

## The Pope and the Capital Juror

*Aliza Plener Cover*

**ABSTRACT.** In a significant change to Catholic Church doctrine, Pope Francis recently declared that capital punishment is impermissible under all circumstances. Counterintuitively, the Pope's pronouncement might make capital punishment less popular but more prevalent in the United States. This Essay anticipates this possible dynamic and, in so doing, explores how "death qualification" of capital juries can insulate the administration of the death penalty when community morality evolves away from capital punishment.

### INTRODUCTION

After Pope Francis's recent declaration that the death penalty is impermissible under all circumstances,<sup>1</sup> there has been speculation about whether his announcement could fuel the end of the American death penalty.<sup>2</sup> In the long term,

- 
1. Pope Francis announced a revision to Number 2267 of the Catechism of the Catholic Church, which will now read in part: "[T]he Church teaches, in the light of the Gospel, that "the death penalty is inadmissible because it is an attack on the inviolability and dignity of the person", and she works with determination for its abolition worldwide." Edward Pentin, *Pope Francis Changes Catechism to Say Death Penalty 'Inadmissible'*, NAT'L CATHOLIC REG. (Aug. 2, 2018), <http://www.ncregister.com/blog/edward-pentin/pope-francis-changes-catechism-to-declare-death-penalty-inadmissible> [<https://perma.cc/V2C8-3NCZ>] (footnote omitted); see also Letter from Luis F. Card. Ladaria, Cardinal of the Roman Catholic Church, Letter to the Bishops Regarding the New Revision of Number 2267 of the Catechism of the Catholic Church on the Death Penalty (Aug. 1, 2018), <http://press.vatican.va/content/salastampa/it/bollettino/pubblico/2018/08/02/0556/01210.html> [<https://perma.cc/T2S6-9M9F>] (explaining the revision).
  2. See, e.g., Phil McCausland, *Pope's Death Penalty Stance Bolsters Conservative Push to End Executions*, NBC NEWS (Aug. 5, 2018), <https://www.nbcnews.com/news/us-news/pope-s-death-penalty-stance-bolsters-conservative-push-end-executions-n897596> [<https://perma.cc/U5VP-GQLG>]; Carol S. Steiker and Jordan M. Steiker, *The Pope Changed the Catholic*

perhaps it will. Catholic politicians and voters, along with non-Catholics who respect Pope Francis as a moral leader, may be more inclined to spearhead or support legislative efforts to abolish the death penalty. Catholic judges – whose ranks include a majority of Justices on the Supreme Court<sup>3</sup> – may be influenced in their opinions on the death penalty. The announcement may also affect society’s “evolving standards of decency,” which in turn inform the contemporary scope of the Eighth Amendment’s prohibition on “cruel and unusual punishment.”<sup>4</sup>

In deciphering these “evolving standards,” the Supreme Court has considered religious groups’ views only as a corroborative, supporting factor.<sup>5</sup> Yet in this instance, there may be a shift in public opinion that trickles down from the shift in church doctrine. Roughly one-fifth of Americans identify as Catholics.<sup>6</sup> It is hard to know how many of them rigidly adhere to the strictures of church doctrine, or how many of them will do so in this case.<sup>7</sup> But if even a fraction of them do, the declaration may have the effect of making our society, as a whole,

---

*Church’s Position on the Death Penalty. Will the Supreme Court Follow?*, TIME (Aug. 7, 2018), <http://time.com/5359690/pope-death-penalty-supreme-court-united-states> [https://perma.cc/ZW6N-CDJT] (“In this moment of fragility, the Pope’s message may move the needle on abolition within America.”).

3. See Z. Byron Wolf, *Why Do Catholics Hold a Strong Majority on the Supreme Court?*, CNN (Jul. 10, 2018), <https://www.cnn.com/2018/07/10/politics/catholic-justices/index.html> [https://perma.cc/Z99W-LRK9].
4. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion) (“[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”).
5. See *Atkins*, 536 U.S. at 316 n.21 (2002); *id.* at 322 (Rehnquist, C.J., dissenting).
6. *America’s Changing Religious Landscape*, PEW RES. FORUM (May 12, 2015), <http://www.pewforum.org/wp-content/uploads/sites/7/2015/05/RLS-08-26-full-report.pdf> [https://perma.cc/2VR5-J4JK].
7. See Claire Gecewicz, *Most U.S. Catholics Rely Heavily on Their Own Conscience for Moral Guidance*, PEW RES. CTR. (Apr. 19, 2016), <http://www.pewresearch.org/fact-tank/2016/04/19/most-catholics-rely-heavily-on-their-own-conscience-for-moral-guidance> [https://perma.cc/GMA9-GH6P] (“Roughly three-quarters of U.S. Catholics (73%) say they rely ‘a great deal’ on their own conscience when facing difficult moral problems, compared with 21% who look to the Catholic Church’s teachings, 15% who turn to the Bible and 11% who say they rely a great deal on the pope.”); Asheley R. Landrum et al., *Processing the Papal Encyclical Through Perceptual Filters: Pope Francis, Identity-protective Cognition, and Climate Change Concern*, 166 COGNITION 1, 5 (2017) (concluding, with respect to climate change, that “encyclical messages were processed through the perceptual filter of political ideology, and that processing informed assessments of Pope Francis’s credibility on climate change”); Michael J. O’Loughlin, *Poll Finds Many U.S. Catholics Breaking with Church Over Contraception, Abortion and L.G.B.T. Rights*, AMERICA: THE JESUIT REV. (Sep. 28, 2016), <https://www.americamagazine.org/faith/2016/09/28/poll-finds-many-us-catholics-breaking-church-over-contraception-abortion-and-lgbt> [https://perma.cc/V65P-WN6H].

less accepting of capital punishment, and thus may shift our society’s collective “evolving standards of decency.”

Yet, counterintuitively, the Pope’s announcement may in fact make death sentences easier to come by, at least in the short term. The reason for this peculiarity is the “death qualification” of capital jurors, a practice first endorsed by the Supreme Court in *Witherspoon v. Illinois*.<sup>8</sup> Death qualification is the process of questioning prospective jurors about their views on the death penalty and removing for cause those who are “substantially impaired” in their willingness to consider imposing a death verdict.<sup>9</sup>

In this Essay, I identify three problematic consequences that might flow from the Pope’s declaration, given a capital punishment system that relies on death-qualified juries. First, prosecutors may be able to strike a greater number of death-averse jurors, thereby seating juries that favor the death penalty and obtaining death verdicts with greater ease. Second, if more Catholic adherents<sup>10</sup> are excluded from jury service, the representativeness – and hence the legitimacy – of capital juries will suffer. Third, if the number of death verdicts rises with the ease of disqualification, a key “objective indicator” of “evolving standards of decency” will be skewed, registering more support for the death penalty despite societal movement against it.

The object of this Essay is not to predict whether, as an empirical matter, these three potential consequences will come to pass. Rather, its aim is to shed light on the *possibility* that a major pronouncement against the death penalty will produce such unexpected results, and through doing so, to highlight how death qualification shapes and distorts the practice of capital punishment in the United States.

## I. ENTRENCHING DEATH-PRONE JURIES

The practice of death qualification in combination with the Pope’s abolitionist stance may mean that seated capital juries will become more predisposed in favor of death. During capital jury voir dire, prospective jurors may be struck for cause if, on account of their views on the death penalty, they are “substantially impaired in [their] ability to impose the death penalty under the state-law framework.”<sup>11</sup> The Supreme Court initially authorized the exclusion of “only those jurors who make it ‘unambiguous’ or ‘unmistakably clear’ that their views

---

8. 391 U.S. 510 (1968).

9. *Uttecht v. Brown*, 551 U.S. 1, 9 (2007); *see also Witherspoon*, 391 U.S. at 522 n.21.

10. I use the term “Catholic adherents” or “observant Catholics” in this Essay to denote those who adhere to canon law on the issue of capital punishment.

11. *Uttecht*, 551 U.S. at 9.

about capital punishment would prevent or substantially impair them from following the law.”<sup>12</sup> Later cases, however, have given prosecutors more latitude to exclude jurors who have moral qualms about capital punishment. The Court has “dispens[ed] with *Witherspoon*’s reference to ‘automatic’ decisionmaking”<sup>13</sup> and no longer requires “that a juror’s bias be proved with ‘unmistakable clarity.’”<sup>14</sup> As a result, death-averse jurors may be excluded even in the face of express assertions of willingness to consider the death penalty. In *Uttecht v. Brown*, the Supreme Court upheld the removal of a juror despite his “assurances that he would consider imposing the death penalty and would follow the law” in light of “his other statements that in fact he would be substantially impaired . . . .”<sup>15</sup>

Already, large segments of the population may be excluded for cause on the basis of their opposition to capital punishment. In a study I conducted of Louisiana capital juries between 2009 and 2014, I found that on average, more than twenty-two percent of the jury pool was disqualified on *Witherspoon* grounds.<sup>16</sup> And there is evidence that Catholics are already removed at a disproportionate rate.<sup>17</sup>

But, prior to the Pope’s announcement, even many devout Catholics had the moral wiggle room to remain on a capital jury, because the Catechism of the Catholic Church made the punishment practice permissible under certain circumstances.<sup>18</sup> When asked during death qualification if they could consider imposing the death penalty,<sup>19</sup> Catholic jurors could, consistent with the tenets of their faith, answer “yes.”<sup>20</sup> For example, the late Justice Antonin Scalia, an observant Catholic and a staunch proponent of the death penalty, expressed the view that the Church did not prohibit the death penalty. He stated that “[i]f I

12. *Wainwright v. Witt*, 469 U.S. 412, 443 (1985) (quoting *Witherspoon*, 391 U.S. at 515-516 n.9, 522 n.21).

13. *Witt*, 469 U.S. at 424.

14. *Id.*

15. *Uttecht*, 551 U.S. at 18.

16. Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 *IND. L.J.* 113, 133 (2016).

17. Logan A. Yelder, Monica K. Miller & Clayton D. Peoples, *Capital-izing Jurors: How Death Qualification Relates to Jury Composition, Jurors’ Perceptions, and Trial Outcomes*, in 2 *ADVANCES IN PSYCHOLOGY AND LAW* 35 (Brian H. Bornstein & Monica K. Miller eds., 2016).

18. CATECHISM OF THE CATHOLIC CHURCH § 2267, [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a5.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm) [<https://perma.cc/3HQY-SSVA>] (permitting capital punishment, prior to August 2018, “if this is the only possible way of effectively defending lives against the unjust aggressor”).

19. See, e.g., *Uttecht*, 551 U.S. at 15 (describing questions asked of prospective jurors in that case).

20. Dan Majors, *Scalia States His Case for Morals*, *PITTSBURGH POST-GAZETTE* (Sept. 25, 2011), <http://old.post-gazette.com/pg/11268/1177453-53-o.stm> [<https://perma.cc/W4CH-DJQQ>].

thought that Catholic doctrine held the death penalty to be immoral, I would resign . . . I could not be a part of a system that imposes it.”<sup>21</sup>

Today, more Catholic adherents, following Pope Francis’s directive, may be unwilling to even consider imposing death because doing so would run directly contrary to Catholic teachings. They will be readily struck from capital jury service. These now-excludable Catholic jurors may have long held reservations about capital punishment, in keeping with Pope John Paul II’s encyclical narrowing of the permissible circumstances for the death penalty in the 1990s.<sup>22</sup> Before Pope Francis’s unequivocal prohibition, however, such Catholics may have been death-averse – but still qualified – jurors.

When a death-averse juror does make it to the jury box, she may be a holdout for life. Most jurisdictions require jury unanimity to sentence a defendant to death,<sup>23</sup> and the presence of a single juror with moral qualms about capital punishment can therefore be determinative. Today, however, more observant Catholics will not reach the jury box – and the net effect may be more pro-death juries and more capital convictions. For individual defendants, a change in the rate of disqualification during *Witherspoon* proceedings may be the difference between life and death.

The number of additional jurors struck after the Pope’s proclamation will depend on multiple factors, including how many Catholics will change their moral stances in accordance with the Catechism, and whether, if asked, they will state in court that their religious views will impair their ability to follow the judge’s instructions and consider the death penalty (or, as in *Uttecht*, otherwise cause the judge to believe that they are “substantially impaired”<sup>24</sup>). The more Catholic jurors who fall into these categories, the more will be struck from capital juries.<sup>25</sup>

---

21. *Id.*

22. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 18. The assumption was that “the cases in which the execution of the offender is an absolute necessity ‘are very rare, if not practically nonexistent.’” *Id.* (citing Pope John Paul II, *Evangelium Vitae* § 56 (1995), [http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae.html](http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html) [<https://perma.cc/5TUB-BQDX>]).

23. *Life Verdict or Hung Jury? How States Treat Non-Unanimous Jury Votes in Capital-Sentencing Proceedings*, DEATH PENALTY INFO. CTR. (Jan. 17, 2018), <https://deathpenaltyinfo.org/Non-Unanimous-Jury-Votes-in-Capital-Sentencing-Proceedings> [<https://perma.cc/J2PE-UDVE>] (listing, by jurisdiction, the consequences of non-unanimous jury votes, and concluding that more than seventy percent of jurisdictions mandate a life sentence in such circumstances).

24. *Uttecht*, 551 U.S. at 18.

25. Moreover, after the Pope’s declaration, prosecutors may show a greater inclination to strategically exercise peremptory strikes against Catholics – including those who express no intention to follow Catholic teaching on this issue.

I do not claim that all of these now-excludable jurors would otherwise have been seated on the jury. Prosecutors surely would have struck at least some of them through peremptory challenges. Peremptory challenges are discretionary strikes, not based on proof of bias or ineligibility to serve, that may be exercised for any reason that does not run afoul of equal protection.<sup>26</sup> In capital cases, prosecutors may choose to exercise peremptory challenges to strike death-averse but qualified jurors, including Catholics.<sup>27</sup> However, unlike for-cause challenges, which are unlimited, the prosecution and defense are generally each allocated only a limited number of peremptory strikes.<sup>28</sup> The decision to peremptorily strike a juror, therefore, comes with the cost of foregoing an alternative peremptory strike. In contrast, if prosecutors can exclude more jurors for cause going forward, they will be able to free up peremptory challenges to strike other death-averse jurors who might otherwise have been seated. In any given case, a more pro-death jury will be the result.

## II. UNMOORING PUNISHMENT FROM THE COMMUNITY

A second potential consequence of the Pope's declaration is that capital juries will be less representative of their communities. Catholics, as a group, may be less likely to serve on capital juries, and the community's most serious decisions about guilt and punishment may be made in the absence of their collective perspectives and participation.

The Sixth Amendment has been interpreted to guarantee a jury selected "from a representative cross section of the community."<sup>29</sup> The Supreme Court has explained that a representative jury is critical both to its *democratic* function as a bulwark "against the exercise of arbitrary power" and to its *legitimizing* function as the protector of "public confidence in the fairness of the criminal justice

---

26. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (prohibiting prosecution from exercising peremptory strikes based on race); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (prohibiting the same based on gender).

27. Cover, *supra* note 16, at 134 (2016) (reporting, based on study of capital voir dire proceedings in Louisiana, that "in one trial, the state ultimately peremptorily struck three of the five jurors who were unsuccessfully challenged under *Witherspoon*; in another trial, two of three; and in another trial, two of three."); Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 28-29 (1982) (reporting that in one judicial district in Florida, "the prosecution used peremptory challenges against . . . 77% of the scrupled jurors.").

28. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 601 (2013).

29. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

system.”<sup>30</sup> Both of these functions are damaged “if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.”<sup>31</sup>

These normative concerns would surely be implicated if Catholics were excluded wholesale from capital jury service. The Supreme Court’s doctrine in this area, however, would likely not recognize a fair-cross-section violation even in that extreme situation. Indeed, the Supreme Court has found the fair-cross-section requirement to be inapplicable in the context of death qualification.<sup>32</sup> In *Lockhart v. McCree*,<sup>33</sup> the Court held that death qualification cannot violate the Sixth Amendment’s fair-cross-section guarantee on two grounds. It first reasoned that this protection only applies to the composition of the jury pool or venire, not to the selection of the petit jury.<sup>34</sup> The Court went on to hold that so-called “*Witherspoon*-excludables” are not a “distinctive group” for purposes of the fair-cross-section requirement.<sup>35</sup>

The Pope’s recent announcement may put pressure on that second rationale, particularly if Catholic adherents are removed wholesale from capital juries. For while the diverse amalgamation of death penalty opponents may not constitute a “distinctive group,” there is a much stronger argument that Catholic adherents do. More than fifty years ago, the Court sweepingly proclaimed that “prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of [the economic, social, *religious*, racial, political and geographical groups of the community].”<sup>36</sup> Despite this dictum, the Court has never actually held that religious affiliates – as opposed to members of racial, ethnic, or gender groups<sup>37</sup> – comprise a “distinctive group” under the fair-cross-section requirement. And in developing other constitutional doctrines regulating jury selection, the Court has considered racial and gender discrimination more readily than religious discrimination.<sup>38</sup>

---

30. *Id.* at 530.

31. *Id.*

32. *Lockhart v. McCree*, 476 U.S. 162, 173-77 (1986).

33. *Id.*

34. *Id.* at 173-74.

35. *Id.* at 174-77.

36. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasis added).

37. *Lockhart*, 476 U.S. at 175 (citing the Court’s recognition of “distinctive groups” based on race, gender, and ethnicity).

38. The Court has held that peremptory challenges exercised on the basis of race, see *Batson v. Kentucky*, 476 U.S. 79 (1986), or gender, see *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), violate the Equal Protection Clause, but it has yet to extend this principle to religious discrimination. Some scholars have distinguished between peremptory challenges based on religious affiliation and challenges based on religiously motivated beliefs, arguing that the former is

Thus, although the Court is unlikely to prohibit the disqualification of observant Catholics under the fair-cross-section requirement, the jury's democratic role as a check against government overreaching, as well as its legitimating role in making criminal punishment appear fair to the community, are both threatened if Catholics are excluded from participation in capital juries. From a theoretical perspective, such diminished representativeness undermines the moral justification for punishment. Theorists have for centuries debated how to defend the violence of criminal punishment. One key justification that has emerged is that criminal punishment is the expression of the shared moral condemnation of the community as a whole.<sup>39</sup> In other work, I have argued that, in keeping with this expressive idea, a legitimate criminal justice system requires, at a minimum, near-consensus-level support for punishment; in this arena, where the state's coercive power over the individual is at its peak, bare majoritarian acceptance is insufficient.<sup>40</sup> Yet when a particular group—here, Catholic adherents—is excluded from even participating in the decision to impose punishment in the most serious cases, the collective expression of the community is lost, and a genuine problem of legitimacy arises. Even if—as seems likely—the Court never recognizes a fair-cross-section problem here, widespread exclusion of Catholic jurors would entail significant costs to the moral legitimacy of the criminal justice system.

### III. SKEWING INDICATORS OF “EVOLVING STANDARDS OF DECENCY”

The third potential problematic effect of the Pope's declaration flows from the first two, and it involves a broader impact on the Court's constitutional assessment of the death penalty. In attempting to decipher society's “evolving standards of decency,” the Court has looked most favorably to two primary “objective indicator[s]” of contemporary values: state legislation and capital jury

---

impermissible while the latter passes constitutional muster. *See, e.g.*, Daniel M. Hinkle, *Peremptory Challenges Based on Religious Affiliation: Are They Constitutional?*, 9 *BUFF. CRIM. L. REV.* 139, 141 (2005).

39. *E.g.*, EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102-110 (First Free Press Paperback ed., 1964); JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95 (1970); James Fitzjames Stephen, 2 *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81 (1883); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. CHI. L. REV.* 591, 594-95 (1996); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1496 (2016).

40. Aliza Plener Cover, *Supermajoritarian Criminal Justice*, 87 *GEO. WASH. L. REV.* (forthcoming 2019), <https://papers.ssrn.com/abstract=3262794>.



verdicts.<sup>41</sup> Thus capital jury verdicts play a dual role in the American system of capital punishment. They decide the fate of individual capital defendants, and they signal to the Supreme Court the contemporary values of the community, which in turn affect the punishment's constitutionality.

Perversely, the Eighth Amendment doctrine fails to account for the distorting effect of death qualification upon capital jury verdicts, and simply treats these verdicts as value statements reflecting the pro-death sentiments of the community at large.<sup>42</sup> Unless and until public opinion swings strongly enough to produce legislative change, the first indicator of “evolving standards of decency,” state legislation, will remain constant. But as discussed above, Pope Francis’s proclamation may very well have a more immediate effect of *increasing* the number of jury verdicts of death. This increase will evidence to the Supreme Court greater public acceptance for the death penalty—even though the verdicts are obtained only by striking a growing number of citizens opposed to the death penalty, and by excluding Catholic adherents, as a group, from a key part of the constitutional conversation. This dynamic creates what I call a “buffer effect” around death qualification: death qualification insulates death verdicts from the effects of social change, and it does so by slowing down the responsiveness of trial outcomes to changing values.

Under the current constitutional framework, a shift in public opinion against the death penalty can affect the judicially recognized “objective indicator[s]” of “evolving standards of decency” in at least three ways. First, if the shift is strong enough, it may lead to legislative abolition. This effect likely requires the greatest swing in public opinion—enough to produce a statewide legislative majority. Second, an intermediate swing may disincentivize prosecutors from charging crimes capitally, and thus decrease the number of death verdicts. When public opinion shifts spottily, with uneven geographic distribution, local prosecutorial discretion may be more affected than statewide legislative action.<sup>43</sup> With either of these two types of strong shifts in public opinion, judicially observable “objective indicator[s]” will move in the same direction as society’s values; the objective indicators will accurately reflect that standards of decency are evolving *away from* capital punishment.

---

41. *Penry v. Lynaugh*, 492 U.S. 302, 334-335 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). The Court’s reliance on other indicia has been more controversial and, in modern years, relegated to supporting footnotes or mere confirmation of the existence of societal consensus. See *Atkins*, 536 U.S. at 316 n.21 (2002); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

42. Cover, *supra* note 16, at 128.

43. Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 *CARDOZO L. REV.* 2397, 2424 (2014).

However, in any case where the shift in public sentiment away from the death penalty is not strong enough to prompt legislative abolition or prosecutorial abstention, a third effect may nonetheless ensue: the removal for cause of a significant number of citizens from capital juries.<sup>44</sup> With more *Witherspoon* exclusions, juries will be more likely both to convict<sup>45</sup> and to sentence the defendant to death.<sup>46</sup> And although society, in the aggregate, will be more disapproving of the death penalty, the judicially observable “objective indicator[s]” will move in the opposite direction: toward the appearance of acceptance of capital punishment.

These three possible effects show that “objective indicator[s]” will not necessarily track our society’s actual “evolving standards of decency.” Because of the practice of death qualification, there may be an intermediate stage—before the tipping point for legislative reform or a change in prosecutorial practice—at which an increase in the number of citizens staunchly opposed to the death penalty will actually increase death verdicts. At this intermediate stage, a moderate increase in opposition to the death penalty may make it look like the society is in fact more pro-death.

The Supreme Court has never recognized nor accounted for the distorting effect of death qualification upon its “evolving standards of decency” doctrine. Now would be an important moment for it to do so.

## CONCLUSION

The Pope’s declaration that the death penalty is impermissible without exception may influence our nation’s “evolving standards of decency.” The extent of its influence remains to be seen. In time, the change in Catholic doctrine may push the nation toward legislative or judicial abolition. Yet for now, this shift may mean that more Catholic jurors, some of whom already may have been skeptical about the death penalty, can now be lawfully struck for cause from death penalty cases. Their voices may be eliminated from the capital jury, on the

---

44. There remains the possibility that the Pope’s announcement will have a softer impact on some citizens, such that they will be skeptical of the death penalty but not firmly opposed, and the effect of death qualification may be moderated. Yet the possibility of increasing *Witherspoon* disqualification is a significant one.

45. Jurors more supportive of the death penalty are more likely to convict capital defendants, prior to and distinct from the penalty phase. See e.g., 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, 724-25 (1998); 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).

46. See, e.g., Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 791-93 (2006).

whole replaced by jurors who are less death-averse – with ripple effects for individual defendants, for the legitimacy of the punishment, and for the Court’s reading of society’s “evolving standards of decency.” This peculiarity – that a societal shift *away* from the death penalty may only strengthen its administration – offers a window into the troubling effects of death qualification upon the practice of capital punishment in the United States.

*Associate Professor, University of Idaho College of Law. J.D., Yale Law School; B.A., Yale College. I am grateful to Valeri Kiesig for research assistance, to the editing team at the Yale Law Journal Forum for their insightful suggestions, and to Benjamin Plener Cover and Sam Newton for helpful feedback as I developed these ideas.*