

Capital Jurors in an Era of Death Penalty Decline

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INTRODUCTION

The state of public opinion regarding the death penalty has not experienced such flux since the late 1960s. Death sentences and executions have reached their lowest annual numbers since the early 1970s.¹ Following decades during which the death penalty shared broad public support, over the last decade, support steadily declined in national and state polling.² Today, the public appears fairly evenly split in its views on the death penalty.³ Still, voters in Nebraska and California recently rejected measures to end the death penalty, and

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1. BRANDON L. GARRETT, *END OF ITS ROPE: HOW THE DEMISE OF THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* (forthcoming 2017) (describing the decline in death sentencing and assessing its broader implications); Brandon L. Garrett, Alexander Jakubow & Ankur Desai, *The American Death Penalty Decline*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2017) (providing a statistical analysis of county-level death sentencing from 1990 to 2016); *Death Sentences in the United States from 1977 By State and By Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> [<http://perma.cc/A32V-T5AW>] (describing data on death sentences from 1977 to 2016); Emily Bazelon, *Where the Death Penalty Still Lives*, N.Y. TIMES MAG., (Aug. 23, 2016), <http://www.nytimes.com/2016/08/28/magazine/where-the-death-penalty-still-lives.html> [<http://perma.cc/C2MS-JM3U>].
 2. For a summary of Gallup polling regarding the death penalty, see, *In Depth: Death Penalty*, GALLUP <http://www.gallup.com/poll/1606/death-penalty.aspx> [<http://perma.cc/45KF-8RFJ>].
 3. Nirah Chokshi, *Death Penalty Loses Majority Support for First Time in 45 Years*, N.Y. TIMES (Oct. 3, 2016), <http://www.nytimes.com/2016/10/04/us/death-penalty-loses-majority-support-for-first-time-in-45-years.html> [<http://perma.cc/YDA3-8MAF>] (reporting Pew poll results stating that forty-nine percent of those polled support the death penalty).

in California voters instead adopted a measure intended to hasten post-conviction review of death penalty cases and executions, although the California Supreme Court has stayed that measure pending further review.⁴ In this Essay, we explore, first, whether these changes in public opinion mean that fewer people will be qualified to serve on death penalty trials as jurors, and second, whether potential jurors are affected by changes in the practice of the death penalty.

One question is whether changes in public opinion, which may affect priorities of prosecutors and other officials charged with seeking death sentences, make it more challenging to litigate capital cases. This uncertainty is primarily a result of the unique way that jury selection occurs in capital cases. Only in death penalty cases have prosecutors long retained unusual power to pose questions to jurors about their belief in the punishment and to qualify jurors who are not against the penalty for both the guilt and the sentencing phases of the trial. This death qualification process, approved since the U.S. Supreme Court's opinion in *Witherspoon v. Illinois*⁵ and more recently affirmed in *Lockhart v. McCree*,⁶ provides prosecutors with a "firewall" against changing public opinion. In its ruling in *Witt v. Wainwright*, the Supreme Court defined the standard as not whether the potential juror would "automatically" vote against the death penalty, but rather whether the juror's beliefs would "substantially impair" the performance of his or her duties.⁷ In an era in which public support for the death penalty is quite divided, prosecutors may be able to remove still larger numbers of potential jurors from capital cases, and perhaps most importantly, from the guilt phase of the trial, because they have some substantial doubts about the death penalty.

A second question, related to public opinion about the death penalty, is whether people are affected by the state of death sentencing practices themselves. Death sentencing has reached lows not seen in three decades, as have

4. Associated Press, *California Supreme Court Halts Voter-Approved Death Penalty Measure*, L.A. TIMES, (December 20, 2016), <http://www.latimes.com/local/lanow/la-me-ln-prop-66-death-penalty-halted-20161220-story.html> [<http://perma.cc/PCT7-5AMX>]; Charles Lane, *Most Americans Don't Like the Death Penalty, Right? Wrong.*, WASH. POST, (Oct. 26, 2016) http://www.washingtonpost.com/opinions/most-americans-dont-like-the-death-penalty-right-wrong/2016/10/26/afd7e6c8-9b9a-11e6-aoed-ab0774c1ea5_story.html [<http://perma.cc/3F4M-LZ43>]. For the text of Proposition 66, see [http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20\(Death%20Penalty\)_o.pdf](http://www.oag.ca.gov/system/files/initiatives/pdfs/15-0096%20(Death%20Penalty)_o.pdf) [<http://perma.cc/AZ2F-QYU9>].

5. *Witherspoon v. Illinois*, 391 U.S. 510, 517-18 (1968).

6. *Lockhart v. McCree*, 476 U.S. 162, 173-83 (1986).

7. *Wainwright v. Witt*, 469 U.S. 412, 422, 424 (1985).

executions.⁸ California voters recently sought to do something about that state of affairs by making executions more feasible. California has a death row larger than other states', but it has not had an execution, or a legally authorized execution method, since the last lethal injection protocol was ruled unlawful by state courts in 2006.⁹ This raises new questions about whether the practical state of the death penalty has affected the attitudes of jurors, including those who can sit on a capital jury.¹⁰

We aimed to study the composition of potentially capital eligible jurors and whether they are affected by the state of the death penalty. Simply put, we wondered whether absence of punishment makes the heart fonder. Perhaps individuals would see less reason to sentence people to death if an execution might not occur for many years, if at all. Or perhaps individuals might think that a death sentence still serves a symbolic purpose or a deterrent role even if an execution is unlikely.

We conducted surveys of persons reporting for jury duty at the Superior Court of Orange County, California. Orange County is one of the leading counties in the country in the numbers of death sentences imposed; it is one of just sixteen counties in the country that imposed five or more death sentences since 2010.¹¹ What we found was surprising. Surveys of jurors in decades past suggested that ten to twenty percent of jury-eligible individuals would be excludable due to their substantial doubts about the death penalty.¹² Despite the recent vote in California, and despite Orange County's status as a redoubt of

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8. See, e.g., Death Penalty Information Center, *The Death Penalty in 2016: Year End Report* (2016), <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf> [<http://perma.cc/KX4T-RPLX>] (describing twenty-nine death sentences imposed in 2016 and twenty executions); see also Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. (forthcoming 2017) (describing a case study in state-level death sentencing decline); Garrett, Jakubow & Desai, *supra* note 1 (describing a decline in county-level death sentencing).
 9. James R. Wong, *Lethal Injection Protocols: The Failure of Litigation to Stop suffering and the Case for Legislative Reform*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 263, 276-77 (2006) (describing litigation leading to the rejection of the California lethal injection protocol in 2006).
 10. For work examining the decline in death sentences, see GARRETT, *END OF ITS ROPE*, *supra* note 1; Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L.J. 259 (2016); Robert J. Smith, *The Geography of the Death Penalty and its Ramifications*, 92 B.U. L. REV. 227, 265-75 (2012); and Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (Oct. 2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [<http://perma.cc/2CYA-5MQQ>].
 11. See Bazelon, *supra* note 1.
 12. See *infra* Part I.

death sentencing,¹³ we find, as described below, that 35% or more of jurors reporting for jury service were *Witherspoon/Witt* excludable as having such substantial doubts about the death penalty that it would “substantially impair” their ability to perform their role as jurors.¹⁴ Indeed, large numbers went further: roughly a quarter of those sampled said that they would be reluctant to find a person guilty of capital murder knowing that the death penalty was a possibility. Such a person may be a “nullifier,” as the Supreme Court put it in *Lockhart*—that is, a person “unable to decide a capital defendant’s guilt or innocence fairly and impartially.”¹⁵

We also found that broad demographics retained opposition to the death penalty. It appears that death qualification not only excludes far higher percentages of the population than ever before, but also has become an even less predictable prosecution tool, because even many stated death penalty proponents now harbor serious doubts about the death penalty. A final question asked whether the fact that executions have not been conducted in California for a decade impacts whether jurors would be favorable towards the death penalty. We found that, across all types of attitudes towards the death penalty, that fact made jurors less inclined to sentence a person to death. Rare punishments may seem more arbitrary, even to those who find them morally acceptable.

We conclude by describing how this research can be useful for scholars, litigators, and judges concerned with selection of jurors in death penalty cases. To the extent that death qualification now excludes a far broader swath of the population, it raises new constitutional questions concerning its effect on the ability to secure a fair cross-section of the community in the jury venire. Moreover, to the extent that still larger groups of people are now likely excluded because they would have difficulty convicting at the guilt stage, these results suggest that prosecutors may be even more likely to obtain a guilt-verdict prone jury for a capital trial. Death qualification may become a more and more powerful tool for biasing a jury towards guilt, precisely because, and not in spite of, popular opinion against the death penalty. More broadly, these findings assist in better understanding how dramatically changes in public opinion have affected death sentencing. This research also suggests that, as social and legal practices change, more study of public attitudes towards punishment is needed.

13. See, e.g., Fair Punishment Project, *Too Broken to Fix: Part II*, at 2 (Sept. 2016), http://fairpunishment.org/wp-content/uploads/2016/12/FPP-TooBroken_II.pdf [<http://perma.cc/EG4J-YDQK>] (noting that Orange County is one of sixteen counties that imposed five or more death sentences between 2010 and 2015).

14. See *infra* Part II.

15. *Lockhart v. McCree*, 476 U.S. 162, 172 (1986).

I. PUBLIC OPINION AND THE DEATH QUALIFICATIONS OF JURORS

The institution of the American death penalty has experienced a time of enormous change over the past decade. The numbers of death sentences imposed grew dramatically in reaction to the Supreme Court's opinion in *Furman v. Georgia*, which struck down all death penalty schemes in the United States as unconstitutional.¹⁶ After the Supreme Court revived the death penalty in decisions in 1976¹⁷, the death penalty experienced a rapid rise in the 1970s through the 1990s, but then experienced an inexorable fall. Since the late 1990s, death sentences have declined steadily.¹⁸ Nineteen states and Washington D.C. have abolished the death penalty, but thirty-one states and the federal government still retain it. Far fewer of those jurisdictions actually use the death penalty anymore. Meanwhile, opinion polling has shown declining support for the death penalty across broader demographic groups. White Americans and older Americans were traditionally more likely to support the death penalty, as were Republicans, but those differences, at least as to race, have narrowed over the past decade.¹⁹ Among opponents of the death penalty, concerns about wrongful convictions have also become generally more salient over the past decade (eleven percent cited to that concern in 1991, while twenty-five percent did in 2003, and seventeen percent did in 2014, which is to be sure, a decline).²⁰

There are many studies of death qualification and the way that process changes the composition of capital juries. Most of those studies, however, are many decades old. For example, past studies of potential jurors had found that death-qualified jurors are more likely to be male, white, politically conservative, and Christian.²¹ In 1966, two years before *Witherspoon* was decided, polls indi-

16. 408 U.S. 238 (1972). *Gregg v. Georgia*, 428 U.S. 153 (1976), brought an end to the death penalty moratorium that *Furman* had prompted.

17. *Gregg*, *supra* note 16.

18. Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1932-55 (2006).

19. For Pew results, see *Shrinking Majority of Americans Support Death Penalty*, PEW RES. CTR. (Mar. 28, 2014), <http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/> [<http://perma.cc/FP73-9TPP>].

20. *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> [<http://perma.cc/7HHK-FH7L>].

21. Brooke Butler & Gary Moran, *The Impact of Death Qualification, Belief in a Just World, Legal Authoritarianism, and Locus of Control on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 25 BEHAV. SCI. & L. 57, 65 (2007) (finding that attitudes toward the death penalty are significantly related to gender, ethnic background, educational level, and political views, and that "men, Caucasians, participants with lower levels of education, [and] participants with conservative political beliefs," were more likely to favor the death penalty).

cated that forty-two percent favored the death penalty while forty-seven percent opposed it.²² In *Witherspoon*, the litigants presented the Court with social science studies suggesting that an exclusionary rule prohibiting those opposed to the death penalty from participating in the guilt phase might cause the exclusion of less than ten percent of jury-eligible adults. The Supreme Court discounted the extant social science studies at the time—particularly those raising the concern that, once those opposed to the death penalty were excluded, the remaining death-qualified jurors would be predisposed to find guilt—as “too tentative and fragmentary.”²³

By the early 1970s, public opinion had shifted towards strong support for the death penalty. For example, a 1972 study, conducted just as this shift had begun, found that sixty percent stated that they would consider the facts and circumstances of a particular case and were not biased for or against the death penalty, while only ten percent would automatically vote for life imprisonment.²⁴ By the 1980s, when the Supreme Court decided *Lockhart v. McCree* and engaged in detail with social science research regarding death qualification, studies suggested that at least eleven to seventeen percent of the population might be excluded by death qualification.²⁵ As a result, it was harder to argue that large swaths of the community would be disenfranchised from participation in jury service. The *McCree* litigants, however, focused on studies suggesting, first, that death qualification would disproportionately affect minorities and members of religions with moral opposition to the death penalty, and second, that death qualification would produce a jury that would be more prone to find guilt during the first phase of trial. For example, Claudia Cowan, William Thompson, and Phoebe Ellsworth conducted a well-known study asking potential jurors death qualification questions and then showing each person a two-hour simulated murder trial. They then asked whether the participants

22. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.16 (1968).

23. *Id.* at 516-17.

24. George L. Jurow, *New Data on the Effect of a “Death Qualified” Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 583 (1971). That survey placed participants into five categories, a scale that subsequent researchers have also used:

1. I could not vote for the death penalty regardless of the facts and circumstances of the case.
2. There are some kinds of cases in which I know I could not vote for the death penalty even if the law allowed me to, but others in which I would be willing to consider voting for it.
3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.
4. I would usually vote for the death penalty in a case where the law allows me to.
5. I would always vote for the death penalty in a case where the law allows me to.

Id. at 599. Of 211 subjects, 21, or ten percent, were excluded through death qualification. *Id.* at 583. Of the group, 132 or six percent expressed neutral attitudes. *Id.* at tbl. ii.

25. *Lockhart v. McCree*, 476 U.S. 162, 187 (1986) (Marshall, J., dissenting).

would convict. They found that death-qualified jurors were twenty-five percent more likely to convict than the *Witherspoon*-excludable jurors who harbored substantial doubts about the death penalty.²⁶

In its ruling in *McCree*, the Supreme Court found the findings in these studies to be still too “fragmentary.”²⁷ Even assuming their validity, the Court explained that “the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented,”²⁸ and moreover, the Court found the specific concern with predispositions at the guilt phase “hopelessly impractical,” given the two-part structure of typical capital trials.²⁹ The Court also criticized the studies presented as not excluding “nullifier”³⁰ jurors or as (perhaps far less supported a concern) not involving “sworn” jurors examining an “actual case involving the face of an actual capital defendant.”³¹ Justice Thurgood Marshall dissented, noting that in practice courts “have frequently excluded jurors even in the absence of unambiguous expressions of their absolute opposition to capital punishment.”³²

The Supreme Court did subsequently hold in *Morgan v. Illinois* in 1992 that, in the “reverse-*Witherspoon*” situation in which jurors would automatically impose a death sentence no matter what the facts of the case, a capital defendant may challenge such jurors for cause.³³ That rule is not the precise mirror image of *Witherspoon*, though, because it requires outright automatic death sentencing, and not the broader “substantial” concerns about the death penalty that support *Witherspoon*/*Witt* exclusion.

The most recent studies of death qualification, conducted in the early 2000s, found comparable results to those considered by the Supreme Court in *McCree*, with far fewer potential jurors who would automatically vote for life or

26. 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, 68 (1984) (reporting that among death-qualified jurors, 78% found defendants guilty of some level of homicide offense and among the excludable jurors, 53% found the defendant guilty of some offense).

27. 476 U.S. at 190 (quoting *Witherspoon*, 391 U.S. at 517).

28. *Id.* at 184.

29. *Id.* 178.

30. *Id.* at 172. Nullifiers refer to jurors whose opposition to the death penalty is so strong that it would impair their ability to even participate in trials where the death penalty could eventually be a sentencing outcome. See *supra* note 15 and accompanying text. In *McCree*, existing social science research suggested that approximately one third of *Witherspoon*/*Witt* excludables were nullifiers. 476 U.S. at 172 & n.13.

31. 476 U.S. at 171.

32. *Id.* at 191 (Marshall, J., dissenting).

33. 504 U.S. 719, 719 (1992).

who would tend not to find guilt. A study of two hundred Florida jurors published in 2007 found that only ten percent opposed the death penalty categorically, while thirty-eight percent opposed it but would consider the death penalty under some circumstances, and twenty-one percent thought the death penalty should be automatically imposed for first-degree murder.³⁴ Existing studies also indicated that death qualification continued to disproportionately lead to the exclusion of minorities and women; death-qualified jurors were more likely to be male, White, politically conservative, and Christian.³⁵ We sought to update that research and to pose a new kind of question concerning the state of the death penalty in decline.

II. SURVEY DESIGN

We posed a brief survey to 480 jurors who had reported to the Superior Court house in Orange County, California during the summer of 2016. We gave four simple questions to the jurors (along with background and demographic questions): three basic death qualification questions and a question regarding the lack of executions in the state since 2006. These are the four questions posed:

Do you have such conscientious objections to the death penalty that, regardless of the evidence in a case, you would refuse to vote for murder in the first degree merely to avoid reaching the death penalty issue?

_____ Yes or _____ No

Do you have such conscientious objections to the death penalty that, should we get to the penalty phase of a trial, and regardless of the evidence in this case, you would automatically vote for a verdict of life imprisonment without the possibility of parole and never vote for a verdict of death?

_____ Yes or _____ No

Do you have such conscientious opinions regarding the death penalty that, should we get to the penalty phase of a trial, and regardless of the evidence in this case, you would automatically, and in every case, vote for a verdict of death and never vote for a verdict of life imprisonment without the possibility of parole?

_____ Yes or _____ No

34. Brooke Butler, *The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCHOL. 115, 119 (2007).

35. Butler & Moran, *supra* note 21, at 65.

Does the fact that California has not executed anyone since 2006, make it less or more likely that you would impose the death penalty?
 _____ More or _____ Less

To summarize the results, we found that for each of these questions: (1) roughly 24% said that they would not feel comfortable finding a person guilty of first-degree murder knowing that a death sentence could follow; (2) 32% said they would automatically vote for life imprisonment; (3) 9% said they would automatically vote for death; and (4) 67% said that they were less likely to sentence a person to death having heard that California has not executed anyone since 2006. The table below summarizes these results, broken down by demographic and political characteristics.

TABLE 1.

AFFIRMATIVE RESPONSES BY PARTICIPANT DEMOGRAPHICS

Demographic Characteristics*	Guilt Phase Objectors (24%, n=114)	Death Sentencing Objectors (32%, n=152)	Automatic Death Sentencers (9%, n=41)	Lack of Executions Makes Death Less Likely (67%, n=313)
Whites	19% (35)	27% (50)	6% (12)	75% (118)
Blacks	8% (1)	36% (4)	0% (0)	91% (10)
Asians	26% (25)	34% (33)	8% (8)	68% (66)
Hispanics	29% (34)	30% (36)	13% (15)	68% (80)
Strongly conservative	25% (8)	28% (9)	13% (4)	67% (18)
Middle of road	25% (27)	32% (35)	12% (13)	75% (77)
Strongly liberal	33% (15)	51% (23)	2% (1)	80% (33)

*Chi-squared analyses were conducted to determine whether affirmative responses differed by participants' race or political ideology. No significant differences were detected (all *p* values are greater than 0.05).

Note. The percentages refer to the proportion of affirmative responses for a given demographic characteristic and values in parentheses refer to the corresponding raw number of participants.

The sections that follow describe these results in greater detail.

A. Guilt Phase Objectors

We asked, as noted, whether jurors have such conscientious objections to the death penalty that, regardless of the evidence in a case, they would refuse to vote for murder in the first degree merely to avoid reaching the death penalty

issue. We found that 24% would refuse to vote for murder due to their objections to the death penalty. That is an extremely high percentage as compared to prior studies of death qualification.³⁶ It suggests that death qualification, perhaps far more than ever before, may skew a jury in favor of a guilt determination. And it suggests that a large swath of the population, even in a highly active death penalty county, might engage in jury nullification (if seated on a jury) due to death penalty concerns. The number of nullifiers may be growing both in real numbers and as a proportion of the *Witt*-excludable jurors.

B. Death Sentencing Objectors

Second, we asked whether jurors have such conscientious objections to the death penalty that, should a case reach the penalty phase of a trial, and regardless of the evidence, they would automatically vote for a verdict of life imprisonment without the possibility of parole and not for a verdict of death. We found that an even higher percentage—32% of jurors—would automatically refuse to consider a death sentence. Such individuals would certainly be excludable under *Witt* and *Witherspoon*.

We note also that each participant was also asked to record his or her gender, age, race or ethnicity, level of education, and political ideology, as well as whether he or she had ever served on a jury. Of the participants who answered that they had conscientious objections to the death penalty, such that they would automatically vote for life, 27% of white respondents said yes, 36% of black respondents said yes, 34% of Asian respondents said yes, and 30% of Latinos responded yes.

Most (72%) of the strongly conservative respondents were not in favor of automatically voting for life without parole, but 38% were in favor of it. Among strong liberals, a majority (51%) would automatically impose life without parole, whereas 32% of “middle of the road” participants voiced the same opinion. Interestingly, among “middle of the road” participants, the results were similar as compared to strongly conservative respondents.

C. Automatic Death Sentencers

Third, we asked whether jurors have such a preference for the death penalty that they would automatically impose it for a person convicted of capital murder. Such individuals are also excludable from a death penalty trial. We found that roughly 9% of jurors (39 out of 465) would be automatically in favor of the death penalty. Of those individuals, twelve were white, eight were

36. See, e.g., Butler, *supra* note 34, at 119 (finding that only 10% opposed the death penalty categorically).

Asian, and fifteen were Latino; none were black; and the rest were some other ethnicity. Thus, this small group was somewhat diverse, and it reflected a small minority of persons in each of the relevant demographic groups. One of the strongly liberal individuals expressed this view, while four strongly conservative persons expressed this view. It was the centrists who more frequently expressed this most extreme view about a mandatory death penalty: eleven moderately liberal individuals were automatic death sentencers, as were thirteen “middle of the road” individuals.

D. Lack of Executions and Death Sentencing Preferences

Fourth, we asked participants whether the fact that California has not executed anyone since 2006 makes it less or more likely that they would impose the death penalty. We found that 67% were less likely to sentence a person to death, while 23% were more likely to sentence a person to death. Even among the individuals who would automatically sentence a person convicted of capital murder to death, 49% of those individuals were less likely to sentence a person to death knowing that no individual had been executed in the last decade in California. (Indeed, the state of affairs has been still more inactive than what we described: as noted, there has not been a legally authorized execution protocol in California since 2006.)

These findings were spread across a range of demographic groups. Among whites, 75% of participants were less likely to sentence a person to death, as were 91% of blacks, 68% of Latinos, and 68% of Asians surveyed.

This brief survey did not explore what animates these views. For example, it could be that the concern is with delays in death sentencing. People may think that if it takes a decade or more to carry out a death sentence, such a sentence does not serve the appropriate deterrent function. Or it could be that it is the rarity of the sentence that might trouble people; if none are being executed, then imposing the punishment may seem like an outlier practice. We are not able to tease out these possible explanations for the view and can only observe the strongly consistent preference across groups for less death sentencing given that executions have not occurred in California in over a decade.

III. IMPLICATIONS OF THESE RESULTS FOR DEATH SENTENCING AND BEYOND

While polling and earlier studies suggested that death-qualified jurors were largely conservative and white individuals, we found that may no longer be the case, even in a staunch death penalty county. Our Orange County survey found higher percentages that opposed the death penalty and that might even be un-

willing to find guilt if the death penalty was a possibility. We also found that whether the jurors were minorities was not significant. (Although minorities were more liberal, most self-identified as in the middle). Thus, our results suggest that today, far higher percentages of the population may not be death-qualified, even in a county like Orange County. Our initial results also suggest that far larger percentages of jurors may be prone to *not* convict in capital cases, including some that might not be identified as *Witherspoon*-excludable. Still more interesting, we found that 67% of those surveyed were less likely to impose a death sentence. We were surprised to see that, across the political spectrum, all reported that lack of executions made them less likely to execute. Even among the small group of 39 people who were automatically in favor of sentencing any murderer to death, twenty of them (51%) were less likely to sentence a person to death knowing that there have been no executions in California since 2006.

Litigators today have available highly sophisticated jury selection instruments and questioning methods that are used during voir dire in death penalty cases; they can do a great deal to bring out the attitudes that we uncovered by asking our simple set of questions.³⁷ What we found suggests that even very simple questions can bring out highly complex views concerning capital punishment. What we found also suggests the greater difficulty in selecting death-qualifying jurors given broader discomfort with capital punishment. As a result, judges should be very careful to ensure careful voir dire and a robust jury selection process.

The results may correspond with different interactions among jurors during deliberations as well. Studies of capital jurors in the 1990s found that despite the rule against seating jurors who automatically sentence to death, many actual jurors in capital cases believed that they were required to automatically sentence a person convicted of capital murder to death.³⁸ Fewer such individuals, and more individuals with deep-seated concerns about death sentencing, may impact deliberations and group dynamics.³⁹

Attitudes towards the death penalty, as Phoebe Ellsworth has put it well, can arise from “emotionally based attitudes that serve to express a person’s ideological self-image.”⁴⁰ In contrast, jurors must deliberate together and make

37. See, e.g., Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION (2010) (describing a particularly effective voir dire method called the “Colorado Method”).

38. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 6-7 (1993).

39. See Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103 (2010) (describing those group dynamics).

40. Phoebe C. Ellsworth, *Some Steps between Attitudes and Verdicts*, in INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING 50 (Reid Hastie ed. 1993).

decisions that “by their very nature require the decision maker to resolve a host of ambiguities and incompletenesses in the patchwork of evidence presented at trial.”⁴¹ Nevertheless, as a range of studies has shown, “Death penalty attitudes are more general, yet they still provide some predictive power.”⁴² Our results suggest that the changing national attitudes towards the death penalty affect qualification of jurors, and to a surprising degree, even in a county noted as one of those that leads the country in its death sentencing.

CONCLUSION

The changing role of death qualification reflects changing attitudes among the public towards the death penalty, and perhaps towards punishment generally. While polls remain divided, and the death penalty retains support and has been recently reaffirmed in statewide measures, death sentencing and executions continue to decline steadily.⁴³ Our results support arguments concerning the troublingly outsized role that death qualification plays today, as attitudes towards the death penalty have shifted. The Supreme Court’s *Witherspoon/Witt* rule may result in exclusion of not just 10% of jury-eligible adults, but 35% or more in Orange County alone. These are remarkably high percentages of the population, and in a strong death penalty county. Moreover, death qualification may not protect prosecutors as much as it did in the past. Even people who should not be on a death penalty jury because they automatically support the death penalty are affected by the fact that no executions have been carried out in a decade in California.

Does this mean that the rarity of punishment, relevant to the question of arbitrariness under the Cruel and Unusual Punishments Clause of the Eighth Amendment, is also reflected in people’s attitudes towards punishment generally? The implications of such a finding would be quite interesting. They might suggest that contemporary standards of decency are in fact linked with actual punishment practices on the ground, and not just with people’s moral intuitions in the abstract. Of course, it could also be that speed in carrying out punishment is the animating concern for many individuals. While California voters approved a measure to increase the speed of executions, no state has successfully hastened the complex process of death penalty appeals and post-conviction review. It is not likely that executions will resume any time soon in California. The need for speed among death penalty supporters may be simply impossible

41. *Id.*

42. *Id.* at 61.

43. See *supra* notes 1-4.

to satisfy if there is to be fair review of death sentences. The fourth finding of our study deserves substantial additional research.

These findings have implications for how we should think about punishment as well as the Eighth Amendment in the area of the death penalty, but also far more broadly. Perhaps unusual punishments appear cruel or unsupported due to their rarity in practice. We hope that future research examines the question of whether absence makes the heart less fond in matters of criminal punishment.

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