to prove their innocence," compared with 30.6% of the excludables.[77] In terms of deference afforded the attorneys, 73.3% of the death-qualified respondents agreed that "[d]efense attorneys have to be watched carefully, since they will use any means to get their clients off," compared with 54.3% of the excludables.[78] The statement that "[t]he plea of insanity is a loophole allowing too many guilty people to go free" prompted 63.8% of the death-qualified to agree, but only 37.5% of the excludables felt the same.[79] Furthermore, although 79.4% of the excludables agreed that "[i]t is better for society to let some guilty people go free than to risk convicting an innocent person," a mere 51.4% of the death-qualified concurred.[80] In short, the bulk of the existing data suggests that Justice Marshall's concerns in his *Lockhart* dissent were valid—death-qualified juries are "more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions."[81] Not surprisingly, such unique juries are also more prone to "guilty" verdicts.[82] According to one analysis, the death-qualification process produces juries that, in comparison to the normal population, have "a 44% increased probability . . . to vote for conviction."[83]

Finally, and perhaps most disturbing, researchers have suggested that prosecutors sometimes seek the death penalty in cases unlikely to receive that degree of punishment merely in the hopes of impaneling a death-qualified jury, thus enhancing their likelihood of prevailing in the guilt

76. Rick Seltzer et al., *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 HOW. L.J. 571, 605 (1986).

77. *Id*.

78. *Id.*

79. *Id.* at 606.

80. *Id.* at 605.

81. *Lockhart*, 476 U.S. at 188 (Marshall, J., dissenting) (citing Grigsby v. Mabry, 569 F. Supp. 1273, 1283, 1293, 1304 (E.D. Ark. 1983)); *see supra* note 47 and accompanying text.

82. Cochran, *supra* note 10, at 1444. Evidence suggests that white, male, death-qualified jurors were more likely to convict in sample cases than were African Americans or Hispanics and one and a half times more likely to sentence a defendant to death. *Id.*

83. Allen et al., *supra* note 62, at 725.

phase of the trial.[84] While what prosecutors *believe* is certainly not determinative as to whether a death-qualified jury is actually more likely to find guilt—after all, some prosecutors might also believe that a rabbit's foot in their pocket increases the chance of conviction—it does lend additional credence to the theory that such a jury is indeed more likely to convict. In a controversial training tape made in the early 1980s and circulated within the Philadelphia District Attorney's office, an assistant district attorney urged prosecutors to seek the death penalty in as many cases as possible.[85] That way, according to the tape, they then get the benefit of death-qualifying jurors and can remove with preemptory challenges even those who express vague or minor concerns about imposing the ultimate sanction.[86] In so doing, they could strike most minorities from the jury.[87] Not coincidentally, the New York Times Magazine deemed Philadelphia's district attorney America's "deadliest D.A." in the mid-nineties in response to the city's high frequency of pursuing the death penalty.[88]

Persuasive as this evidence might be, it is still unlikely that the Supreme Court will reconsider its ruling on the constitutionality of death-qualifying the guilt jury unless it becomes clear that jurors are so affected by their views that they are unable to apply the law.[89] However, this data might nevertheless affect the obligations of a court[90] even if it does not foreclose a specific outcome. In the pursuit of fairness, a court possesses the discretion to consider this data in determining how to best approach the jury selection for a capital trial.

84. Cochran, *supra* note 10, at 1444; Hubbard, *supra* note 62, at 197. The "Court declined to address . . . the possibility that prosecutors would seek the death penalty, in cases in which they otherwise would not, to obtain the benefit of trying their cases before more conviction-prone, death-qualified juries, and would then waive the death penalty after obtaining the desired conviction." Cochran, *supra* note 10, at 1444. This decision was made despite the defendant's argument that this was a common practice in Arizona, because the prosecution "did not 'waive' the death penalty in [this] case." *Id. See also* Buchanan v. Kentucky, 483 U.S. 402, 420 n.19 (1987).

85. David Lindorff, *The Death Penalty's Other Victims*, Salon.com (Jan. 2, 2001), *at* http://dir.salon.com/news/feature/2001/01/02/death_penalty/index.html?pn=2.

86. *Id*.

87. *Id.*

88. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 22, *available at* 1995 WLNR 3808980.

89. *See Lockhart*, 476 U.S. at 178.

90. *See* United States v. Green, 343 F. Supp. 2d 23, 35 (D. Mass. 2004) ("While this decision does not rest on the conviction-prone juror problem, and its constitutional implications, it surely affects my obligations as a trial judge. Death penalty qualification hinders my responsibility to facilitate to the best of my ability, a fair trial on guilt.").

C. The Operative Statute: 18 U.S.C. § 3593

Before examining *United States v. Green*, one must note that unlike many of the cases that have shaped the jurisprudence regarding death-qualification and bifurcated trials, *Green* arises under federal rather than state law.[91] Consequently, a federal statute rather than common law mandates when a unitary jury is required and under what circumstances a bifurcated jury is permissible. Whereas state laws regarding the propriety of unitary versus two-jury systems vary from state to state, and the Court has declined to interfere on behalf of either approach,[92] Congress has expressly set forth the use of a unitary jury in a capital trial. The statute mandates that the sentencing hearing be conducted "before the jury that determined the defendant's guilt."[93] However, according to § 3593(b)(2), a unitary jury is not required if "the jury that determined the defendant's guilt was discharged for good cause"[94] or if it is a resentencing hearing after the original jury has been dismissed.[95] Since a unitary jury is otherwise required under the federal statute, the crux of the issue thus rests on the meaning of good cause or the *Green* court's interpretation of the statute as allowing a defendant to waive the requirement of a unitary jury.[96] This Note's focus is not on the *Green* court's potentially suspect interpretation that such a right to waiver exists in the statute, but rather on the solutions set forth by the court based on that assumption. Consequently, the solutions discussed below can be adapted to cases arising under state law as well, even if the *Green* court's analysis of 18 U.S.C. § 3593 does not ultimately survive appeal.

III. *UNITED STATES V. GREEN*

In a capital case brought pursuant to racketeering charges under the RICO statute,[97] the defendant—accused of murder in connection with a crack cocaine and marijuana distribution ring known as the "Esmond

91. Federal law has been conspicuously absent among the *Witherspoon* and *Gregg* progeny in part because of its relative absence with regards to capital punishment. The 2001 execution of Oklahoma City bomber Timothy McVeigh was the first application of the federal death penalty in over thirty-five years. *See* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 Through October 2002*, 18 AM. U. INT'L L. REV. 651, 727 (2003).

92. *See supra* notes 44–45.

93. 18 U.S.C. § 3593(b)(1) (2004).

94. *Id.* § 3593(b)(2)(C).

95. *Id.* § 3593(b)(2)(D).

96. *Id*.

97. United States v. Green, 343 F. Supp. 2d 23 (D. Mass. 2004).

Street Posse"—challenged impaneling a death-qualified jury to hear the trial's guilt phase.[98] The court responded by issuing a Memorandum and Order in July 2004,[99] setting forth two potential solutions: ("Method One") impanel a unitary jury and the maximum number of alternates to hear the guilt phase without death-qualifying any of them, then death-qualifying that jury and—as necessary—the alternates *after* a guilty verdict but *before* the punishment phase; or ("Method Two") decide at the outset to impanel one jury, then, after a guilty verdict, discharge that jury and impanel a second, death-qualified jury specifically for the punishment phase.[100] After reviewing subsequent briefing by both parties,[101] the court selected Method Two: to impanel, if necessary, two separate juries for the bifurcated phases of the trial.[102]

The *Green* court set forth several reasons in reaching its conclusion.[103] First, the court interpreted 18 U.S.C. § 3593 as not requiring two hearings before a single jury, but merely codifying the defendant's right to a bifurcated hearing.[104] The court also suggested that fairness could be a factor in satisfying the good cause requirement to dismiss the jury.[105] The court acknowledged, but did not necessarily endorse, the defense's contention that "evidence of systematic error" in administering the death penalty rises to the level of good cause for impaneling a separate jury.[106] However, rather than founding its opinion upon the assumption that the good cause requirement was met in this case, the court relied on the defendant's waiver of his right to a unitary jury.[107] Thus, the question of when a unitary jury—in the *absence* of a

98. *Id.* at 26.

99. United States v. Green, 324 F. Supp. 2d 311, 331 (D. Mass. 2004).

100. *Id.*

101. The defense rejected the first option and briefed in support of the second. The prosecution opposed both methods. *See Green*, 343 F. Supp. 2d at 30.

102. *Id.* at 35.

103. *Id.* at 33–35.

104. *Id.* at 30.

105. *Id.* at 35 ("It provides an additional 'good cause' justifying bifurcating the juries in the trials of the capital defendants before me.").

106. *Id.* at 30.

107. *Id.* at 30–31 ("[B]y objecting to death-qualifying the guilt jury, defendants are waiving the provisions of § 3593 that arguably oblige the Court to hold guilt and punishment trials before the same jury."). The court further ruled that such a waiver is permissible: "If the right to appeal from a sentence can be waived along with a long list of other rights, surely § 3593 rights can be waived." *Id.* at 31 (citing United States v. Teeter, 257 F.3d 14 (1st Cir. 2001)). However, whereas the right to an appeal is purely the right of the defendant, one might argue that the right to a unitary trial is a right shared with the prosecution. The *Green* court failed to address this concept.

defense waiver—can actually be supplanted for good cause by a two-jury structure in a federal capital trial is left largely unanswered.[108]

The court also interpreted the statute as suggesting that to whatever extent it *might* require a unitary jury, that right can be waived—and *was* waived here—by the defendant.[109] Further, it noted that the Supreme Court has not held that the Constitution requires a unitary jury nor that failing to death-qualify the liability jury infringes upon the prosecution's rights.[110] Finally, the court asserted that the government's concerns about impartiality of the liability jury can be adequately satisfied through "probing and exhaustive"[111] voir dire and that concerns about witnesses testifying in multiple proceedings can be easily remedied using videoconferencing, transcripts, and stipulations.[112]

The court never explicitly reached the question of skewing the jury to be more conviction-prone,[113] but instead based its decision on principles of judicial efficiency and the likely difficulties of assembling a jury given Massachusetts' unique demographics. Affording considerable weight to the expense of time and resources required to death-qualify a jury, the court reasoned that presumptively death-qualifying the jury is premature[114] and that "[i]t is entirely appropriate for this Court to avoid devoting such substantial resources to jury selection prior to the guilt phase when a 'not guilty' verdict . . . would render death-qualification

108. While the concepts developed in *Green* can be extended to state courts as well, in adherence to relevant state statutes, it is important to acknowledge the influence of 18 U.S.C.A. § 3593 in *Green*. The court gave little consideration to its initial option, after the defense rejected it, of impaneling a single jury but not death-qualifying it unless the jury returns a guilty verdict. *Green*, 343 F. Supp. at 31. Since the court was potentially reliant on the defense's waiver of its possible right to a unitary trial, *Id*., it dared not risk applying the first alternative which the defense deemed unacceptable, lest the court's judgment be vulnerable to possible appeal under § 3593. After all, if the defendant did not approve of the alternative, he could explicitly retract his implied waiver and assert his right to a traditional unitary trial.

109. *Green*, 343 F. Supp. at 31.

110. *Id*. at 26 ("[J]ust because death-qualifying the liability jury that may also hear the penalty phase does not offend a *defendant's* rights, does not mean its opposite: That the failure to death-qualify the liability jury (while death-qualifying the punishment jury) somehow undermines the *government's* rights."). Essentially, the court confined its interpretation of the pertinent law to allowing the prosecution to qualify the punishment jury and did not extend the interpretation beyond that minimal standard.

111. *Id*. at 31.

112. *Id*. at 33.

113. However, the court *did* briefly discuss the extensive data suggesting just that. *Id*. at 33–34. While not basing its decision upon that material, the court did cite the data suggesting a propensity for finding guilt as additional good cause justifying the bifurcation of the jury. *Id.* at 35.

114. *Id.* at 32.

unnecessary."[115] The court further supported its decision by citing the underrepresentation of African Americans in the jury venire in the Eastern Division of Massachusetts, "by as much as half their representation in the community."[116] The disproportionately small number of African Americans in the jury venire coupled with the large percentage of African Americans opposed to the death penalty would "de facto exclude all or most African Americans from a death-qualified jury."[117] In contrast to its extensive explanation for its departure from the standard unitary jury, the *Green* court did not elaborate on the relative strengths and weaknesses of the two methods proposed aside from noting that the defense rejected Method One.[118]

115. *Id*. at 33.

116. *Id*. The court stated:

> [S]tudies suggest that death-qualification leads to the exclusion of a disproportionate number of black and female jurors, especially in this Commonwealth. Defendant's preliminary data suggests that African-Americans are under-represented in the jury venire in the Eastern Division of Massachusetts, by as much as half their representation in the community—particularly that 7.8%–9.1% of residents in the Eastern Division of Massachusetts are in whole or in part African-American, that a significantly smaller percentage are included in the jury venire, that in the United States population 48% of black people (but only 22% of whites) oppose the death penalty, and that 45% of Massachusetts voters overall oppose the death penalty. Death-qualifying a jury could significantly deplete the already paltry number of minority jurors in the Eastern District.

Id. (citations omitted).

117. *Id*.

118. *Id.* at 23.

IV. ANALYSIS: BALANCING INTERESTS IN PURSUIT OF A BETTER SOLUTION[119]

The necessity of death-qualifying the sentencing jury is apparent, lest the presence of jury nullifiers render the imposition of the death penalty virtually impossible. It also makes sense that trying a defendant before a *truly* impartial jury, not already leaning towards conviction, is fairer. Even if a death-qualified jury is *capable* of applying the law, few would argue that it is preferable for a jury to enter the trial already leaning towards a party—particularly when that inclination is towards guilt. After all, a key tenet of American justice is "innocent until proven guilty." Thus, the question is whether it is possible to reconcile these two divergent interests while maintaining the benefits of a unitary jury.

This section begins by discussing the strengths and weaknesses of the unitary system and the other alternatives presented, followed by an explanation of why both options the *Green* court proposed were inadequate. Method Two, which the court chose, sacrifices the benefit of residual doubt, while Method One achieves a better balance of interests yet succumbs to a fatal flaw. Finally, a new modification of Method One is offered which, though still flawed, comes closer to achieving an ideal balance.[120]

119. For purposes of the analysis below, this Note assumes that the *Green* court correctly interpreted 18 U.S.C. § 3593 as providing for a defendant's waiver of a unitary trial without infringing upon the prosecution's rights. As the Supreme Court has done, this Note also assumes for the sake of discussion that the data presented suggesting a guilt predisposition for death-qualified juries is accurate, but still fails to rise to the level of unconstitutionally violating a defendant's rights. Nevertheless, courts may choose other approaches in assembling the jury according to their own discretion and the weight they choose to afford the concerns accompanying the unitary system. Lockhart v. McCree, 476 U.S. 162, 177 (1986). The fact that the unitary system is permitted does not necessarily mean it is the best or only approach. The principal thrust of the analysis, thus, is to determine which jury approach, if any, best satisfies the various diverging interests.

It is also worth noting that while the principal thrust of this Note is focused upon which juror selection method is ideal, the manner in which the court moved past the unitary system set forth in 18 U.S.C. § 3593 is still very significant. If the waiver by the defense is a prerequisite to altering the unitary structure, then the court will inevitably be at the behest of the defense. *See supra* notes 69–71 and accompanying text. However, if the court is actually able to alter the jury structure for good cause, it would enable a greater degree of discretion to the court in determining and applying the best solution possible.

120. While this Note is primarily focused on federal law, these principles are fairly universal in potentially applying to various states.

A. Strengths and Weakness of the Unitary System and Its Alternatives

The Supreme Court has held that the unitary system, even when the jury is death-qualified in advance, is constitutional.[121] Part of the rationale includes the advantages that the unitary system offers.[122] Those advantages include the notion that the jury that has "the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment,"[123] the potential benefit to the defendant of any residual doubt the jury still harbors postverdict,[124] and the judicial efficiency interest in not repeating the entire guilt phase for the benefit of the penalty jury.[125] Further, arguments citing factors such as the defendant's apparent remorse and the role of the victim posit that the cumulative impact of the guilt trial, like the concept of residual doubt, bears considerable influence upon the eventual verdict.[126] Still other arguments question the propriety of allowing jury that is not death-qualified to decide a capital case when the consequence is likely death, even if that jury is not directly responsible for the imposition of that sentence.[127] These ideas all weigh in favor of the unitary system.

121. *See supra* note 37.

122. *Lockhart*, 476 U.S. at 180–81.

123. *Id*. (quoting Rector v. State, 659 S.W.2d 168, 173 (Ark. 1983)).

124. *Id*.

125. *See* Bruce J. Winick, *Prosecutorial Preemptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 58 (1982). This concern was summarily dismissed as unconvincing by Justice Marshall in his *Lockhart* dissent: "[T]he State frequently would be able to avoid retrying the entire guilt phase for the benefit of the penalty jury. Stipulated summaries of prior evidence might, for example, save considerable time." 476 U.S. at 205 (Marshall, J., dissenting).

126. Whitnan J. Hou, *Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness*, 16 CAP. DEF. J. 19, 34–40 (2003). Jurors often consider the extent of remorse shown by the defendant and whether she accepted responsibility for her actions in later determining the verdict. *See id.* Similarly, jurors are influenced as well by an apparent lack of emotion. In one instance, a defendant laughed during the proceedings, openly engaged in flirtatious behavior with one of the jurors and was subsequently sentenced to death. *See id.* (citing Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560–63 (1998)). Discussing the benefits of a unitary jury in the context of re-sentencing cases in which a separate jury has been convened for sentencing alone, one solution presented was to permit the defense's involvement in preparing a guilt phase summary for the new jury. *Id.*

127. *See Rector*, 659 S.W.2d at 174 ("Finally, we perceive no answer to the practical objection . . . [of] what is to prevent a juror strongly opposed to capital punishment, in an effort to avoid feeling *any* responsibility for a death sentence, from choosing to hang the guilt-innocence jury by a vote for acquittal?"). Despite the *Rector* court's inability to answer this objection, however, it would seem that proper and thorough voir dire could accomplish the task of eliminating, at the very

As mentioned above,[128] however, the arguments against the unitary system—though perhaps not rising to a sufficient degree to render the practice unconstitutional—are considerable. Ranging from the potential exclusion of certain demographics[129] and a guilt-predisposition[130] to more basic concerns such as judicial efficiency,[131] there are ample reasons for pursuing an alternative system that can preserve the benefits of the unitary system while avoiding problems that a death-qualified jury might present.

The potential benefits of a unitary system, while significant, do not necessarily compensate for the disadvantages it also creates. For example, in *Lockhart*, Justice Marshall did not deny the value of residual doubt but afforded it little regard as an argument for a unitary jury: "Any suggestion that the current system of death qualification 'may be in the defendant's best interests, seems specious unless the state is willing to grant the defendant the option to waive this paternalistic protection in exchange for better odds against conviction.'"[132] Furthermore, residual doubt may not play as significant a role in capital sentencing as previously thought.[133] Many jurors were unable to distinguish between reasonable doubt and residual doubt, and many even took offense when asked whether during the sentencing phase they had entertained the idea that the defendant might be innocent.[134] Further, some states do not permit defense counsel to argue residual doubt during the penalty phase.[135] Consequently, as Justice Marshall suggested, the value of residual doubt is not so great that its loss cannot be adequately compensated for the benefits to the defendant that jury bifurcation might provide. Balancing the value of residual doubt against the value to a

least, those jurors who would be nullifiers, without rising to the same level as death-qualifying a jury.

128. *See supra* section II.B.

129. *Supra* notes 63–72 and accompanying text.

130. *Supra* notes 73–83 and accompanying text.

131. *Supra* notes 112–13 and accompanying text.

132. 476 U.S. 162, 205 (quoting Michael Finch & Mark Ferraro, *The Empirical Challenge to Death Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 69 (1986)).

133. Sundby, *supra* note 126, at 1579.

134. *Id*. at 1577; *see also* Hou, *supra* note 126, at 39. *But see* Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307, 312 (2001) ("Residual doubt, in fact, may be the strongest possible mitigating factor that a jury uses to determine the appropriate penalty for a capital defendant.").

135. *See, e.g.*, Frye v. Commonwealth, 345 S.E.2d 267, 283 (Va. 1986); Pignatelli, *supra* note 134, at 312 ("While some states have given residual doubt a prominent role in their sentencing schemes, Virginia has declined to do so.").

defendant in being tried before a *truly* impartial and racially diverse jury, the value of residual doubt seems lesser. Nevertheless, an ideal solution would provide for an impartial, diverse jury while still retaining the potential for residual doubt.

The judicial economy interest in not repeating the entire trial on guilt for the benefit of the penalty jury can be mitigated through the use of stipulations and summaries, and balanced by the greater efficiency in not having to presumptively death-qualify all capital juries.[136] Death-qualification adds substantially to the time required for a trial,[137] and, in the aggregate, courts could save considerable time by only death-qualifying sentencing juries when necessitated by guilty verdicts: time and money would be saved every time there is an acquittal. As with residual doubt, however, an ideal solution would combine the time-saving measure of only death-qualifying juries when necessitated by a conviction with the efficiency of having the sentencing jury present for the entire guilt phase. Such a solution would also incorporate unitary jury benefits of allowing the sentencing jury to experience the cumulative impact of the trial.[138]

Method Two, the method the *Green* court selected, which requires impaneling two juries to hear the separate phases of the trial, served to cure two problems—judicial efficiency and the otherwise inevitable exclusion of black and female jurors—while implicitly and consequentially resolving the problem of a jury's predisposition for guilt.[139] Regarding the racial composition of the jury, the Supreme Court has held that the inadvertent exclusion of certain demographics based on shared ideologies does not violate a defendant's rights.[140] However, as the *Green* court noted,[141] death penalty ideologies are so closely aligned

136. This factor however may be weighed against the simple fact that capital trials represent a small minority of the total trials conducted: of the 92,134 criminal defendants tried in U.S. district courts in 2003, only 340 were charged with first degree murder, making them eligible for the death penalty. Administrative Office of the U.S. Courts, Judicial Facts and Figures, tbl.3.4 (2003), *at* http://www.uscourts.gov/judicialfactsfigures/table3.04.pdf. Consequently, one can argue that any judicial economy arguments should be secondary given the small share of the judicial caseload to which this applies.

137. United States v. Green, 324 F. Supp. 2d 329 (D. Mass. 2004).

138. *Supra* note 126 and accompanying text.

139. Not only did the *Green* court allude to this concern, *see* 343 F. Supp. 2d 23, 35 (D. Mass. 2004), but by resolving the problem of demographic under representation, the problem of a guilt predisposition is also resolved.

140. *See supra* notes 38, 39 and accompanying text; *see also* Buchanan v. Kentucky, 483 U.S. 402, 420 (1987).

141. 343 F. Supp. 2d at 33.

with race in Massachusetts that the "inadvertent" exclusion of minorities would actually be a virtually inevitable exclusion. It was also a valid concern that considerable resources might be wasted by going through the expense and effort of death-qualifying the first jury when the verdict might be an acquittal.[142] These two concerns were satisfied by Method Two.

Although Method Two facially satisfies the interest in avoiding possibly unnecessary expense in death-qualifying the jury, while also allowing the court to impanel a racially diverse jury for the guilt phase, this solution sacrifices many of the benefits put forth to justify a unitary jury—residual doubt, not needing to recreate the guilt phase for a new jury, and the trial's cumulative impact—and essentially chooses one set of benefits to the exclusion of another. Rather than have the same jury shouldering the sentencing responsibility that instinctively ought to accompany determining guilt,[143] the court would dismiss the guilt jury without allowing it to take on that additional burden. In terms of residual doubt, the penalty jury is rendered the same as a jury in a resentencing proceeding[144] since it cannot make the sort of firsthand observations that a jury present for the entire trial typically would. Factors that could influence a unitary jury, such as the defendant laughing during testimony against him or demonstrating great sorrow and remorse, would be hidden from the sentencing jury. Further, while judicial economy is advanced by not unnecessarily death-qualifying a jury in advance, that interest is actually exacerbated in the event of a guilty verdict. Not only does a jury still need to be death-qualified, but the additional burden of repeating significant aspects of the guilt phase would then exist. Thus, in terms of judicial economy, the court is gambling: time and money will be saved if there is an acquittal, but a greater amount of those resources must be expended in the event of a conviction.

The *Lockhart* Court quoted an Arkansas Supreme Court case in asserting: "'[T]he same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are

142. Here, the court noted that the defendant had several potential defenses, including the argument that the RICO statute did not even properly apply to the defendant. *See Green*, 343 F. Supp. 2d at 32. Of course, even without a clearly discernible defense, it seems elementary that a defendant is innocent until proven guilty in the absence of a guilty plea (in which case, this discussion is largely irrelevant).

143. *See supra* note 46.

144. *See supra* note 126.

necessarily interwoven.'"[145] The possible logic behind such an adamant belief that those who convict must also sentence may include the concern that, disassociated from the moral responsibility of also dictating the punishment, a guilt jury may not fully appreciate the gravity of its decision.[146] Although it may be aware of the possible consequences of a guilty verdict in a murder case[147]—the imposition of the death penalty—

145. Lockhart v. McCree, 476 U.S. 162, 180–81 (1986) (quoting Rector v. State, 659 S.W.2d 168, 173 (Ark. 1983)). The *Rector* court elaborated, in opposition to having a second jury hear the penalty phase:

> Such a second trial would be comparable to having the actors in a play, after the audience had left the theater, repeat their lines in a second performance for a few spectators in a nearly empty house. Such repetitive trials could not be consistently fair to the State and perhaps not even to the accused. Other suggested modifications have included (a) the empanelling of a second jury at the outset, to listen to the actual trial, and (b) the selection of alternate jurors to replace, in the penalty stage of the trial, those jurors who could not vote for the death penalty in any circumstances. The difficulty with both those schemes for shuffling jurors in and out of the jury box is the separation of certain jurors' responsibility for the verdict from their responsibility for fixing the penalty. The two must go hand in hand, else the common law jury system no longer exists.

Rector, 659 S.W.2d at 173–74 (citing Joseph A. Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-cross-section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595 (1982)).

146. Some arguments challenging death-qualifying a juror before the guilt phase cite as problematic the discussion of potential penalties before the defendant is convicted:

> Several qualitative studies found that jurors who were exposed to the potential punishment during jury selection have a propensity to believe that the subtext of the voir dire is that the trial is not about whether the defendant committed the underlying crime but about what punishment the defendant should receive.

Green, 343 F. Supp. 2d at 34 (citing Darryl Green & Branden Morris, Supplemental Memorandum on the Issue of Impaneling Separate Juries (filed Sept. 10, 2004, at p. 6)).

> Many persons called for jury duty have never been in court prior to their voir dire, and have never been before a judge sitting in her official capacity. In voir dire they are repeatedly asked by the judge if they can "follow the law" and impose a death sentence. Although this question on its face inquires into a juror's capacity to return a death sentence, jurors are likely to infer that a death verdict is actually required by the law, at least under some, as yet unspecified, circumstances. That is, it gets the juror to think "Oh, I get it. They're asking me if I can kill this guy. Yeah, I'll do that if that's what I'm supposed to do."

John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1231–32 (2001) (citing Hirschorn's Memorandum in Support of Motion to Submit Jury Questionnaire, 13 CRIM. PRAC. REP. (P & F) 318, 318–19 (Aug. 11–25, 1999)). However, in some ways the introduction of possible penalties could have a sobering effect upon the jury, which serves to benefit the defense, reminding jury members of what is at stake and the gravity of their decision.

147. Whereas a potential jury is unlikely to know the penalty for a noncapital conviction, they likely know about the looming possibility of the death penalty when first-degree murder is the charge. The lack of death-qualifying a jury might thus lead them to believe that a guilty verdict would directly lead to the imposition of the death penalty. In short, jurors may, in ignorance and in

the guilt jury can displace its sense of responsibility for the defendant's future execution by reasoning that it only convicted: it was the *other jury* that sentenced him to die.[148] Similarly, the penalty jury is compelled to accept the verdict given it, shouldering the moral burden[149] of sentencing without having reached its own independent, beyond-a-reasonable-doubt belief of the accused person's guilt.[150] In this regard, the result could

the absence of any information to the contrary, assume the death penalty as the default punishment—to whatever extent that may affect their appraisal of guilt or innocence. *See supra* note 62.

148. This concept is akin in some ways to a technique used in firing squad executions. *See* L. KAY GILLESPIE, THE UNFORGIVEN: UTAH'S EXECUTED MEN 21–23 (2d ed. 1997). Some members of the firing squad are provided with blanks while others are provided live ammunition. All members are then instructed to aim and fire. Not knowing whether they had live ammo or a blank, each member of the firing squad is able to rationalize that they are not personally responsible for the execution. Similarly, a guilt jury not hearing the penalty phase is able to rationalize that even if the defendant is sent to his death, it is the doing of the penalty jury and not themselves. Consequently, this possibility not only suggests that the jury may not properly appreciate the gravity of their decision but also suggests that, whereas death penalty opponents could not render a guilty verdict when that verdict would certainly lead to the death penalty, under this scenario they can displace that concern onto the shoulders of the sentencing jury.

149. However, some studies suggest that even during the sentencing phase, jurors try to subvert their personal sense of moral responsibility. *See* Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995).

> [D]eath penalty jurors resemble the subjects in the famous Milgram experiments. Like those subjects, the average death penalty juror is placed "in a novel and disorienting situation that pose[s] for him a distressing moral dilemma." And, as in the Milgram experiments, the juror in a death penalty case may seek "a professional, symbolic interpretation of the situation to reorient him"—in short, the "mystifying language of legal formality" may lead the juror to conclude that the sentencing decision falls outside the scope of the juror's personal moral responsibility, and may thereby cause the juror's "moral sense to be distorted."

Id. at 1137 (quoting Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305).

150. Various qualitative studies have suggested that jurors in a capital proceeding endure significant personal emotional turmoil in reaching their decisions. *See, e.g.*, William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 652 (2004) (stating that 60.2% of jurors described the experience of serving on the death penalty jury as an emotionally upsetting experience); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000). To assist jurors in coping with the stress of jury duty, some courts are including a debriefing session with trained court personnel, psychologists, or social workers:

> Sitting on the jury in a capital case can be an extremely traumatic experience for many people. Jurors often experience psychosomatic symptoms, such as headaches, during deliberation as an expression of resentment of being put in such a position or from a sense of entrapment. Some jurors may rely on intuition or a "gut feeling" during sentencing. Others invoke God, the Bible, or religious visions to relieve themselves of the psychological burden at hand.

very well be a more heightened, somewhat warped version of residual guilt. Rather than possessing some residual doubt from the trial, the sentencing jury may possess doubt as to the ability of its predecessor jury to correctly find guilt. Whereas courts consider traditional residual doubt as a good thing—a safety valve of sorts reflecting any uncertainty on the part of jurors that they "got it right"—this secondary type of doubt would be less healthy judicially, serving merely to undermine the verdict that has already been reached without any legitimate basis.[151]

The absence of traditional residual doubt would present the court with somewhat of a quandary. On one hand, the lack of traditional residual doubt can be addressed by presenting a summary of the proceedings, compiled with the input of defense counsel.[152] This practice, however, may inadvertently open the door to increased skepticism of the prior verdict and the secondary type of doubt described above, resulting in a virtual retrying of the case during the sentencing phase. However, judicial attempts to stymie this by excluding the summary of the guilt phase would, conversely, deny the defendant of the potential benefit of residual doubt.[153] Even in states where arguing residual doubt is prohibited, studies nevertheless suggest that jurors' residual doubt, even independent of any express argument, can be a very significant factor.[154] As previously stated, an ideal solution would accommodate the potential benefit of residual doubt.

Cochran, *supra* note 10, at 1447 (citing ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? 148 (2000)); *see also* Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909 (2003).

151. The doubt would consist not of, "maybe I was wrong," but rather, "what if the last jury was wrong, and he's actually innocent?" This concern, however, would not be derived from any actual knowledge of the case, but rather, a lack of confidence in other jurors.

152. *See supra* note 126. This alternative has been proposed for resentencings. *See* Hou, *supra* note 126, at 34–40.

153. Of course, as Justice Marshall suggested in his *Lockhart* dissent, this need not be a paramount concern if the defendant is given the choice of a unitary or bifurcated jury and chooses the option he thinks will benefit him the most. Lockhart v. McCree, 476 U.S. 162, 205 (1986) (Marshall, J., dissenting). Further, while some states do not permit the arguing of residual doubt during the sentencing phase, significant data exists suggesting that jurors nevertheless are influenced by their impressions accrued during the guilt phase. *See* Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 371 (2003); *see also* Hou, *supra* note 126, at 34 ("Studies have shown that the demarcation between the guilt phase and the sentencing phase created by bifurcation more resembles a sieve than a brick wall. Juries are incapable of forgetting the guilt phase proceedings and relying only on the information presented in the penalty phase to reach their sentences.") (citing Sundby, *supra* note 126).

154. *See* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1987–88).

While solutions have been proposed to avoid repeating the guilt trial for the purposes of sentencing—such as videoconferencing, transcripts, and stipulations[155]—those solutions do not provide the same cumulative experience that the trial as a whole does. Jurors would not have the same opportunity to observe the defendant's demeanor during trial[156] and other intangible elements—their general impression of the defendant, how sympathetic witnesses may have been, and so forth—that might affect the sentence they impose. Instead, these proposed solutions provide a very limited replacement for actual trial observation. Consequently, it seems that the only way for a sentencing jury to have the experience described is to actually sit through the entire guilt phase as well, whether as a unitary jury or a bifurcated jury wherein the penalty jury has already been convened. Significantly, this latter technique was employed by a trial court in *People v. Carpenter*.[157]

In *Carpenter*, the court impaneled two juries concurrently, designating one as the guilt jury and death-qualifying the other to serve for the sentencing phase.[158] Both juries attended the trial in its entirety.[159] The defendant challenged this approach on grounds that the very presence of the sentencing jury predisposed the initial jury towards a finding of guilt.[160] Though this argument lost on appeal and the trial court's approach was upheld,[161] the method of calling two juries concurrently is still flawed in some of the same ways the *Green* court's approach is flawed. While the problems of residual doubt and repetition of much of the guilt phase are ameliorated by the approach, the concept that the jury that convicts should also sentence is not satisfied.[162] Furthermore, this approach is void of any benefit of greater judicial efficiency. Instead, judicial economy is further strained by such an approach given the need of impaneling a potentially unnecessary sentencing jury in advance so it can observe the guilt phase, while also

155. *See supra* note 112 and accompanying text.

156. *See supra* note 126 and accompanying text.

157. 935 P.2d 708, 726–27 (Cal. 1997).

158. *Id*.

159. *Id*.

160. *Id*.

161. The court found that even if the presence of the sentencing jury had the alleged effect, the defendant had requested a bifurcated proceeding and could have withdrawn his waiver of a unitary jury before the commencement of the trial if he had so desired. *Id*. at 727.

162. In fact, it would seem that this problem can only be met by a unitary jury since the very existence of a bifurcated jury signifies that the duties of finding guilt and sentencing are divided between two separate juries.

going through a second, non-death-qualifying process to impanel a jury for the guilt phase. Additionally, this approach may be problematic for courtrooms designed to seat only one jury. An approach that enables a jury to sit for the guilt phase without being death-qualified, then uses that same jury for the sentencing phase without infringing the government's right to death-qualify would be a superior option.

B. The Superiority and Failure of the Green *Court's Method One*

While Method Two was an imperfect solution, it was not the only solution offered by the *Green* court. Method One—impaneling a single jury and the maximum number of alternates, conducting the first phase of the trial, and then death-qualifying the jurors in the event of a guilty verdict—seems to solve many of the problems faced by a traditional unitary jury without raising the new problems that a bifurcated jury presents.[163] Any concerns of a predisposition toward finding guilt or the inability to field a jury that includes minorities would be solved since the guilt phase jury would not be death-qualified. By the same token, judicial economy would be served since death-qualifying would only take place if necessary following a guilty verdict. Concerns of residual doubt would be eradicated since the same jury would be determining the sentencing, and replacement jurors added during the death-qualification process would be culled from the pool of alternates who had been present for the entire trial. Further, in contrast to the other approaches put forth, largely the same jurors who rendered the initial verdict would also shoulder the responsibility of determining the sentence. Of course, this is assuming that the majority of jurors survive the death-qualification process. In the event that the subsequent death-qualifying process is unable to field a sufficient number of jurors to hear the penalty phase,[164] the default could be to convene a new jury for purposes of the penalty phase only—essentially identical to Method Two, which, though flawed, is still preferable to a traditional unitary approach.[165] Despite its apparent

163. This concept has existed, but not been utilized, for more than twenty years. *See* Rector v. State, 659 S.W.2d 168, 174 (Ark. 1983).

164. This is a valid concern if we accept the difficult demographics faced in some jurisdictions such as Massachusetts. *See supra* notes 39 and 116.

165. Some difficulty may arise if this possibility is not clearly set forth at the outset of the trial, potentially risking a mistrial. However, this could easily be stipulated in advance.

superiority,[166] however, Method One has three discernable flaws, one of which is insurmountable.

Two initial concerns regarding this option are that alternate jurors added to the jury postverdict may in some ways be subservient to the will of the jurors who were on the jury that rendered the original guilty verdict,[167] and that some of the alternate jurors added to the panel postverdict may not share in that verdict since they were not privy to deliberations. The first concern could be addressed through clear jury instructions at the outset of sentencing deliberations.[168] The second concern could potentially be resolved via voir dire,[169] but might nevertheless lead to a more aggravated degree of residual doubt and, consequently, a leaning towards life imprisonment rather than death.

A third concern that arises under this approach, however, cannot be as readily dismissed. Specifically, the ability of jurors to truthfully answer questions regarding their attitudes towards the imposition of the death penalty are inevitably skewed when there is a specific defendant in mind. Jurors being questioned about their attitudes towards the death penalty at the outset of a trial are able to answer in the abstract. "In the abstract," they do not support the death penalty, but they *could* impose it given certain circumstances. In the aftermath of a trial and subsequent guilty verdict, however, any claims to answering "in the abstract" seem absurd. Potential sentencing jurors would have a very specific individual in mind: the defendant.[170] As a result, the questioning—regardless of the vagueness and abstractness of the questions asked[171]—would be tantamount to asking the jurors: "Would you sentence *this* defendant to

166. The defendant's reasons for rejecting this option are not set forth in *Green*. However, one can surmise that the court likely discounted this option after the defense's refusal because of the court's reliance upon the defense's waiver of a unitary jury under 18 U.S.C. § 3593. *See supra* note 108 and accompanying text.

167. "No one knows what occurs in the jury room but the jury itself, and the jury is not accountable to any higher power." Cochran, *supra* note 10, at 1443.

168. However, as seen in the *Gregg* Court's emphasis on a bifurcated trial (because jurors, despite instructions to the contrary, would likely be unable to disregard prejudicial materials presented purely for sentencing purposes), instructions to a jury cannot be expected to overcome inherent human nature and behavior. *See* Gregg v. Georgia, 428 U.S. 153, 191 (1976).

169. This would require dismissing any jurors who disagreed with or seriously doubted the guilty verdict.

170. No published studies have been conducted regarding this phenomenon. In the absence of quantitative data, this is ultimately speculation. However, the inferences are fairly common sense.

171. It seems a logical inference that instructing the jurors to answer in the abstract, rather than specifically about the defendant, would be no more successful than instructing jurors to disregard prejudicial sentencing evidence presented in a nonbifurcated trial, pre-*Gregg*.

die?" The jurors who survive the death-qualification process would have already professed their willingness to impose the death penalty upon *that specific individual*, rendering death a foregone conclusion. Echoing *Witherspoon*'s declaration some thirty-five years ago, the court must not "entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death."[172] The result of death-qualifying the jury after the guilt phase would be precisely that.

C. A Proposal of a Better Option

Perhaps the best approach to balancing the interests of the court, prosecution, and defense is a modification of Method One, the last option discussed. As explained,[173] impaneling a single jury and death-qualifying it after the guilt phase appears to solve many of the problems faced by a traditional unitary jury and avoids raising the problems a bifurcated jury presents, yet it also succumbs to an insurmountable obstacle by convening a tribunal foreordained to impose the death penalty on the specific defendant. The proposed modification would entail asking the death-qualification questions of the jury and the maximum number of alternates without actually striking jurors from the guilt panel. This would take place before the guilt phase begins, but after initial selection of the jury. The information is acquired from the jurors, but nothing is immediately done with it. Instead, the information is sealed away for the duration of the guilt phase. In the event of a conviction, the answers recorded in advance would then be used to appropriately modify the existing jury. Non-death-qualified jurors who sat for the guilt phase would be released from the panel and replaced by alternates who *are* death-qualified. The result would be a non-death-qualified jury hearing the guilt phase, proceeded by a death-qualified jury that has experienced the entire trial sitting for the sentencing phase. That jury, now likely a mix of original jurors and alternates, has had the opportunity to observe the defendant for the entire duration of the trial and is privy to any residual doubt that may exist.

In the possible event that not enough jurors are left once the death-qualification criteria have been applied,[174] the court could call an entirely new sentencing jury: again, as with the original Method One, the default

172. Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).

173. *See supra* notes 164–72 and accompanying text.

174. This potential problem can be addressed by including as many alternate jurors as possible.

would essentially be Method Two. This proposed solution is identical to Method One, except for the sequence of when the death-qualification questions are asked. Thus, it would be possible for the jurors to answer the death-qualification questions without having the specific defendant in mind, avoiding the fatal error that derails this option in its original form.[175] Instead of asking jurors their views on the death penalty postconviction, when they know specifically who they are going to be sentencing, jurors would be asked *before* the guilt phase. Since the actual composition of the guilt phase panel has already been decided and will not be affected by the jurors' responses, this solution can likely evade the primary concerns of racial underrepresentation and the accompanying inclination towards guilt since those opposed to the death penalty could still be present on the guilt-phase jury. While jurors would still be exposed to the death-qualification questions in advance of the guilt phase, the primary concerns are remedied.[176]

It would be necessary to death-qualify the jury only *after* impaneling it through traditional voir dire—the normal questioning that would take place in a noncapital murder case. To conduct the death-qualification before selecting the jury would reveal the jurors' death penalty beliefs to the prosecution. The prosecution might then target those jurors, exercising preemptory challenges to exclude those individuals categorically opposed to the death penalty. The result would be the equivalent of a death-qualified jury, save the manner in which it is obtained. However, so long as the jury has already been seated and voir dire completed beforehand, the prosecution—and for that matter, the defense—would be unable to use the information gleaned via the death-qualification questions to shape the composition of the jury for the guilt phase. The result is a jury formed through standard voir dire, lacking the predisposition for guilt found in a death-qualified jury.

Additionally, death-qualifying only those jurors already impaneled, rather than the entire jury pool, serves judicial economy as well. Instead of the tremendous expense of resources the *Green* court sought to avoid,[177] the expense would be minimal and confined to the twelve jurors and the alternates. At worst, if not enough jurors and alternates remain after applying the death-qualification information, the default of

175. *See supra* notes 171–72 and accompanying text.

176. Some have argued that merely being exposed to potential sentencing predisposes an assumption of guilt. *See* Cochran, *supra* note 10; Hubbard, *supra* note 62, at 197.

177. *See* United States v. Green, 343 F. Supp. 2d 23, 29–30 (D. Mass. 2004).

calling a new sentencing jury is virtually identical to Method Two, which the *Green* court adopted.

One argument of death-qualification opponents might be that this approach still exposes potential jurors to the potential punishment, inadvertently leading jurors to believe the subtext of the voir dire is about appropriate punishment, rather than guilt or innocence.[178] Furthermore, the two preliminary problems posed by the original version of this solution[179]—namely, that alternate jurors may be both subservient to the jurors who rendered the guilty verdict and may not share in that verdict—still exist. However, when the most disconcerting problems posed by a unitary jury—predisposition for guilt and difficulty in having adequate minority representation among the jurors[180]—are resolved by this technique in having a jury that is not death-qualified determine guilt or innocence, the presence of some shortcomings is both inevitable and relatively less significant.[181] This solution potentially cures the most vexing problems—predisposition toward guilt and inadequate minority representation—that afflict the current death-qualification process.

V. CONCLUSION

As the imperfections of even the proposed final solution demonstrate, the practice of death-qualifying juries in bifurcated proceedings presents numerous challenges. Ultimately, it is a matter of delicately balancing the right of the state to death-qualify its jury and the defendant's interest in receiving the fairest trial possible. The capital punishment system itself is far from perfect,[182] as witnessed to by the

178. *See supra* notes 62, 146.

179. *See supra* notes 168–70 and accompanying text.

180. *See supra* notes 63–83 and accompanying text.

181. Furthermore, it is also possible that the awareness of the potentially severe sentence may have a sobering effect upon jurors, enabling them to acquire a greater appreciation for the gravity of the task before them. *See supra* note 146.

182. *See, e.g.*, John Ritter, *Death Penalty Uneven Across USA*, USA TODAY, Nov. 30, 2004, *available at* http://www.usatoday.com/news/nation/2004-11-30-deathpenalty_x.htm.

> Dozens of mistakenly convicted death row prisoners have been freed in recent years. Two years ago, the U.S. Supreme Court banned executions of the mentally retarded. In Illinois, the outgoing governor in January 2003 cleared the nation's eighth biggest death row. In June, New York's highest court threw out the state's death penalty law. Public approval of capital punishment has slid from 80% in 1994 to 66% a decade later, according to Gallup polls.

Id.

number of overturned death row convictions in many states,[183] and is frequently being challenged.[184] Regardless of one's individual stance regarding the propriety of the death penalty, few would argue that the accused should not be entitled to the utmost care and diligence in the pursuit of truth. In the larger scheme of capital punishment, the issue of death-qualified juries is a small, yet crucial, component.

To quote an old adage, "It is better to free a guilty man than punish the innocent."[185] By pursuing a greater balance of interests in the death-

However, "the use of the death penalty in the United States has seen a dramatic resurgence over the past 25 years. There is little to suggest a reversal in this trend any time soon." Ogloff, *supra* note 10, at 407.

183. "Since 1973, more than 110 individuals have been released from death rows in 25 different states after evidence surfaced that they had not committed the crimes for which they stood condemned." Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*, 10 PSYCHOL. PUB. POL'Y & L. 577, 593 (2004) (citation omitted); *see, e.g.*, Michael Graczyk, *Texas Still No. 1 in Executions in 2004*, SEATTLE POST-INTELLIGENCER, Dec. 21, 2004, (citing overturned death penalty convictions in Texas), *available at* http://seattlepi.nwsource.com/national/apus_story.asp?category=1110&slug=Texas%20Executions; Joseph Neff, *N.C. Prosecutors Stifled Evidence*, NEWS & OBSERVER, http://newsobserver.com/news/story/1944568p-8304499c.html.

184. *See* Ogloff, *supra* note 10, at 386–87.

> [I]n May 1999 the Nebraska legislature approved a 2-year moratorium on the death penalty . . . . One year later, the New Hampshire legislature voted to abolish the death penalty . . . . Bills to abolish the death penalty were also introduced in Connecticut, Indiana, Kansas, Kentucky, Louisiana, Missouri, Montana, New Jersey, New Mexico, New York, Pennsylvania, and South Dakota.
>
> Perhaps most significant to the moratorium movement was Illinois Governor George Ryan's January 31, 2000 declaration of a statewide moratorium on all executions . . . .
>
> Following Illinois' moratorium in January 2000, legislators in Alabama, Kentucky, New Jersey, and Ohio introduced moratorium bills, and commissions to investigate the fairness of capital punishment were established in Arizona, Connecticut, Nebraska, Nevada, and North Carolina.

Id. (citations omitted).

185. *See, e.g.*, Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (providing a general evaluation of the maxim's history, merits, and follies across various cultures). *But see* C.J. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 655 (1876) (criticizing and mocking the extension of the maxim too far):

> Better that any number of savings-banks be robbed than that one innocent person be condemned as a burglar! Better that any number of innocent men, women, and children should be waylaid, robbed, ravished, and murdered by wicked, wilful [sic], and depraved malefactors, than that one innocent person should be convicted and punished for the perpetration of one of this infinite multitude of crimes, by an intelligent and well-meaning though mistaken court and jury! Better any amount of crime than one mistake in well-meant endeavors to suppress or prevent it!

Id.

qualification process, hopefully it is possible to punish the guilty without inadvertently infringing on the rights of the innocent.

Richard Salgado