



universität
wien

MASTER THESIS

Titel der Master Thesis / Title of the Master's Thesis

„Stacking the Deck for Death: Examining American Death-
Qualified Juries and International Fair Trial Rights“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Arts (MA)

Wien, 2016 / Vienna 2016

Studienkennzahl lt. Studienblatt /
Postgraduate programme code as it appears on
the student record sheet:

A 992 884

Universitätslehrgang lt. Studienblatt /
Postgraduate programme as it appears on
the student record sheet:

Universitätslehrgang Master of Arts in Human Rights

Betreut von / Supervisor:

Univ.-Prof. MMag. Dr. Christina Binder, E.MA

“Why do we kill people who kill people to show that

killing people is wrong?”

—a bumper sticker

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Acknowledgements

I would like to thank Manfred Nowak and the entire Vienna Master team for their enthusiasm and support, as well as my thesis supervisor Christina Binder.

At the end of our two years together, I feel that I must also acknowledge the entire Vienna Master of Arts in Human Rights Class of 2016, for re-defining squad goals and making these last two years such a delight. Especially Jovana, my spouse in a parallel dimension, deserves enormous credit for struggling through the lawspeak of this thesis to edit and proof-read it, and even more for always being there for me in the process of writing.

I also have to acknowledge Reprieve for the great work they do in the death penalty field. I got the idea for this thesis when I was volunteering for them, researching old US execution cases: I noticed how many of them listed the improper exclusion of jurors as a ground for appeal, and as a European unfamiliar with this type of challenge, this immediately arose my suspicions.

Finally, I want to thank my family for always supporting me in my academic pursuits. Papa, I wish I could have known your thoughts on all of this.

List of Abbreviations

American Convention	American Convention on Human Rights (1969/1978)
American Declaration	American Declaration of the Rights and Duties of Man (1948)
ADP	Automatic Death Penalty juror
APA	American Psychological Association
CJP	Capital Jury Project
ECOSOC	United Nations Economic and Social Council
IA Commission	The Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights (1966/76)
GA	United Nations General Assembly
HR Committee	United Nations Human Rights Committee
OAS	Organisation of American States
OAS Charter	Charter of the Organisation of American States (1948)
UN	United Nations
US	United States of America

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1. Introduction

The United States (US) is the only Western State to retain the death penalty, and probably the death penalty State with the strongest fair trial and due process guarantees; in fact, the right to a jury of peers – a phrase that dates back to the Magna Carta – lies at the heart of the American criminal justice system. It may be surprising, then, to find out that in death penalty cases, it is more likely to be a jury of *some* peers.

In any trial which could end in a death sentence, the potential jurors have to go through a process called death-qualification, which lives up entirely to its ominous name: Before even starting the guilt phase of the trial, during the *voir dire*, every juror is questioned about their views regarding capital punishment in order to determine whether they can follow the law in deciding what sentence to impose. If it is determined that they will be ‘substantially impaired’ by their beliefs about the death penalty, then they are not ‘death-qualified’ and are stricken from the jury. This significantly diminishes the impact of being tried by a jury of peers, since it is only a jury of peers who are not opposed to the death penalty to a significant degree. There are secondary effects of excluding death penalty opponents as well: it has a certain white-washing effect on the jury, since it disproportionately eliminates minorities, and women are excluded at a higher rate as well. Furthermore, there is evidence that jurors who were subjected to death qualification are also psychologically affected by this process: They come out of it more conviction-prone and biased against the defendant. In most capital cases, a single juror can mean the difference between life and death; jury composition is therefore crucial.

Death-qualification has been found constitutional by the Supreme Court multiple times at this point; however, the obligations of the US in international human rights law are another matter. This thesis explores the legality of death-qualification in international law, specifically under the International Covenant on Civil and Political Rights (ICCPR) and the American Declaration of the Rights and Duties of Man (American Declaration).

1.1. Research Questions

The following research questions will be answered:

- 1) What are the implications of death qualification – its effects on juries, and therefore fair trial rights and due process guarantees?
- 2) Is this practice compatible with the US' international human rights obligations?

First of all, the methodology will be discussed. Secondly, the context of death-qualification in the 21st century will be illustrated – the legal framework of modern US death penalty, the different capital sentencing systems used in retentionist US states, as well as recent developments and the development of public opinion on the death penalty in the modern era. Thirdly, the origins of death-qualification in the US will be discussed, and its domestic challenges in the Supreme Court, which shaped the practice in its current form. Fourthly, the empirical studies on the effects of death-qualification will be used to describe its human rights implications, regarding a fair trial by an impartial tribunal, its effects on the representativeness of juries, and the rights of those jurors who are excluded, and its side effect of racial and gender discrimination. Finally, the last and most comprehensive section deals with the question of its legality under international human rights law: The ICCPR and the views of the Human Rights Committee (HR Committee) are scoured for evidence that death-qualification violates the treaty, followed by a similar analysis of the American Declaration as interpreted by the Inter-American Commission on Human Rights (I-A Commission). As subsidiary sources, the views of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions are discussed, as well as a short comparative analysis of two other common law jurisdictions and the way they deal with juror selection: the United Kingdom and Canada. The thesis ends on a conclusion.

1.2. Methodology

The following methodology was used in the discussion of the issue:

- 1) The issue was positioned in the current context of capital punishment in the US and in light of the history of domestic challenges to death-qualification in the Supreme Court.
- 2) A summary of the psychological effects of death qualification was compiled by analysing the existing social scientific and psychological studies on the topic.

- 3) The HR Committee views on capital punishment, fair trial rights and impartiality, as well as jury selection expressed in General Comments, State Reports and Individual Communications was reviewed.
- 4) The jurisprudence of the I-A Commission on capital punishment, fair trial rights and jury selection related specifically to the US was analysed to gauge its interpretation of the American Declaration.
- 5) As subsidiary sources, relevant views of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, as well as a comparative law analysis of jury selection in the United Kingdom and Canada were studied.

2. Modern US Death Penalty in Context

2.1. The Death Penalty in the Modern Era

2.1.1. *FURMAN, GREGG, AND THE BEGINNING OF ‘DEATH IS DIFFERENT’ AND ‘SUPER DUE PROCESS’*

While capital punishment has been practiced in the US for a long time, its modern era began in 1972 and 1976. When the Supreme Court suspended capital punishment in 1972 on account of rampant arbitrariness, it essentially hit the reset button on its evaluation of capital punishment, ushering in a new era characterised by the ‘death is different’ doctrine, and its resultant ‘super due process’ requirement.

The case that paved the way for the modern era of the death penalty was *Furman v. Georgia*, which in 1972 found the states’ death penalty statutes, which gave the jury unbridled discretion on whether or not to impose a death sentence, to be unconstitutional. The Justices filed nine separate opinions, highlighting how divided the Court was on the issue, but five of them concurred that the current practice could not continue, on account of imposing the death penalty entirely arbitrarily.¹ Justice Douglas observed that “people live or die, on the whim of one man or 12;”² Justice Stewart said that “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”³ So while the death penalty itself was not found to be unconstitutional (at least, not by a majority: Justices Brennan and Marshall⁴ were willing to go that far), it had to change in order to be imposed.

States quickly adopted new sentencing statutes, which were followed by constitutional challenges: In 1976, in *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Supreme Court rejected new statutes which made the death penalty mandatory for

¹ *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

² *Furman v. Georgia*, 408 U.S., p. 253 (Douglas, W., concurring).

³ *Furman v. Georgia*, 408 U.S., p. 309 (Stewart, P., concurring).

⁴ *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), pp. 258-306 (Brennan, J., concurring) and 315-371 (Marshall, J., concurring).

specific crimes, which the majority judged to be “unduly harsh and unworkably rigid.”⁵ However, in the landmark decision of *Gregg v. Georgia*⁶ (as well as its companions *Jurek v. Texas*⁷ and *Proffitt v. Florida*⁸), the Court voted 7-2 to approve more guided sentencing schemes, which gave the jury some direction and allowed them to consider the specific characteristics of the case, as described in section 2.2 below. They also approved the bifurcation of trials (splitting them into separate guilt and sentencing phases with separate decisions)⁹ and an automatic appeal to the State Supreme Court with a proportionality review.¹⁰ Even though it was questionable how much these new guidelines and safeguards would do to reduce arbitrariness – Justice White concurred in the result, but predicted that “mistakes will be made and discriminations will occur which will be difficult to explain.”¹¹ He was not wrong, and Justice Stevens, who also voted with the majority, in a 2010 interview pinpointed *Gregg* as the only vote he regretted and would have change if he could:

"I thought at the time ... that if the universe of defendants eligible for the death penalty is sufficiently narrow so that you can be confident that the defendant really merits that severe punishment, that the death penalty was appropriate," he says. But, over the years, "the court constantly expanded the cases eligible for the death penalty, so that the underlying premise for my vote has disappeared, in a sense. [...] I really think that the death penalty today is vastly different from the death penalty that we thought we were authorising."¹²

In fact, Stevens is not alone in his regret. Justice Blackmun, in a 1994 dissent, said

From this day forward, I no longer shall tinker with the machinery of death. [...] Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of

⁵ *Woodson v. North Carolina*, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), p. 293; *Roberts v. Louisiana*, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976), p. 333.

⁶ *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

⁷ *Jurek v. Texas*, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976).

⁸ *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

⁹ *Gregg v. Georgia*, 428 U.S., pp. 191-195.

¹⁰ *Gregg v. Georgia*, 428 U.S., p. 198.

¹¹ *Gregg v. Georgia*, 428 U.S., p. 226 (White, B., concurring)

¹² Totenberg, Nina. “Justice Stevens: An Open Mind On A Changed Court.” NPR. 4 October 2010. Web. Accessed 30 May 2016, at <<http://www.npr.org/templates/story/story.php?storyId=130198344>>.

procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.¹³

Add to that Justice Powell – who confirmed to his biographer that he had “come to think that capital punishment should be abolished”¹⁴ – and it is hard to escape the creeping realisation that the death penalty was upheld, if not by accident, then at least on a faith in the effects of these safeguards that was not warranted or, ultimately, confirmed by fact. If these three justices had seen the light earlier and voted differently in *Gregg*, the death penalty may never have been reinstated.

Whatever the successes or failures of the new system, it still marked a new understanding of the death penalty by the Supreme Court. Margaret Radin coined the term “super due process” for the new procedural safeguards, developed by the Court between 1972 in *Gregg* and 1977 in *Lockett v Ohio*.¹⁵ In *Lockett*, the Court held that the sentence should “not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense” in response to the state’s attempt to limit mitigating circumstances in its statute.¹⁶

Super due process is a consequence of the ‘death is different’ doctrine developed by the Supreme Court, which was initiated by Justice Brennan in *Furman*. In his opinion, he pointed out that “death is a *unique punishment* in the United States”¹⁷ and the Supreme Court “almost always treats death cases as *a class apart*.”¹⁸ This was necessary, because “death is truly an awesome punishment.”¹⁹ The calculated killing of a human being by

¹³ *Callins v. Collins*, 510 U.S. 1141, 114 S. Ct. 1127, 127 L. Ed. 2d 435 (1994).

¹⁴ New York Times (Opinion). “Justice Powell's New Wisdom.” *The New York Times*. 11 June 1994. Web. Accessed 25 June 2016, at <<http://www.nytimes.com/1994/06/11/opinion/justice-powell-s-new-wisdom.html>>.

¹⁵ Radin, Margaret Jane. “Cruel Punishment and Respect for Persons: Super Due Process for Death.” *South California Law Review* 53 (1979), p. 1143.

¹⁶ *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), p. 604.

¹⁷ *Furman v. Georgia*, 408 U.S., p. 286.

¹⁸ *Furman v. Georgia*, 408 U.S., p. 287.

¹⁹ The author would like to remind readers, for good measure, that the word ‘awesome’ also means ‘inspiring fear and respect,’ especially when it is used by a Supreme Court Justice in the 1970s.

the State involves, by its very nature, a denial of the executed person's humanity.”²⁰ This view was subsequently picked up time and again.²¹

2.1.2. IMPLEMENTING THE NEW SYSTEM: SUCCESSES AND FAILURES

While initially executions only commenced again slowly in the decade following *Gregg*, both executions and new sentences increased continuously throughout the 1980s and 1990s, peaking in the late 1990s (317 new sentences in 1996, 98 executions in 1999), before beginning to fall again after 2005.²² The Court remains divided on the issue of the legality of capital punishment; most recently, it rejected two challenges against lethal injection in *Baze v. Rees*²³ and *Glossip v. Gross*.²⁴ On the other hand, it has ruled unconstitutional the execution of the insane in *Ford v. Wainwright*,²⁵ mentally disabled people in *Atkins v. Virginia*,²⁶ and juvenile offenders in *Roper v. Simmons*,²⁷ it also required in *Ring v. Arizona* that all aggravating factors, which make a defendant death-eligible, must be found by a jury,²⁸ which was followed up by *Hurst v. Florida*.²⁹

All in all, the Supreme Court has a spotty record of implementing the ‘death is different’ doctrine, and few cases illustrate this better than *McCleskey v. Kemp*. In this case, the defendant attempted to prove that systemic racial discrimination, as proven by

²⁰ *Furman v. Georgia*, 408 U.S., p. 290.

²¹ E.g. in *Lockett v. Ohio*, 438 U.S., pp. 604f (“We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed”); *Woodson v. North Carolina*, 428 U.S., p. 305 (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”); *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), p. 358. (“From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”)

²² Hood, Roger, and Carolyn Hoyle. *The Death Penalty: A Worldwide Perspective*. Oxford: Oxford University Press, 2015, p. 130.

²³ *Baze v. Rees*, 128 S. Ct. 1520, 553 U.S. 35, 170 L. Ed. 2d 420 (2008).

²⁴ *Glossip v. Gross*, 136 S. Ct. 20, 192 L. Ed. 2d 990 (2015).

²⁵ *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986).

²⁶ *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

²⁷ *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

²⁸ *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

²⁹ *Hurst v. Florida*, 136 S. Ct. 616, 577 U.S. ___, 193 L. Ed. 2d 504 (2016).

the impactful Baldus study, was a grounds for constitutional violation of the system. It was a chance for the Court to examine the new system put in place by *Gregg*, as it provided a realistic look at discriminatory imposition of capital punishment, the kind *Gregg* sought to avoid.³⁰ However, rather than acknowledge the pervasive problem of racial discrimination, which went unchallenged by the Court, it decided that such studies could only demonstrate “a risk that the factor of race entered into some capital sentencing decisions.”³¹ It did not acknowledge that previous cases had relied on precisely these kinds of statistical evidence. Instead, they held that a constitutional challenge can only arise when a defendant can “show evidence specific to his own case that would support an inference that racial considerations played a part in his sentence,”³² and also that sentencers “acted with discriminatory purpose.”³³ This proof must, furthermore, be “exceptionally clear” to convince them.³⁴

In practice, that meant that such a challenge was practically impossible, since “persons who are most prejudiced often are least aware of their biases and, when they are aware, are least willing to disclose them.”³⁵ There was no remedy envisioned for structural, unconscious discrimination, as the Court obviously thought its “‘unceasing efforts’ to eradicate racial prejudice from our criminal justice system”³⁶ were enough, missing the opportunity to actually make an effort that mattered. Ironically, even in this decision, the majority opinion referred to the super due process afforded in capital cases.³⁷ The fallout from *McCleskey* is, in the end, that these challenges based on statistical evidence are essentially precluded at the Court. It was confirmed that in capital cases, “unrealistic demands for ‘statistical proof’ have been made, of a kind not called for in other areas of discrimination law.”³⁸

³⁰ Haney, Craig. *Death by Design: Capital Punishment as a Social Psychological System*. New York: Oxford University Press, 2005, p. 14f

³¹ *McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987), FN 7 (stating that the Court “assumed the study is valid statistically”).

³² *McCleskey v. Kemp*, 481 U.S., p. 292.

³³ *McCleskey v. Kemp*, 481 U.S., p. 292.

³⁴ *McCleskey v. Kemp*, 481 U.S., p. 297.

³⁵ Haney, 2005, p. 17.

³⁶ *McCleskey v. Kemp*, 481 U.S., p. 309.

³⁷ *McCleskey v. Kemp*, 481 U.S., p. 303, 309-320.

³⁸ Hood/Hoyle, p. 385.

Justice Blackmun later stated in resignation that in *McCleskey*, the Court had “virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty.”³⁹ Justice Powell, the author of the majority opinion in the narrow 5-4 decision, later said that out of his whole career, *McCleskey* was the one case he regretted and wished he could change his vote, therefore tipping the majority.⁴⁰ The same considerations governed the regulation of death-qualification, as will be shown in section 3.

2.2. Differences in Capital Sentencing Modalities: The Importance of the Unanimous Jury

As illustrated above, the post-1976 death penalty hinges on a balancing act between mandatory death sentences, which were considered too harsh and rigid, and entirely discretionary sentences, which were considered arbitrary. Modern, post-*Furman* sentencing systems attempt to find the sweet spot in between, the amount of discretion that is ‘just right.’ In real terms, this is probably an impossible task; legally speaking, this is accomplished as long as the Supreme Court does not take offence.

These attempts to strike a balance between the two extremes, and vary slightly between states, but all are premised on the finding of aggravating and mitigating circumstances in the sentencing phase of the trial.⁴¹ Current capital statutes can be categorised broadly in three ways: “Balancing schemes” in which the jury decides which side of identified aggravating and mitigating circumstances outweighs the other; “threshold schemes,” in which the finding of at least one aggravating factor makes the defendant ‘death-eligible’, followed by the consideration of other aggravating and mitigating factors; and determination of “special sentencing issues,” which require certain specific findings by the jury through answering a series of questions, such as future dangerousness (Texas and Oregon) and “outrageously or wantonly vile, horrible or inhumane conduct” (Virginia).⁴²

³⁹ *Callins v. Collins*, 510 U.S. (Blackmun, J, dissenting).

⁴⁰ New York Times (Opinion).

⁴¹ Hood/Hoyle, pp. 354f.

⁴² Hood/Hoyle, p. 355.

The Supreme Court has ruled a few times on mitigating circumstances, requiring juries to be able to consider any aspect of the defendant's "character or record," or of the offence he was convicted for,⁴³ and "meaningful consideration" to be given to them.⁴⁴ Generally, while these schemes prevent absolute discretion as was ruled unconstitutional in *Furman*, there is still plenty of room for it, since individual judgement calls have to be made by the jurors on whether or not the respective circumstances exist, and on the weight they ascribe to them. When dealing with murder, the finding of whether or not it was particularly 'wantonly vile,' as mentioned above, is rather subjective, but on the other hand, practically "invites an affirmative answer,"⁴⁵ while a prognosis of future dangerousness of a defendant will be determined by a juror's beliefs on rehabilitation and restorative justice, as well as entirely unrelated factors like racial bias. There is generally a lot of room for arbitrary judgements in these schemes.⁴⁶ The specific effects of death-qualification on jurors' ability to judge aggravating and mitigating circumstances are discussed below in section 4.1.1.

Table 1 below gives a visual overview of the current capital sentencing modalities of US states and the federal death penalty, post-*Hurst*.⁴⁷

⁴³ Concerning Florida, in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987).

⁴⁴ Concerning Texas, in *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654, 550 U.S. 233, 167 L. Ed. 2d 585 (2007).

⁴⁵ Hood/Hoyle, p. 358.

⁴⁶ For a more detailed critique, see Hood/Hoyle, p. 357-368.

⁴⁷ Information compiled from: Cleek, Ashley. "Alabama's Death Penalty Needs to Go." *Slate*. 30 March 2016. Web. Accessed 1 July 2016, at <http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/alabama_s_horrible_death_penalty_law_needs_to_go.html>; Death Penalty Information Center. "U.S. Supreme Court: Ring v. Arizona." *Death Penalty Information Center*. 2016. Web. Accessed 1 July 2016, at <<http://www.deathpenaltyinfo.org/us-supreme-court-ring-v-arizona>>; Parrent, Ann M. "Provisions of State and Federal Statutes Concerning Sentence If Capital Sentencing Jury Cannot Agree." *Death Penalty Information Center*. 2014. Web. Accessed 1 July 2016, at <<http://www.deathpenaltyinfo.org/documents/JuryDeadlockLaws.pdf>>; Reyes, Jessica M. "Public Defenders: Death Penalty Unconstitutional." *Delaware Online*. 1 March 2016. Web. Accessed 1 July 2016, at <<http://www.delawareonline.com/story/news/local/2016/03/01/public-defenders-del-death-penalty-law-unconstitutional/81146406/>>.

Table 1: Capital Sentencing Statutes Comparison

	JURY VERDICT			IN EVENT OF HUNG JURY		
	Sentence unanimous and binding	Sentence non-unanimous advisory for judge	Only on eligibility (aggr. factors)	Judge decides non-capital sentence	Judge decides capital or non-capital sentence	New sentence jury, if no unanimity: judge decides non-capital sentence
AL		x		Jury: at least 10 votes for death recommendation - not binding		
AZ	x					x
AR	x			x		
CA	x					x
CO	x			x		
DE		x		Jury non-unanimously recommends sentence - not binding		
FL		x		Jury: at least 10 votes for death recommendation - binding		
GA	x			x		
ID	x			x		
IN	x				x	
KS	x			x		
KY	x					x
LA	x			x		
MS	x			x		
MO	x			x		
MT			x	Judge can sentence to death if jury finds at least 1 aggr. factor		
NV	x			x		x
NH	x			x		
NC	x			x		
OH	x			x		
OK	x			x		
OR	x			x		
PA	x			x		
SC	x			x		
SD	x			x		
TN	x			x		
TX	x			x		
UT	x			x		
VA	x			x		
WA	x			x		
WY	x			x		
Fed	x			x		

Statutes are in fact constantly changing: Florida just had its statute overturned in *Hurst v. Florida*, which mandated that the jury must find every aggravating factor (in line with *Ring v. Arizona*), and declared the judicial override (which allows a judge to sentence a defendant to death despite the jury's recommendation) unconstitutional. The new statute calls for a supermajority of 10 jurors to impose a death sentence, but it was predicted that the State Supreme Court will eventually change this to a unanimity requirement.⁴⁸ The Montana statute allowing a judge to sentence was recently challenged.⁴⁹ In Delaware, a State Supreme Court challenge is in progress to end the judicial override; in practice, no judge has ever done so, but the court stayed all pending executions until the decision.⁵⁰ The same issue may still give rise to a Supreme Court challenge to Alabama's sentencing scheme in light of *Hurst*.⁵¹

Generally, though, what is obvious instantly is that the vast majority of US states – 27 out of 31 – as well as the federal death penalty statute leave the imposition of a death sentence exclusively to a unanimous jury. Notably, these include the three states which have been most active in executing – Texas, Oklahoma and Virginia, which together make up for over half of all executions in the US since 1976.⁵² Only in four states can a judge or a non-unanimous jury sentence a defendant to death, and in one of these – Florida – a supermajority of ten jurors is required, with any more than two dissenters precluding a death sentence. That means that in 28 out of 32 US jurisdictions, a single dissenting juror can mean the difference between life and death for the defendant, and the likelihood of such a juror having been excluded from the jury during death-qualification is considerable.

⁴⁸ Tabak, Ronald J. "Chapter 20: Capital Punishment." *The State of Criminal Justice 2016*. Ed. Mark E. Wojcik. American Bar Association, 2016, p. 245.

⁴⁹ Hood/Hoyle, p. 349.

⁵⁰ Reyes.

⁵¹ Cleek.

⁵² Death Penalty Information Center. "Number of Executions by State and Region Since 1976." *Death Penalty Information Center*. 2016. Web. Accessed 12 July 2016, at <<http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>>.

2.3. Recent Development and Statistics

To claim that the death penalty in the United States is on its last legs would be premature; however, it is impossible to look at the developments of the last few years, in figures, statutes, and courts, and not see a trend, however incremental, towards abolition. At the very least, the last few years have proven tumultuous for the death penalty, and it is not assured that these disruptions can be overcome in a way that is found constitutional.

The number of executions carried out in 2015 – 28 – is the lowest in 25 years, since before the height of the death penalty in the 1990s. The number of new death sentences handed down is even more telling, since it presents a 33% decline from 2014 and a 40-year low, the fewest of any year in the modern era since 1976. Texas, the leading executing state, only sentenced two people to die in 2015, unprecedented under its post-1976 statute.⁵³ While on its face that is good news, there is a troubling side to these numbers: According to Harvard's Charles Hamilton Houston Institute for Race and Justice, 75% of those executed in 2015 either had severe mental disabilities and illnesses (50%), had suffered extremely traumatic childhood traumas (18%), or their guilt was in doubt (7%).⁵⁴ The record, therefore is far from good.

Several reasons for the new low in sentenced imposed have been suggested: New initiatives for improved legal representation by public defenders, who have been developing strategies for more effective mitigation proceedings, specialised teams for capital cases, and approaching prosecutors directly with reasons not to seek a death sentence; the prohibitive cost of the death penalty; on-going concerns over racial disparities and exonerations;⁵⁵ the availability of life imprisonment without parole,

⁵³ Death Penalty Information Center. "The Death Penalty in 2015: Year End Report." *Death Penalty Information Center*. 2015. Web. Accessed 25 July 2016, at <<http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>>, pp. 1ff.

⁵⁴ Harvard Law Today. "Death Penalty 2015: Lowest Number of Executions in 25 Years, but Marked by Disability and Impairment." *Harvard Law Today*. 23 December 2015. Web. Accessed 20 June 2016, at <<http://today.law.harvard.edu/death-penalty-2015-lowest-number-of-executions-in-25-years-but-marked-by-disability-and-impairment/>>.

⁵⁵ Tabak, p. 238.

which previously had been less available in part because of limitations in staffing and technology; and the low crime rate (as well as the consequently low public opinion).⁵⁶

The drop in executions has been attributed almost solely on on-going lethal injection controversies, which have haunted the institution since 2010. Lethal injection is the sole primary method of execution in all US states, having entirely replaced electrocution, which is now only available in some states for prisoners who were sentenced when it was still used, or by choice of the prisoner. However, electrocution and other methods which can be chosen play almost no role in practice; lethal injection, considered to be the most humane and safe method, now accounts for the vast majority of deaths.⁵⁷ That may be about to change, however.

What seems like a scientifically engineered protocol actually “involves as much guesswork as expertise,” and there were not many known alternatives to the protocols used by states, which, while it has been known to fail, at least worked most of the time relatively free of controversy.⁵⁸ There was only one US-based manufacturer of the drug needed, and when they ceased production, it transpired that otherwise, the drugs could only be imported from abroad, mainly abolitionist Europe.⁵⁹ Due to the work of activists – in large part Reprieve⁶⁰ – European countries stopped the export of these drugs for the purposes of executions, finding this inconsistent with their abolitionist agendas, US states had to turn elsewhere, and to more experimental drug protocols.⁶¹ The results were botched executions, like the one of Dennis McGuire in Ohio (which saw him gasping and moving for 10 minutes),⁶² Joseph Wood in Arizona (which took two hours with the prisoner clearly in distress),⁶³ and Clayton Lockett in Oklahoma

⁵⁶ Von Drehle, David, “The Death of the Death Penalty.” *Time*. 8 June 2015. Web. Accessed 20 June 2016, at <<http://time.com/deathpenalty/>>.

⁵⁷ Hood/Hoyle, p. 180.

⁵⁸ Stern, Jeffrey E. “The Cruel and Unusual Execution of Clayton Lockett.” *The Atlantic*. June 2015. Web. Accessed 20 June 2016, at <<http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>>.

⁵⁹ Tabak, pp. 251f.

⁶⁰ Stern.

⁶¹ Stern; Tabak, pp. 251f.

⁶² Tabak, p. 253.

⁶³ Tabak, p. 255.

(which, aside from experimental drugs, also involved an inexpertly inserted needle, causing him to die after 43 minutes of a heart attack).⁶⁴

Following foreign States, big pharmaceutical companies began instituting distribution controls for drugs that could be used in executions – none were produced for this purpose, and most companies were adamantly opposed to their products being used in executions.⁶⁵ In 2016, Pfizer was the last big company to join their ranks, and effectively closed off the last open-market source for the drugs.⁶⁶ As a result, some states are returning to the electric chair as a backup mandatory execution method: Texas has passed legislation to that effect, which is being challenged in the State Supreme Court;⁶⁷ Utah has reinstated the firing squad as a backup;⁶⁸ in Oklahoma it was the gas chamber.⁶⁹ Virginia was poised to reintroduce the electric chair, but the effort was dropped in favour of finding other ways to secure lethal injection drugs.⁷⁰ Two State Supreme Courts have already outlawed electrocution, with Nebraska's calling it "being tortured to death."⁷¹

In 2015, the Supreme Court ruled in *Glossip v. Gross* that the new lethal injection protocols did not violate the constitution even after Lockett's execution. It was a 5-4 vote which gave rise to a blistering dissent by Justice Breyer, joined by Justice Ginsburg, in which he concluded that the death penalty itself violates the constitution.

⁶⁴ Tabak, p. 256. Stern.

⁶⁵ Tabak, 251-254; Stern; Eckholm, Erik. "Pfizer Blocks the Use of Its Drugs in Executions." *The New York Times*. 13 May 2016. Web. Accessed 20 June 2016, at <http://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0>.

⁶⁶ Eckholm.

⁶⁷ Bellaware, Kim. "Tennessee Suspends Executions Amid Legal Challenges to Lethal Injection, Electric Chair." *The Huffington Post*. 14 April 2015. Web. Accessed 20 June 2016, at <http://www.huffingtonpost.com/2015/04/13/tennessee-suspends-executions_n_7057764.html>.

⁶⁸ Bellaware, Kim. "Utah Governor Signs Law Reinstating Firing Squad as Backup Execution Method." *The Huffington Post*. 24 March 2015. Web. Accessed 20 May 2016, at <http://www.huffingtonpost.com/2015/03/23/utah-firing-squad_n_6927550.html>.

⁶⁹ Christianson, Scott. "How Oklahoma Came to Embrace the Gas Chamber." *The New Yorker*. 24 June 2015. Web. Accessed 20 June 2016, at <<http://www.newyorker.com/news/news-desk/how-oklahoma-came-to-embrace-the-gas-chamber>>.

⁷⁰ Berman, Mark, and Laura Vozzella. "In a Move that Could Jeopardize Executions, McAuliffe Wants to Shield the Identity of Makers of Lethal-Injection Drugs." *The Washington Post*. 11 April 2016. Web. Accessed 20 June 2016, at <https://www.washingtonpost.com/local/virginia-politics/mcauliffe-guts-virginias-electric-chair-bill/2016/04/11/3c0d4a74-ff2f-11e5-9203-7b8670959b88_story.html>.

⁷¹ Hood/Hoyle, p. 180.

He cited in support three specific defects: 1) Unreliability, which was bolstered by data on exonerations, innocent people having been executed, and the frequent failure of procedural safeguards; 2) arbitrariness, which has haunted the death penalty since before *Furman*; 3) “unconscionably long delays,” which undermine any deterrent effect it may have.⁷² Any efforts to alleviate the third defect would come at the expense of the first two, which would be aggravated further.⁷³ He concluded that the death penalty was increasingly unusual and that the Court should consider its legality again.⁷⁴ The *Glossip* dissent made waves and was widely seen as a powerful political message, indicating that maybe this would be the Supreme Court (post-Scalia) which would finally take on capital punishment again. Justice Sotomayor, in her dissent, also criticised the majority opinion for imposing the “wholly novel requirement of proving the availability of an alternative means for their own executions.”⁷⁵

2.4. Public Opinion Development since 1976

In the long history of capital punishment in the US, public approval of its use and fairness has fluctuated continuously, and is believed to have a considerable influence on the retention of the death penalty so far, when all other comparable Western States have abolished it.⁷⁶ It even exerts an indirect influence on Supreme Court decisions, with contemporary polling data being cited in support of “each major death penalty decision in the last century [...] whether for or against capital punishment.”⁷⁷ This pattern seems to fit also the Supreme Court decisions related to death-qualification cited below. In a way, popular opinion can also influence the retention of the death penalty more directly in the US, because of the prevalent “criminal justice populism” in which prosecutors and judges are elected, rather than appointed, and regularly run on death penalty-

⁷² *Glossip v. Gross*, 135 S. Ct. (2015), pp. 2755f (Breyer, J., dissenting).

⁷³ *Glossip v. Gross*, 135 S. Ct. (2015), p. 2772 (Breyer, J., dissenting).

⁷⁴ *Glossip v. Gross*, 135 S. Ct. (2015), pp. 2776f (Breyer, J., dissenting).

⁷⁵ *Glossip v. Gross*, 135 S. Ct. (2015), p. 2781 (Sotomayor, J., dissenting).

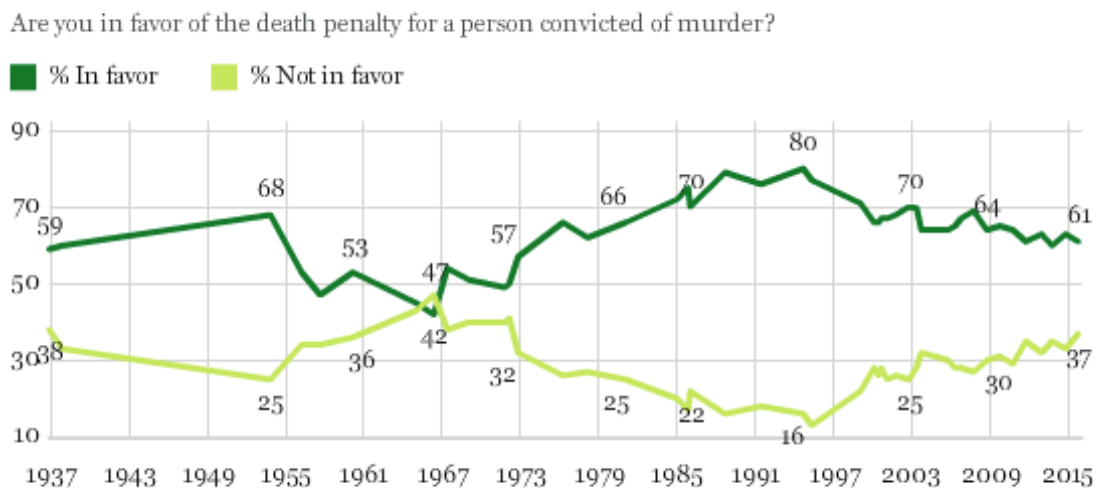
⁷⁶ See Bohm, Robert M., and Ray Surette. “Toward an Understanding of Aggregate Death Penalty Opinion Change: A Possible Role for Popular Music.” *International Journal of Criminology and Sociology* 2 (2013).

⁷⁷ Baumgartner, Frank R., Suzanna L. De Boef, and Amber E. Boydston. *The Decline of the Death Penalty and the Discovery of Innocence*. Cambridge: Cambridge University Press, 2008, p. 169.

friendly platforms which then mandates them to implement it after the election.⁷⁸ The relevance of public opinion for death-qualification, in particular, is clear: The less people support the death penalty (and the strength of their opposition), the more will be excluded from capital juries. This is reflected in the empirical research, see section 4.2.1.

The most recent Gallup poll shows, as indicated in Figure 1, that 61% of Americans supported the use of the death penalty in 2015, while 37% opposed it. The numbers have been steadily moving towards the 50-50 mark since the height of death penalty support in 1994, and in the current decade marked the lowest level in 35 years. Levels are still far away from the lowest point in the last century in 1967, when for the first and only time opposition at 47% outweighed support at 42%. Incidentally, it was in 1968 that the Supreme Court took the first and most far-reaching step in restricting death-qualification, in a precursor of its nation-wide suspension of the death penalty between 1972 and 1976. On the other hand, when it ruled to loosen these restrictions again, in the mid-1980s, support levels had soared again and were approaching their highest recorded point.⁷⁹

*Figure 1: Development of Popular Opinion on the Death Penalty in the US (Gallup)*⁸⁰



⁷⁸ Steiker, Carol S. "Capital Punishment and American Exceptionalism." *Oregon Law Review* 81 (2002), pp. 119ff.

⁷⁹ Gallup. "Solid Majority Continue to Support Death Penalty." *Gallup*. 15 October 2015. Web. Accessed 15 July 2016, at <<http://www.gallup.com/poll/186218/solid-majority-continue-support-death-penalty.aspx>>.

⁸⁰ Gallup.

The Gallup data also shows a significant racial difference in support: Figure 2 shows that a majority of African Americans oppose the death penalty, and while Hispanics do not quite reach that level, their support also trails that of white Americans.⁸¹

Figure 2: Racial Differences in Death Penalty Support (Gallup) ⁸²

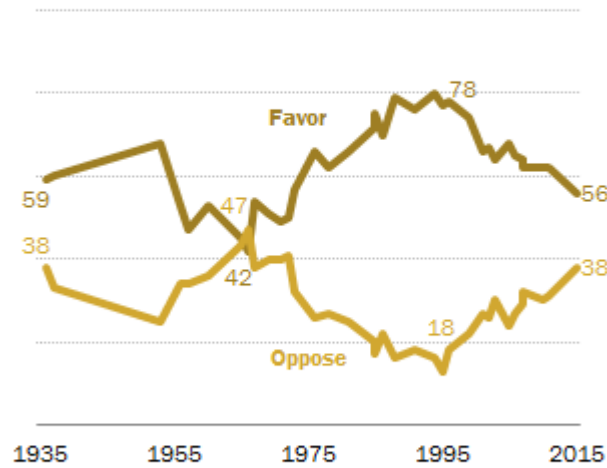
Americans' Views on the Death Penalty, by Race

	% White	% Black	% Hispanic
Yes, in favor	68	39	56
No, not in favor	29	55	43

The most recent data from Pew Research Centre (Figure 3) confirms these trends, actually recording support 5% lower than Gallup, and opposition 1% higher. Racial differences accordingly showed less support across the board; interestingly, while support among men has remained the same since 2011, support among women, formerly roughly comparable to men, has dropped by 10% and is now markedly lower.⁸³

Figure 3: Development of Popular Opinion on the Death Penalty in the US (Pew) ⁸⁴

% who favor/oppose the death penalty for persons convicted of murder



⁸¹ Gallup.

⁸² Gallup.

⁸³ Pew Research Center. "Less Support for Death Penalty, Especially Among Democrats." *Pew Research Center*. 16 April 2015. Web. Accessed 2 July 2016, at <<http://www.people-press.org/2015/04/16/less-support-for-death-penalty-especially-among-democrats/>>.

⁸⁴ Pew Research Center.

Figure 4: Racial and Gender Differences in Death Penalty Support (Pew) ⁸⁵

	Nov 2011		Mar 2015		Change in favor
	Favor %	Oppose %	Favor %	Oppose %	
Total	62	31	56	38	-6
Men	65	30	64	30	-1
Women	59	33	49	45	-10
White	68	26	63	33	-5
Black	40	49	34	57	-6
Hispanic	52	42	45	47	-7

Given the differences among US states, it is also worthwhile to look at local death penalty support. In Texas – the most active state when it comes to executions, responsible for over one third of the total number since 1976 – the most current available state-wide numbers record public death penalty support at 75% (with 49% strongly supportive) in 2015, compared to 19% opposition (with only 9% strongly opposed). An analysis of the cross-tabulations reveals, however, that there is also a deep racial gulf in Texas: While 77% of whites register support, only 58% of blacks do, and opposition mirrors this with 18% and 31% respectively. Interestingly, Hispanics in Texas show even stronger support for the death penalty than white people, with 79% against 13%.⁸⁶

Data is also available for the Houston area specifically, which is relevant because it encompasses three Texas counties, two out of which make the top-ten list of US counties by execution numbers: Harris County, TX, is the number 1 execution county in the US,⁸⁷ having executed 126 people to date since 1976,⁸⁸ more than any US state except Texas itself.⁸⁹ Comparatively, the other one, Montgomery County, is the 6th most

⁸⁵ Pew Research Center.

⁸⁶ Ramsey, Ross. "UT/TT Poll: Voters Less Open to Open Carry." *The Texas Tribune*. 24 February 2015. Web Accessed 2 July 2016, at <<https://www.texastribune.org/2015/02/24/uttt-poll-voters-less-open-open-carry/>>.

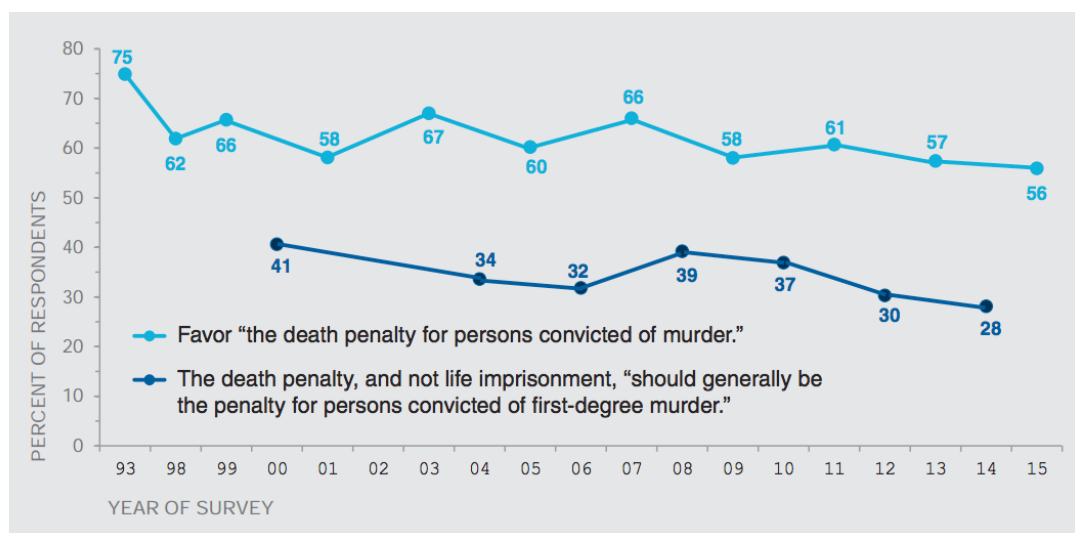
⁸⁷ Death Penalty Information Center. "Executions by County." *Death Penalty Information Center*. 1 January 2013. Web. Accessed 2 July 2016, at <<http://www.deathpenaltyinfo.org/executions-county>>.

⁸⁸ Texas Coalition to Abolish the Death Penalty. "Texas Death Penalty Facts." Texas Coalition to Abolish the Death Penalty. Web. Accessed 2 July 2016, at <<http://tcadp.org/get-informed/texas-death-penalty-facts/>>.

⁸⁹ DPIC, "Executions by State."

active county nationally with 16 executions, highlighting just how active Harris County is. Given these numbers, the level of support for the death penalty recorded by the Kinder Houston Area Survey is startling: As Figure 5 shows, only 56% of the people in Houston supported the death penalty in 2015. This is considerably lower not only than support for the death penalty in Texas, but also at the same level (Pew) or even lower (Gallup) than nation-wide support. Furthermore, this has been the case for a long time, since local support is recorded at 75% in 1993,⁹⁰ when nation-wide support was at its height at 80%. It has been suggested that this disconnect between public opinion and the policies enforced is due to a low turnout among the younger, poorer and non-white voters, redistricting, single-issue voting and the influence of money on local politics.⁹¹

*Figure 5: Development of Popular Opinion on the Death Penalty in the Houston, TX, Area (Kinder)*⁹²



In summary, nation-wide, there is a definitive trend towards opposition of the death penalty in public opinion over the last 20 years, with stark racial differences and a growing difference between men and women. It is not guaranteed that this will continue until public opinion demands abolition, since the death penalty has once before rallied

⁹⁰ Kinder Institute for Urban Research. *The 34th Annual Kinder Houston Area Survey: Perspectives on a City in Transition*. Houston: 2015. Accessed 2 July 2016, at <https://kinder.rice.edu/uploadedFiles/Urban_Research_Center/News/Kinder_Report_2015_lowres.pdf>, p. 18.

⁹¹ Klineberg, Stephen L. "The Disconnect Between Texans and Their Elected Officials." *TribTalk*. 1 July 2015. Web. Accessed 2 July 2016, at <<https://www.tribtalk.org/2015/07/01/the-disconnect-between-texans-and-their-elected-officials/>>.

⁹² Kinder Institute for Urban Research.

from a historic low in the late 1960s, but if the trend since the mid-90s holds more or less steadily, the 50-50 mark will be reached in 10 years or sooner. Public opinion is important for this particular thesis because it is an indicator of the amount of people who would be excluded from jury service in capital trials, as will be discussed in the following section.

3. A Brief History of Supreme Court Death-Qualification Rulings

3.1. The Origins of Death-Qualification and *Logan v. United States* (1892)

Death-qualification is a uniquely American invention and did not exist in the system of English common law as described by Sir William Blackstone. The only comparable challenge to a juror was the challenge *proper affectum*, for having specific ties to a party (a personal/familial relationship, or one of the master/servant variety), or for having already served in an official function in the same case before.⁹³ There had been cases in the 18th century in the US, in which jurors who stated they did not believe slavery could or should be legal (while it still was the law of the land) were challenged, but these challenges were denied, since jurors were free to rule on the law and its constitutionality, not only the facts. “Future courts would take the opposite, ahistorical view.”⁹⁴

The first case of the exclusion of a juror on account of their opposition to capital punishment is likely an 1820 case in which two Quaker jurors were removed, apparently spontaneously, by the trial judge. This decision was affirmed on appeal with no precedent given, the appeals judge holding that it would “subvert the objects of trial by jury” to let sit jurors who would either have to decide against their beliefs or violate their oath.⁹⁵ The first published record of the prosecution challenging a juror for his inability to sentence a defendant to death – which he had stated of his own accord – is *Commonwealth v. Leshner* in 1828. The exclusion was affirmed by the Pennsylvania Supreme Court, drawing a parallel to *proper affectum* without any “textual or historical analysis on the meaning or correct interpretation of the concept of partiality” or the

⁹³ Cohen, G. Ben, and Robert J. Smith. “The Death of Death-Qualification.” *Case Western Reserve Law Review* 59:1 (2008), p. 92.

⁹⁴ Cohen/Smith, pp. 93f.

⁹⁵ Quigley, John. “Exclusion of Death-Scrupled Jurors and International Due Process.” *Ohio State Journal of Criminal Law* 2 (2004), p. 270.

function of a criminal jury, which the dissent by Chief Judge Gibson denounced as “political activism.”⁹⁶ Gibson pointed out that under the law of the United Kingdom, *proper affectum* concerned bias about the specific person of the defendant, not abstract concepts like the legitimacy of capital punishment; the majority, however, held that in cases of specific or general bias there was the same “mischief,” going so far as to call it “perversion of truth” and “prostitution of the solemn forms of criminal justice,” and that conscientious objection was even harder to overcome for a juror than personal bias.⁹⁷ This case was later cited in a Louisiana Supreme Court decision affirming the exclusion of jurors on similar grounds, which changed the common law requirement of a juror’s indifference between the parties into the ability to follow the law, claiming that any English judge would do the same.⁹⁸ The origin of death-qualification is this conflation of bias *proper affectum* with the need for indifference.⁹⁹ By 1892, the practice was commonplace, and when the question reached the Supreme Court, it held in *Logan v. United States* that

A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. [...] The principle has been applied to the very question now before us [...] by the courts of every State in which the question has arisen, and by express statute in many States.¹⁰⁰

This standard of excluding juror for scruples alone stood for almost 80 years, until the Supreme Court, enabled by the reality of sharply declining execution numbers after the Second World War,¹⁰¹ took up the task of regulating the – thus far largely unchecked – administration of capital punishment in a series of constitutional challenges.¹⁰² One of the first such cases redefined death-qualification for the modern era.

⁹⁶ Cohen/Smith, pp. 94f.

⁹⁷ Quigley, 2004, pp. 271f.

⁹⁸ Cohen/Smith, p. 97.

⁹⁹ Cohen/Smith, p. 98.

¹⁰⁰ *Logan v. United States*, 144 U.S. 263, 12 S. Ct. 617, 36 L. Ed. 429 (1892), p. 298.

¹⁰¹ Hood/Hoyle, p. 129.

¹⁰² Brown, Teresa A. “Who’s Qualified to Decide Who Dies? *Wainwright v. Witt*, 105 S. Ct. 844 (1985).” *Nebraska Law Review* 65:3 (1986), pp. 569f.

3.2. *Witherspoon v. Illinois* (1968): Setting a Standard

Witherspoon v. Illinois was a landmark 6-3 Supreme Court case that preceded the post-*Furman* suspension of the death penalty. In petitioner Witherspoon's trial, nearly half the venire – 47 out of 95 potential jurors – had been successfully challenged for having scruples about imposing the death penalty, with the trial judge apparently setting the tone by beginning the *voir dire* with the words, "Let's get these conscientious objectors out of the way, without wasting any time on them."¹⁰³

The majority opinion by Justice Stewart found the empirical studies cited by the petitioner to be "too tentative and fragmentary" yet to convince the Court that juries purged of death penalty opponents are conviction-prone, and the record did not show that the jury was unrepresentative in this regard. Therefore, it declined to reverse all death sentences handed down by death-qualified juries.¹⁰⁴ It did find it to be self-evident that "this jury fell woefully short of that impartiality" guaranteed by the Sixth and Fourteenth Amendment,¹⁰⁵ though: Such a jury could not do what was required by the law, namely "express the conscience of the community on the ultimate question of life or death", since it speaks "only for a distinct and dwindling minority" in wielding the wide discretion afforded by the capital sentencing statutes.¹⁰⁶ The Court emphasised the importance of juries in bringing "contemporary community values" into the penal system, which was essential in the relatively new 'evolving standards of decency' doctrine the Court had established to evaluate punishment.¹⁰⁷ It held that the state had exceeded neutrality and "in its quest for a jury capable of imposing the death penalty, the state produced a jury uncommonly willing to condemn a man to die," which amounted to organising the court to impose the death penalty.¹⁰⁸ The Court concluded that "no defendant can constitutionally be put to death at the hands of a tribunal" which had excluded all potential jurors who had general objections to the death penalty.¹⁰⁹ As

¹⁰³ *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), p. 514.

¹⁰⁴ *Witherspoon v. Illinois*, 391 U.S., pp. 517f.

¹⁰⁵ *Witherspoon v. Illinois*, 391 U.S., p. 518.

¹⁰⁶ *Witherspoon v. Illinois*, 391 U.S., pp. 519f.

¹⁰⁷ *Witherspoon v. Illinois*, 391 U.S., p. 520.

¹⁰⁸ *Witherspoon v. Illinois*, 391 U.S., pp. 520f.

¹⁰⁹ *Witherspoon v. Illinois*, 391 U.S., pp. 522f.

the state had “stacked the deck” against the defendant, the death sentence was reversed.¹¹⁰

The Court did not correct the concept of impartiality as including general bias about the imposition of the death penalty, but found that it sufficed if they could apply the law.¹¹¹ *Witherspoon* focussed on which jurors a state could *not* exclude, but it did not explicitly articulate a standard for who *could* be excluded. The most significant part of the *Witherspoon* ruling, consequently, turned out to be its now-infamous Footnote 21, which clarified that the ruling concerned only the sentence, not the guilt determination of capital cases, and stated that the Court did not rule against states excluding 1) jurors who “would *automatically* vote against” the death penalty “without regard to any evidence,” and 2) jurors whose opposition to a possible death sentence “would prevent them from making an impartial decision as to the defendant’s *guilt*,” provided they made these impairments “unmistakably clear.”¹¹² Absent any other guidance, this remark was subsequently used by lower courts as the defining standard of jury selection, and was ritualistically followed for the most part, since it was the surest way to avoid having a sentence overturned by the Supreme Court.¹¹³

Witherspoon undoubtedly set a standard, and a rather strict one at that, fitting for a time in which death penalty opposition was at a high level and the suspension of the death penalty on account of arbitrary application by the Supreme Court was imminent. But it was not without its critics: The *Witherspoon* standard rendered the death penalty almost impossible to impose and prosecutors complained about a too-high burden of proof;¹¹⁴ others thought the standard was not high enough yet, with many of their complaints summarised in the concurring opinion by Justice Douglas, who had argued that the right to a “jury which represents a cross-section of the community” should not exclude anyone, even jurors who would not impose the death penalty, as the defendant is

¹¹⁰ *Witherspoon v. Illinois*, 391 U.S., p. 523.

¹¹¹ Cohen/Smith, p. 105.

¹¹² *Witherspoon v. Illinois*, 391 U.S., FN 21.

¹¹³ Carr, James M. “At Witt’s End: The Continuing Quandary of Jury Selection in Capital Cases.” *Stanford Law Review* 39:2 (1987), pp. 433f.

¹¹⁴ Carr, p. 343.

entitled to the “benefit of that controlling principle of mercy.”¹¹⁵ It also bothered some that such an important standard had been articulated only in a footnote, which might only represent dicta.¹¹⁶ Thus, the door was open for the Supreme Court to revisit the issue, which it did under very different political and legal circumstances in the mid-1980s.

3.3. *Wainwright v. Witt* (1985): Backtracking in Favour of Discretion and Deference

Furman had put an end to unfettered discretion of juries in the imposition of the death penalty, replacing it with more guided sentencing schemes based on aggravating and mitigating circumstances (see section 2.2), and in the view of the 6-3 majority in *Wainwright v. Witt*, this had changed the role of jurors. Written by Justice Rehnquist, the majority opinion effectively replaced the *Witherspoon* standard with one articulated before in a 1980 decision, *Adams v. Texas*.

In *Adams*, the Supreme Court had the opportunity to judge the *Witherspoon* rule in the context of the new sentencing procedures, specifically that of Texas, which required the jury to answer three questions: whether the crime was committed intentionally and a death could be realistically expected, whether the defendant would pose a danger to other people in the future, and whether the defendant had reacted unreasonably to a prior provocation, if any, by the victim.¹¹⁷ (This procedure, which ultimately hinges on the future-dangerousness component, was first found to be constitutional in 1976, when the Supreme Court decided that even though mitigating circumstances are not explicitly mentioned in the questions, the future-dangerousness question was a suitable medium in which to consider them.¹¹⁸ Later, shortly after *Adams*, it was found to be too narrow

¹¹⁵ *Witherspoon v. Illinois*, 391 U.S., pp. 524, 528 (Douglas, W., concurring).

¹¹⁶ Carr, p. 438.

¹¹⁷ *Adams v. Texas*, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), p. 41.

¹¹⁸ *Jurek v. Texas*, 428 U.S. p. 272.

after all and replaced by a more explicit question regarding mitigating circumstances.¹¹⁹)

In *Adams*, the majority held that despite the more limited discretion, jurors still made judgement calls – answering the questions was not an “exact science” – and were aware that the consequence of their answers to the questions was a possible death sentence.¹²⁰ A state could only exclude jurors if their views on capital punishment would “prevent or substantially impair the performance” of their duties,¹²¹ which the Court treated as an affirmation of *Witherspoon*, only using slightly different language. Justice Rehnquist actually dissented, claiming the majority was extending the *Witherspoon* doctrine.¹²² In an ironic twist, he would use the *Adams* language he saw as expanding *Witherspoon* to limit it in *Witt*.

The majority opinion in *Witt* drastically changed the *Witherspoon* standard in “an amazing lapse of judicial memory,”¹²³ replacing it entirely with the standard articulated in *Adams*: A juror could be excluded if his views on the death penalty “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”¹²⁴ This is markedly vaguer than the *Witherspoon* standard of automatically voting against the death penalty or being unable to judge guilt impartially. Even more crucially, the Court did away with *Witherspoon*’s high standard of proof and held that a juror’s bias did not need to be proven to be “unmistakably clear” anymore,¹²⁵ and that a trial judge was owed deference by higher courts in this decision: It is the judge’s overall impression (that the juror will not be able to follow their oath and be impartial) which counts, and is based on the juror’s demeanour,¹²⁶ unless their finding is “not fairly supported by the record viewed as a whole.”¹²⁷ The *Witherspoon* standard

¹¹⁹ Vartkessian, Elizabeth S. “Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence.” *Quinnipiac Law Review* 29 (2011), pp. 244-247.

¹²⁰ *Adams v. Texas*, 448 U.S., p. 46.

¹²¹ *Adams v. Texas*, 448 U.S., p. 45.

¹²² *Adams v. Texas*, 448 U.S., p. 52 (Rehnquist, J., dissenting).

¹²³ Carr, p. 441.

¹²⁴ *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), p. 424.

¹²⁵ *Wainwright v. Witt*, 469 U.S., p. 424.

¹²⁶ *Wainwright v. Witt*, 469 U.S., pp. 426, 428.

¹²⁷ *Wainwright v. Witt*, 469 U.S., 431.

had previously been seen as a “mixed question of law and fact,” which could be reviewed independently by a higher court; however, while “the trial judge is of course applying some kind of legal standard to what he sees and hears,” the finding that a juror’s views on the death penalty would impair their judgement is a factual issue which benefits from a “presumption of correctness” on review.¹²⁸

The reasons given by the majority for this radical change were firstly, the changed role of the jury in the post-*Furman* limited-discretion era;¹²⁹ secondly, the footnote in *Witherspoon* was only dicta and “not controlling,”¹³⁰ and finally, the ruling that there was nothing unique about juror exclusion on the basis of opposition to capital punishment, but that the exclusion of jurors in a capital case should be treated just like the exclusion for traditional bias. The Court rejected the notion that a defendant was “entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favour,”¹³¹ and in doing so, went against established doctrine: At the time of this decision, “all nine Justices had joined in at least one opinion declaring that ‘death is different.’”¹³²

The dissent, written by Justice Brennan, denounced the “the Court’s brazenly revisionist reading of *Adams* today that leaves *Witherspoon* behind”¹³³ and the allocation of the risk of the inclusion of a juror on the defendant instead of the State in the rejection of *Witherspoon*’s high standard of proof.¹³⁴ It stressed the importance of a representative jury,¹³⁵ rejected the view that death-qualification was a question of fact subject to a presumption of correctness,¹³⁶ and found it “unpardonable” of the Court to let a “skewed jury” decide questions of life and death.¹³⁷ The *Witt* decision was widely

¹²⁸ *Wainwright v. Witt*, 469 U.S., pp. 427-429.

¹²⁹ *Wainwright v. Witt*, 469 U.S., pp. 421f.

¹³⁰ *Wainwright v. Witt*, 469 U.S., p. 422.

¹³¹ *Wainwright v. Witt*, 469 U.S., p. 423.

¹³² Carr, p. 456.

¹³³ *Wainwright v. Witt*, 469 U.S., p. 450.

¹³⁴ *Wainwright v. Witt*, 469 U.S., pp. 444f.

¹³⁵ *Wainwright v. Witt*, 469 U.S., pp. 459f.

¹³⁶ *Wainwright v. Witt*, 469 U.S., p. 462.

¹³⁷ *Wainwright v. Witt*, 469 U.S., p. 461.

criticised also outside of the dissent,¹³⁸ especially for lowering the standard of proof and restricting review of an exclusion decision: The decision was found to place “unjustified faith in a judge’s ability to divine impermissible bias” based on a short round of questions,¹³⁹ and erroneously assume that the judge’s decision and jury deliberations both are based on “a certain factual, quasi-scientific precision”¹⁴⁰ instead of somewhat subjective judgement calls.

The *Witt* Court claimed to simplify the *Witherspoon* standard, but this is not the case; it only succeeded in replacing a relatively clear and very strict standard with a vague one which grants greater discretion in exclusion to the trial judge – and since discretionary decisions are harder to review for a higher court based only on the record, the judge is owed deference and a presumption of correctness.

3.4. *Lockhart v. McCree* (1986): Organised to Convict

Only a year after *Witt*, another blow was dealt to the opponents of death-qualification: Neither *Witherspoon* nor *Witt* had ruled on the question of whether or not death-qualified juries are more conviction-prone than regular juries, or in other words, they had not ruled on the impact of death-qualification on the guilt phase of a trial. *Witherspoon* had issued essentially an invitation to researchers to explore the phenomenon, since the available data in 1968 had not been enough to convince the Court to address the question. This invitation was met “with a vengeance,” in the words of a Berkeley law professor, but in the end, the 1986 case of *Lockhart v McCree* proved to be an example of “legal empirical research being too good for the Court.”¹⁴¹

¹³⁸ E.g. in Brown, pp. 569-580 (calling the *Witt* standard, based on a “judge’s intuition, or hunch,” intolerable, p. 580.); Callans, Patrick J. “Sixth Amendment. Assembling a Jury Willing to Impose the Death Penalty: A New Disregard for a Capital Defendant’s Rights.” *Journal of Criminal Law and Criminology* 76:4 (1985), p. 1050. (regretting that the “‘essential balance’ of *Witherspoon* has been tipped”); Meltzer, Cynthia L. “The Battle over the Standards for Death-Qualifying Juries: Defendants Lose Another Round.” *Chicago-Kent Law Review* 61:3 (1985), p. 628 (fearing the broader standard to be “a regression to the pre-*Witherspoon* era”).

¹³⁹ Carr, p. 453.

¹⁴⁰ Carr, p. 457.

¹⁴¹ Liptak, Adam. “Facing a Jury of (Some of) One’s Peers.” *The New York Times*. 20 July 2003. Web. Accessed 20 May 2016, at <<http://www.nytimes.com/2003/07/20/weekinreview/20LIPT.html>>.

McCree concerned an appeals court decision which had held death-qualification unconstitutional in *Grigsby v. Mabry*. The American Psychological Association had submitted a detailed *amicus curiae* brief for the case, giving an objective overview of the studies, the findings, and explaining their relevance and statistical significance, to counter an amicus brief submitted by 16 US states which had attacked the research.¹⁴² The APA addressed all criticisms the states made separately, finding them either “erroneous or unrelated,”¹⁴³ and concluding that the data shows death-qualification results in juries that are “less than neutral with respect to guilt, unrepresentative, and ineffective compared to normal criminal juries.”¹⁴⁴ The studies cannot be considered either tentative or fragmentary any longer, given that they have survived “trial in the twin crucibles of journal review by anonymous expert peers and the adversarial process of cross-examination in a court-room” and not been found wanting by either social science or law.¹⁴⁵ (These findings as well as newer studies are discussed further in section 4.) However, *McCree* overturned the lower court ruling and found death-qualification to be constitutional.

Justice Rehnquist again wrote for the majority, which began the discussion by discrediting all but one of the 15 social scientific studies on the effects of death-qualification submitted into evidence by the petitioner against the opinion of the APA: Eight were dismissed for “dealing solely with generalised attitudes and beliefs” and thus being “only marginally relevant,”¹⁴⁶ and the Court did not address the fact that the district court had found these to be particularly relevant.¹⁴⁷ One was dismissed because it dealt with the actual effect of *voir dire* questioning and the defendant’s counsel had conceded that on its own, it would not amount to a violation of the Constitution, even

¹⁴² American Psychological Association. *Lockhart v. McCree: Brief for Amicus Curiae American Psychological Association in Support of Petitioner*. Washington, DC: 1985. Accessed 10 May 2016, at <<http://www.apa.org/about/offices/ogc/amicus/lockhart.pdf>>, p.3, FN 3.

¹⁴³ APA, pp. 21-30.

¹⁴⁴ APA, p. 30.

¹⁴⁵ APA, p. 29.

¹⁴⁶ *Lockhart v. McCree*, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986), p. 169.

¹⁴⁷ *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), p. 1304 (“Attitudinal surveys” clearly establish that “a juror’s attitude toward the death penalty is the most powerful known predictor of [their] overall predisposition in a capital criminal case” and “highly correlated with other criminal justice attitudes.”)

though it would not actually be considered in isolation;¹⁴⁸ the same argument was used to dismiss three more studies, namely the ones already cited by the petitioner in *Witherspoon*, which had then been found to be ‘too tentative and fragmentary,’ so now must be considered even more so,¹⁴⁹ despite the fact that they were now corroborated by additional studies. To keep ignoring them even though they were no longer only preliminary reports and had been duplicated multiple times was highly illogical. Two post-*Witherspoon* studies which dealt with conviction-proneness were discredited because they did not simulate jury deliberation or account for guilt nullifiers, leaving them “fatally flawed,”¹⁵⁰ which finally left one study (which did everything but use actual jurors), and, having successfully whittled down the body of evidence to this, the Court found a “lone study” not enough to base a far-reaching ruling on.¹⁵¹

Rehnquist continued by saying that even if the research were sound and proved that death-qualified juries were “somewhat more ‘conviction-prone,’”¹⁵² the practice would still not be unconstitutional. The ‘fair cross-section’ requirement did not apply to petit-juries, only the venire from which these juries are drawn,¹⁵³ and *Witherspoon/Witt*-excludables did not qualify as a distinctive group in this context, which required some “immutable characteristics,”¹⁵⁴ not an “attribute that is within the individual’s control,” since beliefs could be ignored if necessary.¹⁵⁵

Death-qualification, the Court found, did not make a jury more conviction-prone, because the very same jury could be chosen by the “mere chance,”¹⁵⁶ proving that the Justices clearly do not understand fundamental probability theory on which the ‘luck of the draw’ is based – yes, there is a chance that the exact same twelve death penalty supporters are chosen by chance, but that chance is *substantially* bigger if the pool from which they are drawn is limited to only death penalty supporters, which skews a

¹⁴⁸ *Lockhart v. McCree*, 476 U.S., p. 170.

¹⁴⁹ *Lockhart v. McCree*, 476 U.S., p. 170.

¹⁵⁰ *Lockhart v. McCree*, 476 U.S., pp. 171f.

¹⁵¹ *Lockhart v. McCree*, 476 U.S., pp. 172f.

¹⁵² *Lockhart v. McCree*, 476 U.S., p. 173.

¹⁵³ *Lockhart v. McCree*, 476 U.S., pp. 173f.

¹⁵⁴ *Lockhart v. McCree*, 476 U.S., pp. 174f.

¹⁵⁵ *Lockhart v. McCree*, 476 U.S., p. 176.

¹⁵⁶ *Lockhart v. McCree*, 476 U.S., p. 178.

defendant's chances. In McCree's case, specifically, *eight* jurors were eliminated because they could not vote for the death penalty,¹⁵⁷ who would have constituted two thirds of the final jury if they had not been excluded for cause. The Court saying that it has trouble understanding where the unfairness lay in this procedure when chance could also result in the same jury¹⁵⁸ may actually mark the intellectual low point of the entire death-qualification debate. The Court then adds that ensuring a balanced and representative jury in every case would be a "Sisyphean task" (again not understanding that not compromising the jury pool is all that is asked, a "classic 'straw man' argument"¹⁵⁹) and would likely also entail the abolition of peremptory challenges¹⁶⁰ – which evidence suggests may not be the worst idea.¹⁶¹ Finally, the Court concludes that the state's "entirely proper interest in obtaining a single jury" to judge both phases of a trial was served by death-qualification, and that a single jury was more efficient and also allowed defendants to benefit from possible residual doubt in the sentencing phase.¹⁶²

The dissent, written by Justice Marshall and joined by Brennan and Stevens, condemned the majority opinion for its demonstrated "glib nonchalance" and "blatant disregard for the rights of a capital defendant [which] offends logic, fairness and the Constitution."¹⁶³ It took the social scientific studies presented by the petitioner and their evaluation in the lower courts much more seriously and accepted their findings, emphasising that the courts themselves have prevented studies conducted in more realistic settings and that no credible studies existed to contradict the findings.¹⁶⁴ Citing Court precedent requiring a certain jury size (which relied on empirical data as the basis of the decision), the dissent described how death-qualification impaired proper jury

¹⁵⁷ *Lockhart v. McCree*, 476 U.S., p. 166.

¹⁵⁸ *Lockhart v. McCree*, 476 U.S., p. 178.

¹⁵⁹ Thompson, William C. "Death Qualification After *Wainwright v. Witt* and *Lockhart v. McCree*." *Law and Human Behavior* 13:2 (1989), p. 200.

¹⁶⁰ *Lockhart v. McCree*, 476 U.S., p. 178.

¹⁶¹ See Hoffman, Morris B. "Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective." *The University of Chicago Law Review* 64.3 (1997). Peremptory challenges are challenges which can be used without a reason given, and they are given to the prosecution as well as the defence in equal, limited numbers.

¹⁶² *Lockhart v. McCree*, 476 U.S., pp. 180f.

¹⁶³ *Lockhart v. McCree*, 476 U.S., p. 185 (Marshall, J., dissenting).

¹⁶⁴ *Lockhart v. McCree*, 476 U.S., pp. 187-190 (Marshall, J., dissenting).

function which could not be justified by efficiency or cost arguments.¹⁶⁵ Finally, it dismissed the majority's residual doubt argument: The defendant did not have the option of waiving "this paternalistic protection in exchange for better odds against conviction," and the Court regularly refused to "grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing." Therefore, the argument that these residual doubts are beneficial to the defendant is "more than disingenuous. It is cruel."¹⁶⁶

It is not unreasonable to assume the Court's decision, including the careless dismissal of social science evidence, was more motivated by pragmatic reasons than the evidence presented, since a very large number of capital convictions may have been invalidated by a decision to the contrary.¹⁶⁷ It certainly proved that the Court, at least in this matter, was not receptive to social scientific research; different political circumstances may make a difference, and some social scientists have not given up studying death-qualification and have accumulated another 30 years' worth of data on death-qualification (see section 4). However, the likelihood of the Supreme Court addressing death-qualification again is rather slim – not only does *Witt* generally demand deference to the trial court, which makes cases reaching the Supreme Court unlikely, the additional restrictions on federal habeas review instituted in the 1990s exacerbate this deference even more.

3.5. *Uttecht v. Brown* (2007) and *White v. Wheeler* (2015): the Effects of Deference, and the AEDPA Standard

In *Uttecht v. Brown*, with a 5-4 split the Court's closest decision on death-qualification, the defendant alleged that a juror was improperly excluded from his trial, and the case focussed on the question of deference. The Court noted that the need for deference to the trial court in the evaluation of a juror's potential bias was established in *Witt*, and reaffirmed in *Darden v. Wainwright* a year later in 1986. Here, the Court held that even

¹⁶⁵ *Lockhart v. McCree*, 476 U.S., pp. 199-204 (Marshall, J., dissenting).

¹⁶⁶ *Lockhart v. McCree*, 476 U.S., pp. 205f (Marshall, J., dissenting).

¹⁶⁷ Thompson, pp. 202f.

when the exclusion of a juror was not supported by the record because the exact phrasing of the question posed and the juror's answers "do no by themselves compel the conclusion" that they were substantially impaired by their beliefs, the need to defer to the trial court remains because so much may turn on a potential juror's demeanour."¹⁶⁸ By 2007, this requirement for deference was supplemented by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which elevated the standard for federal habeas review of state court rulings even more by creating an "independent, high standard" to be met before federal review is required.¹⁶⁹ AEDPA was a response to "a perception that the statutory writ of habeas corpus was being abused by lawyers" and aimed to streamline habeas cases, but ultimately received considerable criticism for its limitations to federal review.¹⁷⁰ However, the AEDPA standard, while ostensibly applicable, was not actually discussed much by the Court.

The majority opinion considered the exclusion of the juror, who had made contradictory statements in the course of the *voir dire* regarding the circumstances during which he could imagine sentencing someone to death, but did state unequivocally that he could consider it;¹⁷¹ while the appeals court found that the record proved without ambiguity that the juror was not substantially impaired by his beliefs,¹⁷² the majority opinion disagreed and found that the "only fair reading" of the record confirmed that the trial court made a discretionary judgement while applying the *Witt* standard.¹⁷³ In its considerations, it discussed the fact that the defence counsel had not objected to the exclusion of the juror at the time, which was found to be relevant because it prevented the trial judge from explaining his reasons for the record, even though there "is no independent federal requirement" for this to preserve the right to seek review later,¹⁷⁴ nor in applicable state law.¹⁷⁵

¹⁶⁸ *Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986), p. 178.

¹⁶⁹ *Uttecht v. Brown*, 127 S. Ct. 2218, 551 U.S. 1, 167 L. Ed. 2d 1014 (2007), p. 2224.

¹⁷⁰ *Hood/Hoyle*, p. 310.

¹⁷¹ *Uttecht v. Brown*, 127 S. Ct., p. 2226f.

¹⁷² *Uttecht v. Brown*, 127 S. Ct., pp. 2227f.

¹⁷³ *Uttecht v. Brown*, 127 S. Ct., p. 2228.

¹⁷⁴ *Uttecht v. Brown*, 127 S. Ct., p. 2229.

¹⁷⁵ *Uttecht v. Brown*, 127 S. Ct., p. 2230.

In fact, the defence counsel's exact words when asked about challenges regarding the juror were, "We have no objection," which in context is not unequivocal: They could be seen as responding to the prosecution's explanation on why the juror should be excluded, meaning the defence does not object to the prosecution's challenge, or they could have been responding directly to the judge's question, meaning the defence had no objections to the juror being included.¹⁷⁶ This is also the exact view articulated in the dissenting opinion,¹⁷⁷ written by Justice Stevens and joined by three other Justices, although it also sees objection as irrelevant.¹⁷⁸ Stevens affirms that there was no basis in the record for excluding the juror, and denounced the "completely unwarranted" amount of deference the majority awarded the trial court.¹⁷⁹ The dissenting Justices saw the juror not as substantially impaired, but as willing to impose the death penalty when appropriate, and stated that "AEDPA does not permit us to abdicate our judicial role in this fashion."¹⁸⁰ The dissent concludes by stating that it would be

difficult to imagine under such a standard, a juror who would not be considered so impaired, unless he delivered only perfectly unequivocal answers during the unfamiliar and often confusing legal process of *voir dire* and was willing to state without hesitation that he would be able to vote for a death sentence under any imaginable circumstance. [...] Today, the Court has fundamentally redefined – or maybe just misunderstood – the meaning of "substantially impaired," and, in doing so, has gotten it horribly backwards.¹⁸¹

Uttecht v. Brown indicates that the post-*Witherspoon* backtracking actually left significant room for juror challenges akin to the pre-*Witherspoon* era, only now the exclusion of jurors who are merely scrupled about the death penalty is protected by deference to trial court discretion.

The AEDPA standard was finally discussed in more detail with regard to death-qualification in the case of *White v. Wheeler*, decided in December of 2015: The case concerned another juror who gave somewhat contradictory answers during *voir dire*, which led to the Court of Appeals to side with the defendant and reverse the lower court

¹⁷⁶ *Uttecht v. Brown*, 127 S. Ct., p. 2238.

¹⁷⁷ *Uttecht v. Brown*, 127 S. Ct., p. 2242 (Stevens, J., dissenting).

¹⁷⁸ *Uttecht v. Brown*, 127 S. Ct., p. 2243 (Stevens, J., dissenting).

¹⁷⁹ *Uttecht v. Brown*, 127 S. Ct., p. 2239 (Stevens, J., dissenting).

¹⁸⁰ *Uttecht v. Brown*, 127 S. Ct., p. 2240 (Stevens, J., dissenting).

¹⁸¹ *Uttecht v. Brown*, 127 S. Ct., p. 2243 (Stevens, J., dissenting).

decision. The juror in question had said that he had no definitive opinion on the death penalty as he could see “arguments on both sides” of the debate, but that it was difficult for him to predict how he would act if called on to sentence someone, but came to the conclusion later in the *voir dire* that he could consider all penalty options, which was reflected in the judge’s notes.¹⁸² However, the judge ultimately allowed the challenge after reviewing the record, despite the defence’s objections.¹⁸³

Under AEDPA, the Court noted, federal habeas relief is “authorised if the state court’s decision ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,’” such as the *Witherspoon/Witt* standard for juror exclusion; this presents a “formidable barrier,” since a defendant must show that the trial court’s decision was “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.”¹⁸⁴ The Court found that review of death-qualification decisions must be “doubly deferential”¹⁸⁵ under AEDPA and *Witt*, and that *Uttecht v. Brown* had clarified that any ambiguity regarding a juror’s impairment should be decided in favour of the prosecution, so the *Wheeler* juror’s inability to guarantee with absolute certainty if he could consider imposing a death sentence reasonably entitled the trial court to exclude him.¹⁸⁶ It concluded that nothing in previous case law prevented the trial court from making its decision based on “demeanour alone and not the substance of a juror’s response.”¹⁸⁷

This latest Supreme Court case seems to close the door on almost any future death-qualification challenges – likely the only reason it had even decided this case under the strict AEDPA standard is that the Court of Appeals for the Sixth Circuit had apparently been acting somewhat rebelliously in habeas cases, siding with defendants and forcing

¹⁸² *White v. Wheeler*, 136 S. Ct. 456, 577 U.S., 193 L. Ed. 2d 384 (2015), p. 459.

¹⁸³ *White v. Wheeler*, 136 S. Ct., p. 459.

¹⁸⁴ *White v. Wheeler*, 136 S. Ct., p. 460.

¹⁸⁵ *White v. Wheeler*, 136 S. Ct., p. 460.

¹⁸⁶ *White v. Wheeler*, 136 S. Ct., p. 461.

¹⁸⁷ *White v. Wheeler*, 136 S. Ct., p. 462.

the Supreme Court to reverse its rulings.¹⁸⁸ The Supreme Court ruled unanimously that it now demands jurors be *absolutely certain* that they can impose a death sentence (which four Justices had still thought nearly impossible in the *Uttecht v. Brown* dissent and considered a redefinition and misunderstanding of the *Witt* standard). It also ruled that the demeanour of the juror, as perceived by the trial judge, is more important than the substance of the juror's actual answers. Finally, it held that it demands errors be proven beyond any possibility of fair-minded agreement, and that doubt about a juror's ability benefits the prosecution rather than the defendant (which seems highly problematic, given that the worst the prosecution can fear is a sentence of life imprisonment, but for the defendant a juror's doubts about the death penalty can mean the difference between life and death). Such a judgement in a time when public support for the death penalty as well as actual execution numbers are at their lowest point in 20 years, and the entire institution seems to be going through a constitutional crisis (see section 2.3), deals a severe blow to any hope of domestically challenging death-qualification.

¹⁸⁸ Adler, Jonathan H. "Sixth Circuit Smackdown Watch: White v. Wheeler." *The Washington Post*. 14 December 2015. Web. Accessed 1 July 2016, at <<https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/14/sixth-circuit-smackdown-watch-white-v-wheeler/>>.

4. The Human Rights Implications of Death-Qualification

In the preceding section, the negative implications of death-qualification with regard to fair trial and due process rights as well as discrimination have already been alluded to as discussed by the Supreme Court. This section now describes the concerns, as well as the research they are based on, in more detail, because “the endorsement of death-qualification in [*McCree*] may be settled law, but it is not settled fact.”¹⁸⁹ Even if these concerns will fall on deaf ears at the Supreme Court, that does not mean the discussion should be over, especially in light of the international perspective highlighted in the next section.

One thing that is beyond the scope of this thesis is a discussion of the question if using juries of laypersons, as opposed to professional judges, in criminal cases is generally conducive to realising fairness in criminal justice, or if it is more of a hindrance. (It seems like a better solution than using only elected judges, which is a controversial practice used in some US states,¹⁹⁰ but that is also a topic for another thesis.) The Supreme Court has, in a series of judgements, including (but not limited to) *Duncan v. Louisiana*, *Ring v. Arizona* and *Hurst v. Florida*, firmly enshrined the right of a criminal defendant to be tried and sentenced by a jury. The point of departure for this discussion is, rather, that since this is the chosen system, defendants should have a jury of their peers, not only a jury of *some* peers.

Discussing in detail the entire body of research on the effects of death-qualification, compiled over more than fifty years at this point, would also exceed the scope of this thesis. Instead, the brief of amicus curiae by the American Psychological Association,

¹⁸⁹ Butler, Brooke M., and Gary Moran. “The Role of Death Qualification in Venirepersons’ Evaluations of Aggravating and Mitigating Circumstances in Capital Trials.” *Law and Human Behavior* 26:2 (2002), p. 183.

¹⁹⁰ See, e.g. Bright, Stephen B. “Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights.” *Texas Law Review* 78 (2000); the issue of judicial independence and the effects of elections on judge’s decision-making was also effectively illustrated in LastWeekTonight. “Last Week Tonight with John Oliver: Elected Judges (HBO)” Online video clip. YouTube. YouTube, 23 February 2015. Web. Accessed 28 June 2016, at <<https://youtu.be/poL7l-Uk3I8?t=5m>>.

submitted to the Supreme Court for *McCree* in 1985, forms the basis of this discussion, since it gives a very good overview of the research compiled at that point – and the pre-*McCree* time was also the most active period for death-qualification research, since the Supreme Court had not yet closed the door on the discussion. At the time, the APA conclude that all the findings are proven by the research “without credible exception;”¹⁹¹ that any misidentification (or use of the *Witherspoon* instead of *Witt* standard¹⁹²) as well as lack of realism in some studies actually “diluted the magnitude of the observed differences,” since the effects of death-qualification became more pronounced the more realistic and methodologically sound the studies were;¹⁹³ and that the diversity in methodologies “reinforces their reliability,” since results were the same across the board.¹⁹⁴

The *McCree* decision left researchers somewhat disillusioned about whether or not it was even worth continuing their efforts in this area. However, more recent research does exist (especially by Brooke Butler and Gary Moran in Florida), and will be used here to support the pre-1985 findings – because essentially all of the modern research corroborates the earlier findings. While the Supreme Court has proceeded to deregulate the practice of death-qualification even further, social scientists have continued to prove that the effects of death-qualification are real, measurable, and a cause for grave concern in many ways.

4.1. Impartiality and “Hanging Juries”

In *Witherspoon*, the Supreme Court had decided that the imposition of the death penalty by a “hanging jury” – one organised to convict – was unacceptable.¹⁹⁵ However, the first conclusion of the APA brief is that death-qualified juries are biased in the evaluation of guilt and “uncommonly prone to convict,”¹⁹⁶ which was shown by pre-

¹⁹¹ APA, p. 3.

¹⁹² APA, pp. 29f.

¹⁹³ APA, pp. 24ff.

¹⁹⁴ APA, pp. 26f.

¹⁹⁵ *Witherspoon v. Illinois*, 391 U. S., p. 523.

¹⁹⁶ APA, p. 5.

Witherspoon research¹⁹⁷ and corroborated by subsequent studies. There are two separate issues to consider:

4.1.1. COMPOSITION EFFECTS

The *composition effects* of death-qualification concern the way the overall composition of the final jury is affected, compared to the venire it was drawn from. One study examined in the APA brief deserves to be highlighted: Cowan, Thompson & Ellsworth, which was published in a special issue of *Law and Human Behavior* dedicated to death-qualification,¹⁹⁸ was the most methodologically sound study at the time. The respondent group included actual jurors and entirely excluded nullifiers (who admitted they would not be able to judge guilt impartially). The stimulus material used was a sophisticated filmed re-enactment of a murder trial, and the researchers recorded juror judgements before and after deliberation in jury groups, half of which were only comprised of death-qualified jurors, and half which included both death-qualified and a minority of non-death-qualified jurors.¹⁹⁹ The results, determined to be highly significant, confirmed that death-qualified juries are more likely to find a defendant guilty.²⁰⁰ Other recorded differences were that death-qualified jurors found prosecution-witnesses more credible than excludables,²⁰¹ and that jury deliberations that included excludables significantly improved the juror's memory of the evidence presented, suggesting that their verdict would be more accurate.²⁰² Of course, it must also be noted that this data does not stand alone, but in line with all other studies discussed in the APA brief, which both lends additional confidence to these findings as well as those of other studies that were discredited for being less methodologically sound.²⁰³

In 1998, a meta-analysis of the existing body of research concerning the conviction-proneness of death-qualified juries was compiled, which put all 14 available studies

¹⁹⁷ APA, pp. 6ff.

¹⁹⁸ Cowan, Claudia L., William C. Thompson, and Phoebe C. Ellsworth. "The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation." *Law and Human Behavior* 8:1-2 (1984): 53.

¹⁹⁹ Cowan/Thompson/Ellsworth, pp. 62f.

²⁰⁰ Cowan/Thompson/Ellsworth, pp. 67ff.

²⁰¹ Cowan/Thompson/Ellsworth, p. 69

²⁰² Cowan/Thompson/Ellsworth, p. 73

²⁰³ APA, pp. 11, 13.

together (some were excluded because their methodology did not fit with the rest) and weighted them to extrapolate an average effect.²⁰⁴ The results confirmed that death-qualified jurors were more likely to convict to a significant degree,²⁰⁵ and that “even minimal restrictions of juror membership using any type of death-qualification can create a jury more likely to convict.”²⁰⁶

Aside from guilt, it comes as no surprise that studies have consistently found that death-qualification also significantly influences the sentence decision: Death-qualified jurors are more likely to hand down a death-sentence. This is affected by the differences in which death-qualified and excludable jurors evaluate aggravating and mitigating circumstances, which form the basis of the sentencing decision. Two recent studies supported the research conducted Haney, Hurtado & Vega in 1994²⁰⁷ when their data showed that death-qualified jurors were more receptive to aggravating factors than mitigating factors, and more likely to impose a death sentence.²⁰⁸ These evaluations were also related to attitudes towards criminal justice in general, see section 4.2.2 below. It was concluded that juries which are “more prone to accepting arguments for death and rejecting arguments for life” place the defendant at a considerable disadvantage.²⁰⁹ Data from the Capital Jury Project (CJP), a large-scale national study of actual capital jurors who were, naturally, death-qualified, confirms these findings: Half of the examined jurors erroneously thought mitigating circumstances had to meet the standard of reasonable doubt and had to be found unanimously by the jury; the same percentage also believed the death penalty was mandatory when certain aggravating

²⁰⁴ Allen, Mike, Edward Mabry, and Drue-Marie McKelton. “Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis.” *Law and Human Behavior* 22:6 (1998), pp. 719f.

²⁰⁵ Allen/Mabry/McKelton, pp. 722f.

²⁰⁶ Allen/Mabry/McKelton, p 724.

²⁰⁷ Haney, Craig, Aida Hurtado, and Luis Vega. “‘Modern’ Death Qualification: New Data on Its Biasing Effects.” *Law and Human Behavior* 18:6 (1994): 619.

²⁰⁸ Butler/Moran, 2002, pp. 181f; Butler, Brooke, and 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.” *Behavioral Sciences & the Law* 25:1 (2007a), p. 65.

²⁰⁹ Butler/Moran, 2007a, p. 66.

factors were found.²¹⁰ The study also found that premature sentence decisions are rampant in capital juries: Almost half of the jurors had chosen the sentence they considered appropriate before consideration of evidence in the sentencing hearing even began.²¹¹

In respect to sentence, the process-effects of death qualification are also relevant, see section 4.1.2. A biasing factor not discussed in this section is the overinclusion of jurors who would automatically impose a death-sentence, see section 4.2.1; another potentially biasing factor is the systematic exclusion of certain beliefs and attitudes, not only towards the death penalty, but also generally on criminal justice issues and ideology, all of which are less favourable to the prosecution; this is discussed below in section 4.2.2.

4.1.2. PROCESS EFFECTS

Aside from *composition effects* of death-qualification, death-qualification also has *process effects*: It is argued that the very process jurors are subjected to when they are death-qualified impacts their impartiality. The APA brief specifies two studies of this issue by Craig Haney.²¹² In the first, respondents were death-qualified and then shown one of two videos: Either a realistic two-hour video of a re-enacted *voir dire* process including death-qualification (which took up half an hour), or the same video but without the death-qualification part, followed by an attitude survey.²¹³ The study found that the effect of death-qualification on a potential juror's frame of mind should not be underestimated, since it made them more likely to believe in the defendant's guilt before the beginning of the trial, as well as the hold belief that the judge, prosecution and defence shared their feeling. Respondents felt more strongly that the prosecutor and judge both supported the death penalty, and that opposition to it went against the spirit

²¹⁰ Rozelle, Susan D. "The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation." *Arizona State Law Journal* 38 (2006), p. 791.

²¹¹ Rozette, p. 790.

²¹² APA, pp. 14f.

²¹³ Haney, Craig. "On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process." *Law and Human Behavior* 8:1/2 (1984), pp. 122-125.

of the law. Finally, it resulted in them selecting the death penalty as the appropriate punishment more often.²¹⁴

The likely reasons for this are illustrated in a second article based on scrutiny of *voir dire* proceedings in more than 30 capital cases,²¹⁵ in which Haney identifies the following factors: 1) There is an *implication of guilt* even before the start of the trial in discussing the possible penalty, *exacerbated by the language* used by the court, which is repetitive and therefore liable to simplifying explanations about the structure of the trial, giving the impression that a penalty phase *will* occur and that this phase is the most important.²¹⁶ 2) Being asked to *imagine their behaviour* in the penalty phase makes it *more likely* that it will actually occur, based on existing theories in psychological research, especially since jurors are frequently asked to assume they *are* already in this situation, which has a *desensitising* effect.²¹⁷ 3) *Public affirmation* of a juror's willingness to sentence someone to die *intensifies their commitment* to this possibility, especially since they are sometimes asked for a "behavioural commitment" to this course.²¹⁸ 4) The exclusion of jurors based on their beliefs makes them feel like the *law and the judge disapprove* of their views, especially since judges may become impatient in the long, repetitive and complicated process, and to avoid being judged to be 'unfit,' they may endorse a more extreme position than necessary.²¹⁹

In a later work, Haney added that defence attorneys, trying to rehabilitate sceptical jurors they want on the jury by helping them imagine an especially terrible case in which they may consider the death penalty, may end up in the paradox position of appearing to advocating *for* the death penalty. Death-qualification can thus *anchor* the specific case at the worst end of the spectrum in juror's minds.²²⁰ Frequently, jurors are left feeling that death-qualification is akin to a *promise* to the judge to impose the death

²¹⁴ Haney, "Selection of Capital Juries," 1984, pp. 128f.

²¹⁵ Haney, Craig. "Examining Death Qualification: Further Analysis of the Process Effect." *Law and Human Behavior* 8:1/2 (1984).

²¹⁶ Haney, "Examining Death Qualification" 1984, pp. 136ff.

²¹⁷ Haney, "Examining Death Qualification" 1984, pp. 140f.

²¹⁸ Haney, "Examining Death Qualification" 1984, pp. 141-144.

²¹⁹ Haney, "Examining Death Qualification" 1984, pp. 144f.

²²⁰ Haney, 2005, pp. 128, 130.

penalty after a conviction, and jurors have been known to bring this up in deliberations to convince their colleagues to join their vote to the rest for a death sentence.²²¹

As a caveat, all the findings on the *process effects* of death-qualification are based on a single study from the 1980s, which still used the *Witherspoon* standard. Due to the vaguer standard which replaced *Witherspoon*, the amount of discretion accorded to the trial judge and the absence of a standardised questioning procedure, it would not be easy to replicate to more accurately reflect present conditions.²²² However, the CJP data does support these claims: 10% of jurors said that they thought the *voir dire* questions “made them think the defendant ‘must be’ or ‘probably was’ guilty” and should be sentenced to death.²²³ It is not unreasonable to assume that this direct line of questioning would underrepresent the overall effect, as most of it would also be an unconscious process; but even 10% is a significant finding.

4.2. A Jury of (Some) Peers: Unrepresentative, Out of Touch, Undemocratic

4.2.1. THE DEATH-QUALIFIED JURY, IN NUMBERS

The APA brief in the mid-1980s estimated the size of the excluded venirepersons to be somewhere between 10-17%, based on the available studies.²²⁴ These numbers will, of course, fluctuate according to the level of popular support for the death penalty at any given time; currently, support is below the levels found in 1985 (see section 2.4). However, there is another factor to consider: The standard used in these studies was the narrower *Witherspoon* standard in force at the time; since *Witt* is vaguer and relies more on a judge’s impression of overall juror demeanour, which is afforded considerable discretion, it is reasonable to assume that the numbers would have been larger under *Witt*, as well as now. Haney, Hurtado & Vega confirmed both of these assumptions in 1994, when they found that, at the height of abstract death-penalty support, this changed

²²¹ Haney, 2005, pp. 131f.

²²² Haney, 2005, pp. 132f.

²²³ Rozelle, p. 792.

²²⁴ APA, pp. 16f.

the relative size of the excludable/includable groups, and that the *Witt* standard increased the relative size of the excludable group compared to *Witherspoon*.²²⁵

Maybe the most compelling study to date on the actual impact in numbers of death-qualification is a forthcoming quantitative study of juror strikes in Louisiana: Spurred by a general lack of statistics on the aggregate impact of death-qualification,²²⁶ the study covers eleven out of the 14 Louisiana trials between 2009 and 2013 which resulted in a death sentence, and a total of 1445 potential jurors being death-qualified.²²⁷ On average, 22.2% of the total venire (29.5 jurors) was excluded during death-qualification, a total of 325 jurors;²²⁸ the individual rates ranged from 12% to 32.1%.²²⁹ By contrast, ADP-*Morgan*-challenges comprised only 12.4% on average,²³⁰ and challenges on this basis failed almost three times as often as *Witt*-challenges.²³¹ This is believed to actually underrepresent the potential exclusions related to death penalty beliefs, since other reasons for dismissal preceded the death-qualification part of the *voir dire*.²³² The results also indicate that unsuccessful *Witt* challenges will prompt the use of peremptory challenges.²³³ For the racial implications of this, see section 4.3.

One finding which concerns the representativeness of juries from the CJP is particularly worrying: The failure of the death-qualification process to weed out so-called ADP (automatic death penalty) jurors. The Supreme Court had held in *Morgan v. Illinois* that these jurors, similarly to death-qualified jurors, could be challenged for cause in a process sometimes called ‘life-qualification.’²³⁴ The exclusion of ADPs is, on the surface, somewhat less relevant to the impartiality of a jury, since the prevalent unanimity requirement means that a single juror opposed to the death penalty can make a difference if they persist in their view, while a single juror who would automatically

²²⁵ Haney/Hurtado/Vega, p. 624.

²²⁶ Cover, Aliza Plener. “The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency.” *Indiana Law Journal*, Forthcoming/Draft (2016), p. 21.

²²⁷ Cover, pp. 22ff.

²²⁸ Cover, p. 25.

²²⁹ Cover, p. 26.

²³⁰ Cover, p. 26.

²³¹ Cover, p. 27.

²³² Cover, p. 27.

²³³ Cover, p. 27.

²³⁴ *Morgan v. Illinois*, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).

vote for a death sentence still has to have the support of eleven other jurors for their view to take effect.

However, the CJP provided data which showed that “an astonishing number” of ADPs make it onto capital juries, suggesting that the mechanisms in place are insufficient: Between 24% and 70% of CJP jurors said that they believed the death penalty the only appropriate punishment, depending on the category of murder (70% for murder with a prior murder conviction, 60% for a premeditated murder; with 24% the least likely category to provoke an ADP was felony murder).²³⁵ Comparatively, a negligible amount of potentially excludable jurors made it into the juries studied, with 2-7% responding that a death sentence would be unacceptable for certain capital crimes.²³⁶ Reasons given for this divergence include the fact that those favouring life “come to their positions through conscious reflection” whereas ADPs may not be aware of their views until put in the situation, as well as a “general lack of knowledge about capital crimes [...] and the process of choosing.”²³⁷ Another study from 1996 using felony jurors also concluded that 28.2% of *Witt*-includables would “always give the death penalty for intentional murder, regardless of the evidence,” compared to only 3% of misidentified *Witt*-excludables, jurors who were included but would actually never vote for it;²³⁸ *Witt* had, in this study, only succeeded in identifying two out of 44 ADP jurors.²³⁹

This study found that correct identification and subsequent inclusion or exclusion of jurors using the *Witt*-standard is generally problematic: 9.1% of *Witt*-includables should have been excluded, since they reported finding at least one task required of a capital jury impossible, but on the other hand, nearly one third of excludables should have been included, since they did not find any impossible.²⁴⁰ The study concluded that 36% of jurors had been misidentified by the *Witt*-standard,²⁴¹ also citing lack of sufficient

²³⁵ Rozelle, pp. 788f.

²³⁶ Rozelle, p. 789.

²³⁷ Rozelle, p. 789.

²³⁸ Dillehay, Ronald C., and Marla R. Sandys. “Life Under *Wainwright v. Witt*: Juror Dispositions and Death Qualification.” *Law and Human Behavior* 20:2 (1996), p. 159.

²³⁹ Dillehay/Sandys, p. 160.

²⁴⁰ Dillehay/Sandys, p. 159.

²⁴¹ Dillehay/Sandys, p. 159.

understanding of the requirements of the role of a juror as a possible explanation.²⁴² These findings are consistent with an earlier study, which used a sample of college students: 60.6% of excluded respondents (identified using the *Witherspoon* standard) would in fact have been prepared to vote for the death penalty in at least one out of five cases, and almost as many would have done so in more than one case; nearly all of the excluded respondents, 98.9% indicated that they would have at least considered it.²⁴³

4.2.2. THE FAIR CROSS-SECTION REQUIREMENT AND EVOLVING STANDARDS OF DECENCY

One had to look no further than *Witherspoon* to gauge the importance accorded to a jury of peers. It “express[es] the conscience of the community” and “maintains a link between contemporary community values and the penal system,” but only if it is not exclusively composed of people who support the death penalty – in that case it only speaks for “a distinct and dwindling minority.”²⁴⁴ In the concurring opinion, Justice Douglas already considers, under the Sixth Amendment fair cross-section requirement,²⁴⁵ that there is a “constitutional right to a jury drawn from a group which represents a cross-section of the community [...] It is a democratic institution, representative of all qualified classes of people”²⁴⁶ and the defendant is entitled to “the benefit of that controlling principle of mercy.”²⁴⁷ This is then brought up again in the dissent in *Witt*, where Justice Brennan notes that the previous case law of the Supreme Court has recognised the jury as

a profound judgement about the way in which law should be enforced and justice administered [...] providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.²⁴⁸

It also noted that, in *Taylor v. Louisiana*, the Court held that

²⁴² Dillehay/Sandys, p. 160.

²⁴³ Robinson, Robert J. “What Does ‘Unwilling’ to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors.” *Law and Human Behavior* 17:4 (1993), p. 475.

²⁴⁴ *Witherspoon v. Illinois*, 391 U.S., pp. 519f.

²⁴⁵ *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), p. 364-366.

²⁴⁶ *Witherspoon v. Illinois*, 391 U.S., p. 524. (Douglas, W., concurring)

²⁴⁷ *Witherspoon v. Illinois*, 391 U.S., p. 528. (Douglas, W., concurring)

²⁴⁸ *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), pp. 155f.

this prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.²⁴⁹

Brennan, in his dissent, applied these principles to death-qualification, finding the practice “fraught” with such threats, especially in capital cases where “passions [...] can run to the extreme,” and pressures are especially dangerous when “prosecutors and judges are elected, or [...] harbour political ambitions.”²⁵⁰

The implications of death-qualification for the fair cross-section requirement are obvious, even though the majority did not agree in *Witt*. However, there is another reason why the systematic exclusion of jurors is problematic: The Eighth Amendment prohibits ‘cruel and unusual punishment,’ the cruelty and unusualness of which the Supreme Court has been interpreting in light of the “evolving standards of decency that mark the progress of a maturing society.”²⁵¹ This should be done on objective evidence, the most reliable of which are legislation and the “actions of sentencing juries,” which are a “significant and reliable objective index of contemporary values;” these two “ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency.”²⁵² *Witherspoon* similarly acknowledges the link of the “contemporary community values” for ‘evolving standards of decency.’²⁵³ Most recently, in his *Glossip* dissent, Justice Breyer cited the steady decline of death sentences as an important indicator of the evolving standards of decency²⁵⁴ – imagine what the numbers would look like without death-qualification. In fact, it has been said

²⁴⁹ *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), p. 530.

²⁵⁰ *Wainwright v. Witt*, 469 U.S., p. 459.

²⁵¹ *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958), pp. 100f.

²⁵² *Atkins v. Virginia*, 536 U.S., pp. 323f.

²⁵³ *Witherspoon v. Illinois*, 391 U.S., p. 520.

²⁵⁴ *Glossip v. Gross*, 135 S. Ct. (2015), pp. 2772f. (Breyer, J., dissenting)

that death-qualified juries are a “broken thermometer for gauging community consensus,”²⁵⁵ and, in a similar vein,

measuring the community’s sentiment concerning a specific punishment by gathering a venire, removing from the venire all people opposed to a punishment, and then taking the temperature of the remaining citizens concerning the propriety of that punishment, would be like assessing the impact of global warming by taking the temperature in a room with its air-conditioning on.²⁵⁶

Death-qualified juries are unrepresentative of the larger population by definition: They exclude anyone who is opposed to the death penalty to an extent that prevents them from imposing it personally. But not only this viewpoint is lost to the jury: Studies have proven that there are certain attitudes related to criminal justice more commonly found in excludable jurors, which are also disproportionately eliminated through death-qualification. This is especially important since attitudes have been known to accurately predict jurors’ votes.²⁵⁷ One study of 881 people found that excludable jurors (without nullifiers) held significantly different beliefs compared to death-qualified jurors, to a highly significant statistical level. The attitudes in question concerned topics like self-incrimination (what it means when a defendant does not take the stand), inadmissible evidence (whether or not illegally acquired evidence should be considered in court and information reported in the media), the juror’s opinion about prosecution and defence attorneys, and death-qualified jurors showed bias towards the prosecution in all, contrary to excludable jurors.²⁵⁸

Others confirmed these findings, showing that death-qualified jurors believe more strongly in the necessity of harsh punishments and that they can be a “solution to the crime problem,” the deterrent effect of the death penalty; they believe less strongly that innocent people and members of minorities are sentenced to death on a too-frequent basis.²⁵⁹ Death-qualified jurors are also known to have a higher belief in a just world (meaning that people generally get what they deserve), more legal authoritarian beliefs

²⁵⁵ Levinson/Smith/Young, p. 571.

²⁵⁶ Cohen/Smith, FN 54.

²⁵⁷ APA, p. 23f.

²⁵⁸ APA, pp. 17ff.

²⁵⁹ Haney/Hurtado/Vega, p. 628.

(feeling that the rights of the government take precedence over the rights of the individual) and an external locus of control (belief that events occur because of things in an individual's control). It was found that these attitudes influence the way jurors evaluate aggravating and mitigating circumstances, and they were found to vote in favour of the death sentence often.²⁶⁰ Death-qualified jurors are also less receptive to the insanity defence, and more likely to believe myths associated with it.²⁶¹

It has also been proven that juries function better when death penalty opponents are not excluded, which is reflected in the quality of jury deliberations, the accuracy of fact-finding, "critical scrutiny of testimony, and the proper application of the standard of reasonable doubt."²⁶² A recent study corroborates the finding that non-death-qualified juries would return more accurate results, since it showed that death-qualified jurors are more susceptible to pre-trial publicity and more likely to underestimate the effect this has on a defendant's due process guarantees.²⁶³

4.2.3. THE RIGHTS OF JURORS

This thesis is focussed mostly on the effect of death-qualification on the rights of defendants and a fair trial, but it is worth mentioning that it can also be seen as a violation of the rights of potential jurors who are excluded. They are prevented from serving on a jury, on account of entirely reasonable beliefs.²⁶⁴ "The State is asking the individual juror to be complicit" in what they believe is "tantamount to murder,"²⁶⁵ with no meaningful way of objecting.²⁶⁶ In fact, it has been suggested that the complicity objection may, in the wake of *Hobby Lobby*, open up a new avenue for challenge: A series of challenges are currently at the court concerning the requirement that companies claiming "a religious exemption from the contraceptive mandate" would, by

²⁶⁰ Butler/Moran, 2007, p. 66.

²⁶¹ Butler, Brooke, and Adina W. Wasserman. "The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense." *Journal of Applied Social Psychology* 36:7 (2006), p. 1757.

²⁶² APA, pp. 20f.

²⁶³ Butler, Brooke. "The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity." *Journal of Applied Social Psychology* 37:1 (2007), p. 120.

²⁶⁴ Clark, Adam M. "An Investigation of Death Qualification as a Violation of the Rights of Jurors." *Buffalo Public Interest Law Journal* 24 (2005), p. 3.

²⁶⁵ Clark, p. 38.

²⁶⁶ Clark, p. 62.

providing their employees with a confirmation of this, be complicit in their employees getting contraceptives from an insurance company instead.²⁶⁷ If these challenges are endorsed by the Court, excluded jurors can point out the parallel: If they admit to being impaired by their beliefs about the death penalty, they are replaced by another juror, who will not have such qualms, and thus complicit in someone else potentially sentencing the defendant to death.²⁶⁸

4.3. Racial and Gender Discrimination: The Undesirable Side-Effect of Death-Qualification

There are two ways death-qualification has discriminatory effects: Firstly, it reduces actual minority and female representation on juries: The APA noted that all studies which accorded for racial and gender differences are unanimous in their conclusion that excluded jurors are more likely to be African American or women. In the studies available at the time, the reported rate of exclusion of African Americans on the basis of their beliefs about the death penalty was 26-46% (depending on the used standard, which either included or excluded nullifiers), compared to an exclusion rate of white people from 9-29%. Similarly, women were excluded at the rate of 13-37%, while for men it was 8-24%, respectively.²⁶⁹

The recent quantitative study in Louisiana corroborates these findings in terms of race: Racial data was available for seven out of the eleven trials analysed, encompassing 803 potential jurors in an average jury pool that was 55.8% Caucasian and 41.6% African American.²⁷⁰ Out of these, 38.7% of those struck were Caucasian, 59.8% were African Americans, a clear overrepresentation. The result was a significantly impacted composition of the remaining jury pool: Out of all potential black jurors, 35.2% were excluded, compared to only 17% of potential white jurors – African Americans were 1.8

²⁶⁷ Evans, Danieli. “Religious Objections to the Death Penalty after Hobby Lobby.” *Stanford Law & Policy Review* 27.1 (2015), pp. 2f.

²⁶⁸ Evans, p. 5.

²⁶⁹ APA, p. 19.

²⁷⁰ Cover, p. 28.

times more likely to be excluded.²⁷¹ The ADP exclusions had the opposite effect in terms of race.²⁷² The venire went from having 1.3 Caucasian jurors for every African American juror to having 1.6 after all exclusions.²⁷³

These findings are especially important because the racial composition of capital juries affects the outcome: Using CJP data, Bowen, Steiner & Sandys found that sentencing was considerably determined by a “white male dominance” and a “black male presence” effect, both of which are highly statistically significant in cases of black defendants and white victims.²⁷⁴ Five or more white male jurors in such a trial drastically increased the probability of a death sentence to 63.2% from only 23.1% (with only four such jurors). Just one black male juror in such a jury caused the probability of a death sentence to decrease from 71.9% (with no black male juror) to 42.9%.²⁷⁵ The data also showed that black and white jurors differ on when they decide what penalty is appropriate (over half of white jurors have made this decision by the time sentencing begins; at the first jury vote, black jurors predominantly vote for a life sentence).²⁷⁶ They also interpret identical evidence wildly differently, specifically concerning future dangerousness (whites tend to assume so), remorse and residual doubt (both of which black people are more receptive to).²⁷⁷ There was, however, little such effect to be found in cases in which the defendant and the victim were of the same race,²⁷⁸ except for residual doubt and remorse, which black jurors are always more receptive to.²⁷⁹ The presence of female jurors, black or white, also did not have a significant impact on sentencing,²⁸⁰ and generally white and black female jurors exhibit fewer differences than white and black male jurors.²⁸¹

²⁷¹ Cover, p. 29.

²⁷² Cover, p. 31.

²⁷³ Cover, p. 32.

²⁷⁴ Bowers, William J., Benjamin D. Steiner, and Marla Sandys. “Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition.” *University of Pennsylvania Journal of Constitutional Law* 3 (2001), p.

²⁷⁵ Bowers/Steiner/Sandys, p. 193.

²⁷⁶ Bowers/Steiner/Sandys, p. 241.

²⁷⁷ Bowers/Steiner/Sandys, pp. 241f.

²⁷⁸ Bowers/Steiner/Sandys, p. 194.

²⁷⁹ Bowers/Steiner/Sandys, p. 242.

²⁸⁰ Bowers/Steiner/Sandys, p. 195.

²⁸¹ Bowers/Steiner/Sandys, p. 243.

Overall, these findings do not come as a surprise considering the known issues with racial bias, which is the second effect of death-qualification: There is compelling data which shows that the remaining death-qualified jurors are more racially biased than excludable jurors, and consequently a representative jury: A 2007 study of jurors found that a juror's support of the death penalty significantly correlated with their level of modern racism (as well as sexism and homophobia). The more a juror supports the death penalty, the more they believe that there is no problem with discrimination in the US anymore, the more they believe black people are "too demanding in their push for equal rights" and have gotten more than they deserve in terms of economic equality, and the less they understand discontent of African Americans with the status quo.²⁸² Another recent study dealt with the issue that "the very processes that are supposed to neutralise the system [...] unintentionally exacerbate efforts to eradicate unjustified racially disparate outcomes."²⁸³ Levinson, Smith & Young used Implicit Association Tests on racial stereotypes and "value of life," which measured the perceived "value/worth" respondents ascribed to black and white people, as well as the recorded self-reported explicit racist attitudes of respondents according to the Modern Racism Scale, the same used in the previous study. Before, the participants were death-qualified with the *Witherspoon* questions, given a case to read, and asked to sentence the convicted defendant.²⁸⁴ The data showed that death-qualified jurors demonstrate significantly stronger implicit as well as explicit racial biases, with the implicit bias predicting the probability of a death sentence for a black defendant, and the explicit bias that of a death sentence in a case with a white victim. They conclude that the stronger biases exhibited are caused by "the disproportionate elimination of non-white jurors."²⁸⁵

²⁸² Butler, Brooke. "Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process." *Behavioral Sciences & the Law* 25:6 (2007), p. 864.

²⁸³ Levinson, Justin D., Robert J. Smith, and Danielle M. Young. "Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States." *New York University Law Review* 89 (2014), p. 542.

²⁸⁴ Levinson/Smith/Young, pp. 554ff.

²⁸⁵ Levinson/Smith/Young, p. 569.

5. Death-Qualification in International Law

The United States, owing to its exceptionalism and disdain for international oversight, has not ratified a great number of international human rights treaties. Civil and political rights, however, make up the one area in which it has accepted a number of international obligations, in the form of the American Declaration of the Rights and Duties of Man of 1948, and the International Covenant on Civil and Political Rights of 1966.

The following section will deal with the international obligations relevant to the issue of death-qualification. Firstly, the relevant articles of the International Covenant on Civil and Political Rights will be interpreted, relying on the Human Rights Committee's General Comments, the US Reports under the state reporting procedure, and the relevant case law of the Human Rights Committee individual complaints procedure. The next section will discuss the validity of death-qualification under the American Declaration as interpreted by the Inter-American Commission in its individual petitions. Finally, the last section contains subsidiary sources of relevance, namely the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' opinions on death-qualification, and a comparative analysis of two other common law jurisdictions and the way they deal with juror selection: the United Kingdom and Canada.

The issue of death-qualification and international law has been examined before, albeit quite a while ago and in a rather limited way: John Quigley, a professor at Ohio State University, first asserted in 1993 that it was "doubtful" death qualification was in line with the Covenant's fair trial rights,²⁸⁶ and followed up this assertion with a more detailed study of death-qualification in international human rights cases as well as a comparative legal analysis.²⁸⁷

²⁸⁶ Quigley, John. "Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights." *Harvard Human Rights Journal* 6 (1993), p. 80.

²⁸⁷ Quigley, John. "Exclusion of Death-Scrupled Jurors and International Due Process." *Ohio State Journal of Criminal Law* 2 (2004) (citing *Celestine v. United States*, *Poongavanam v. Mauritius*, *Judge v. Canada* as well as several cases of the Inter-American Court for Human Rights, the European Court for

In considering international cases concerning juror bias, it is helpful to distinguish the different forms it can take – Vidmar in his comparison of world jury systems differentiates the following: *Interest* prejudice – when a juror has a personal interest in a case (relation with a party, personally impacted by the outcome); *specific* prejudice – when a juror has a preconceived opinion or belief about the case at hand (due to media coverage or personal knowledge); *conformity* prejudice – when a juror feels influenced by an expectation of the community (a perceived “strong public consensus”); and *generic* prejudice – if a juror is more generally biased and holds stereotypical attitudes about a person involved in the case or the crime itself.²⁸⁸ The last category covers racial bias, and would be the closest fit for beliefs about the death penalty as well, so it is the most relevant category for the consideration of death-qualification.

5.1. The International Covenant on Civil and Political Rights: General Considerations

The International Covenant on Civil and Political Rights, which together with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights forms the so-called ‘International Bill of Rights,’²⁸⁹ and was adopted by the GA in 1966.²⁹⁰ It was ratified by the US in 1992 and domestically has the status of federal law, but is not self-executing, so it is not possible to base a domestic lawsuit directly on the Covenant.²⁹¹ The extent of the obligation undertaken by State Parties is set out in Article 2 of the Covenant, which requires the State Parties to “respect and ensure” the Covenant rights without discrimination,²⁹² and “give effect” to

Human Rights and the Committee on the Elimination of Racial Discrimination, which are discussed, as relevant, below).

²⁸⁸ Vidmar, Neil. “A Historical and Comparative Perspective on the Common Law Jury.” *World Jury Systems*. Neil Vidmar. New York: Oxford University Press (2000), p. 33.

²⁸⁹ Nowak, Manfred. U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2nd Revised Edition. NP Engel, 2005, p. XIX.

²⁹⁰ GA Resolution 21/2200, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, A/RES/21/2200, of 16 December 1966.

²⁹¹ American Civil Liberties Union. “FAQ: The Covenant on Civil & Political Rights (ICCPR).” *American Civil Liberties Union*. April 2014. Web. Accessed 1 July 2016, at < <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr>>.

²⁹² *The International Covenant on Civil and Political Rights* of 16 December 1966, Art 2.1.

these rights by adapting their domestic laws, and doing whatever else might be required.²⁹³

The Human Rights Committee (“the HR Committee”) was established as a treaty body charged with the international oversight of States’ compliance with the Covenant.²⁹⁴ The main (and only obligatory) monitoring instrument of the Covenant is the state reporting procedure set down in Art 40, which requires States Parties to submit regular reports on how the Covenant rights are being implemented.²⁹⁵ The HR Committee then considers these reports and publishes its Concluding Observations.²⁹⁶ Art 41 provides for a procedure of inter-state complaints of non-compliance with the Covenant,²⁹⁷ however, the acceptance of this mechanism is voluntary, and in practice States are hesitant to bring complaints against each other.²⁹⁸ Furthermore, the HR Committee has established a practice of issuing General Comments, a competence which is mentioned in Art 40(4) of the Covenant: In the interpretation of the HR Committee, Art 40(4) authorises it to publish comments based on its experience for the purpose of clarifying its interpretation of the Covenant, which are addressed to all States Parties.²⁹⁹

An individual complaints procedure was established separately from the Covenant, in its First Optional Protocol.³⁰⁰ Subject to admissibility,³⁰¹ the HR Committee can consider the complaint alleging a violation of the Covenant by a State Party and make its opinion known in ‘views,’ which are transmitted to the State and the complainant.³⁰² These views amount to a decision on the merits, and have evolved to take the form of a “court-like design,” and culminate in the finding of a violation as well as a recommendation of remedies for the State Party to accord.³⁰³ While every State Party is

²⁹³ ICCPR, Art 2.2.

²⁹⁴ ICCPR, Art 28.

²⁹⁵ ICCPR, Art 40.

²⁹⁶ Nowak, p. 744.

²⁹⁷ ICCPR, Art 41.

²⁹⁸ Nowak, p. 757f.

²⁹⁹ Nowak, p. 746f.

³⁰⁰ *First Optional Protocol to the International Covenant on Civil and Political Rights* of 16 December 1966., Art 1.

³⁰¹ *OP-ICCPR*, Art 3, 5.

³⁰² *OP-ICCPR*, Art 5.

³⁰³ Nowak, p. 892.

obligated to provide an effective remedy based on Art 2(3) of the Covenant,³⁰⁴ neither the finding of a violation nor the recommendations made in a view by the HR Committee are legally binding.³⁰⁵ How seriously they are taken depends, therefore, on the State Party concerned and various circumstantial (often political) factors, and on the whole, the HR Committee's views are considered to carry "great moral authority"³⁰⁶ and constitute an "authoritative interpretation" accepted by many States.³⁰⁷ The HR Committee, in its General Comment No. 33, has emphasised the indirectly binding effect of its views based on Art 2(3) of the Covenant, as well as arguing that because of the principle of good faith of the Vienna Convention on the Law of Treaties, States Parties are duty-bound to cooperate.³⁰⁸ It will come as no surprise that the US has neither signed nor ratified the Protocol,³⁰⁹ so any interpretation of the treaty by the HR Committee based on individual complaints can only be found in cases relating to other States Parties.

It is important for a State Party like the US with a strong federal structure to keep in mind Article 50 of the Covenant, which charges every constituent federal state to respect the Covenant rights. This issue was emphasised again by the HR Committee in its General Comment No. 31, which clarified the nature of the obligation accepted by States Parties: The HR Committee first underlined the principle of good faith compliance with international treaties, codified in the Vienna Convention on the Law of Treaties.³¹⁰ More importantly, though, it emphasised that the Covenant obligates the State Party in its entirety, and so makes the federal government responsible for Covenant breaches of its constituent federal states. Acts of State agents on any federal

³⁰⁴ ICCPR, Art 2(3).

³⁰⁵ Nowak, p. 893.

³⁰⁶ Nowak, p. 894.

³⁰⁷ Nowak, p. 895. The Committee itself has called its views an "authoritative determination [...] [which] derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol." Human Rights Committee, *General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/GC/33, of 5 November 2008, §13.

³⁰⁸ Committee, *General Comment 33*, §14-15.

³⁰⁹ United Nations. "Optional Protocol to the International Covenant on Civil and Political Rights." *United Nations Treaty Collection*. Web. Accessed 1 July 2016, at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-5&chapter=4&lang=en>.

³¹⁰ Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, of 26 May 2004, §3.

level are attributed to the State Party, in this case the US government, as a whole, and while it is up to the States Parties and their individual constitutional order how to implement the Covenant, a failure to do so effectively cannot be excused by pointing to its constitutional provisions.³¹¹ Therefore, if one US state violates the Covenant, the US as a whole is held responsible for this breach.

Finally, the US has entered five reservations, five understandings, and three declarations to the Covenant.³¹² The HR Committee has expressed regret in response, finding them very extensive, and concluded that, “taken together, they intended to ensure that the United States has accepted what is already the law of the United States.”³¹³ It found two of the reservations, those concerning Article 6 (right to life: reserving the right to execute juveniles) and Article 7 (prohibition of torture and cruel, inhuman and degrading treatment or punishment: binding effect only to the extent that of the prohibition of ‘cruel and unusual treatment or punishment’ in the US Constitution),³¹⁴ to be “incompatible with the object and purpose of the Covenant.”³¹⁵ Schabas concludes that this finding is supported by international law, and that it is reasonable to assume that the US remains bound by the Covenant (since the HR Committee does not address what effect its finding of incompatibility has).³¹⁶

Of relevance to the issue of death-qualification is, however, only Understanding 1 submitted by the United States:

That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status – as those terms are used in article 2, paragraph 1 and

³¹¹ Committee, *General Comment 31*, §4.

³¹² United Nations. “International Covenant on Civil and Political Rights.” *United Nations Treaty Collection*. Web. Accessed 3 July 2016, at <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en>.

³¹³ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, CCPR/C/79/Add.50, of 7 April 1995, §14.

³¹⁴ United Nations, “Covenant”.

³¹⁵ Committee, *Consideration*, 1995, §14.

³¹⁶ Schabas, William A. “Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?” *Brooklyn Journal of International Law* 21 (1995), p. 324.

article 26 – to be *permitted* when such *distinctions are, at minimum, rationally related to a legitimate governmental objective*.³¹⁷

Two States Parties submitted objections to this Understanding: Finland, noting that it concerned fundamental non-discrimination Articles of the Covenant, found the Understanding to “constitute in substance a reservation,” and objected on the basis of incompatibility with the object and purpose of the treaty; Sweden concluded the same.³¹⁸ This has not been addressed by the HR Committee, but given the Understanding’s reliance on US law to change Covenant obligations, as well as the awfully low bar set by a ‘rational relation to a legitimate government interest,’ it is questionable if this substantial reservation is valid.³¹⁹

5.1.1. RELEVANT ARTICLES OF THE COVENANT

The following are the relevant parts of the Covenant provisions pertinent to death-qualification:

5.1.1.1. Article 2 ICCPR: Non-Discrimination

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction *the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.³²⁰

5.1.1.2. Article 6 ICCPR: Right to Life

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

2. In countries which have not abolished the death penalty, *sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant* and to the Convention on the Prevention and Punishment of the

³¹⁷ United Nations, “Covenant.” (emphasis added)

³¹⁸ United Nations, “Covenant.”

³¹⁹ Ash, Kristine. “US reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence.” *Northwestern Journal of International Human Rights* 3 (2005), §24.

³²⁰ ICCPR, Art 2.

Crime of Genocide. This penalty *can only be carried out pursuant to a final judgement rendered by a competent court*.³²¹

5.1.1.3. Article 14 ICCPR: Right to a Fair Trial

1. All persons shall be *equal before the courts and tribunals*. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to *a fair and public hearing by a competent, independent and impartial tribunal established by law*. (...)

5. Everyone convicted of a crime shall have the right to his conviction and sentence being *reviewed by a higher tribunal* according to law.³²²

5.1.1.4. Article 26 ICCPR: Equality and Non-Discrimination

All persons are *equal before the law* and are *entitled without any discrimination to the equal protection of the law*. In this respect, the law shall *prohibit any discrimination* and guarantee to all persons *equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.³²³

5.1.2. INTERPRETATION OF THE HUMAN RIGHTS COMMITTEE

5.1.2.1. General Comment 6: Right to Life (1982)

In its General Comment No. 6, the HR Committee stresses the importance of limiting the death penalty to only the ‘most serious crimes’ and the ultimate goal of abolition.³²⁴

In this context, it insists that the use of the death penalty should be the exception, not the rule, and emphasises the importance of the fair trial rights of the Covenant, which must be guaranteed, as capital punishment may only be “imposed in accordance with the law”³²⁵.

³²¹ ICCPR, Art 6. (emphasis added) In particular, this reference to other Covenant rights concerns Articles 14, 15, 2 and 26, all of which must be guaranteed for a death sentence to be in accordance with the Covenant. Nowak, p. 142.

³²² ICCPR, Art 14. (emphasis added) The US with its tradition of strong due process guarantees played an important role in the drafting of this Article. Nowak, p. 305.

³²³ ICCPR, Art 26. (emphasis added)

³²⁴ Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, 1982. Accessed 28 June 2016, at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_6630_E.doc>, §6.

³²⁵ Committee, *General Comment 6*, §7.

5.1.2.2. *Draft General Comment 36: Right to Life (2015)*

To date, the HR Committee has only formally published two General Comments regarding the right to life: General Comment No. 6, discussed above, and No. 14, which deals with war and weapons of mass destruction.³²⁶ Both date back to the 1980s, and are not very extensive, counting only seven paragraphs each. The HR Committee is now looking to adopt a new General Comment regarding the right to life to replace them. In 2015, discussion began, and after receiving input in the form of 116 submissions from NGOs and NHRIs for discussion,³²⁷ a draft of General Comment No. 36 was published.

In the version of 2 September 2015, it encompasses 67 paragraphs on various issues related to the right to life, including but not limited to abortion, disappearances, military operations, extraditions and investigations.³²⁸ A whole section of 20 paragraphs is dedicated to the death penalty and its limitations, and it is noticeable that the HR Committee has strengthened its language: It constantly emphasises the strictness of the limitations in place,³²⁹ prescribes a restrictive interpretation of the ‘most serious crimes’ restriction,³³⁰ emphasises the importance of discretion in capital sentencing with regard to the personal circumstances of the crime,³³¹ the principle of legality,³³² prohibited methods of execution (which now include lethal injection using untested drugs) and extended delays on death row.³³³

With regard to provisions relevant to death-qualification, fair trial guarantees are also discussed much more extensively. The HR Committee makes explicit that the right of life itself is violated *ipso facto* if the death penalty is imposed in breach of fair trial

³²⁶ Human Rights Committee, *General Comment No. 14: Article 6 (Right to Life)*, 1984. Accessed 28 June 2016, at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/INT_CCPR_GEC_4723_E.doc>.

³²⁷ Human Rights Committee. “Written contributions for the half day of discussion.” *Human Rights Committee*. Web. Accessed 29 June 2016, at <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WCRightToLife.aspx>>.

³²⁸ Human Rights Committee, *Draft General Comment No. 36: Article 6 (Right to Life)*, U.N. Doc. CCPR/C/GC/R.36, of 2 September 2015.

³²⁹ Committee, *Draft General Comment 36*, §§4, 20, 35.

³³⁰ Committee, *Draft General Comment 36*, §37.

³³¹ Committee, *Draft General Comment 36*, §39.

³³² Committee, *Draft General Comment 36*, §41.

³³³ Committee, *Draft General Comment 36*, §42.

guarantees, including cases when an appeal cannot be effectively obtained or where there is a “general lack of fairness in the criminal process or lack of independence or impartiality of the trial or appeal court.”³³⁴ It imposes on States the duty to “take all feasible precautions in order to avoid wrongful convictions,” including bearing in mind empirical studies on the inaccuracy of witness statements and predominance of inaccurate confessions.³³⁵ The issue of non-discrimination is also addressed, with the HR Committee suggesting that a disproportionate number of death sentences handed down to members of minority groups may be a violation of Art 6(1) and (2).³³⁶ It reminds States Parties that precautionary measures from international bodies should be respected in good faith, even when they are not explicitly foreseen in the treaties (relevant for the US with regard to the Inter-American Commission, see section 5.2.2).³³⁷

Finally, the HR Committee demands all States be on an

irrevocable path towards complete abolition [...] de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for human dignity, and abolition of the death penalty is both desirable, and necessary for the enhancement of human dignity and progressive development of human rights,”³³⁸

acknowledging the possibility of the death penalty being considered a violation of Art 7 of the Covenant in the future.³³⁹ It determines that fair trial rights in capital cases may not be derogated from even in times of emergency,³⁴⁰ and that it will not acknowledge reservations by States to Art 6 as valid anymore.³⁴¹

The HR Committee has yet to formally adopt this General Comment in its final version, but even in this preliminary stage it is obvious how much more far-reaching and extensive the new version will be, reflecting an additional thirty years of HR Committee

³³⁴ Committee, *Draft General Comment 36*, §43.

³³⁵ Committee, *Draft General Comment 36*, §45.

³³⁶ Committee, *Draft General Comment 36*, §46.

³³⁷ Committee, *Draft General Comment 36*, §48.

³³⁸ Committee, *Draft General Comment 36*, §52.

³³⁹ Committee, *Draft General Comment 36*, §53.

³⁴⁰ Committee, *Draft General Comment 36*, §64.

³⁴¹ Committee, *Draft General Comment 36*, §65.

jurisprudence, state report considerations, and general development in international human rights law.

5.1.2.3. *General Comment 32: Right to a Fair Trial (2007)*

In General Comment No. 32, the HR Committee elaborates on the Covenant's fair trial guarantees of Art 14, which must be guaranteed by the States Parties no matter the state of their national laws.³⁴² It demands "scrupulous respect of the guarantees of fair trial"³⁴³ in capital cases, also highlighting also the importance of the right to an appeal in capital cases,³⁴⁴ since a violation of Art 14 in a capital trial automatically also carries with it a violation of the right to life.³⁴⁵

The HR Committee notes that the right to an impartial tribunal is absolute and may not be limited,³⁴⁶ and sets down the standard for impartiality: On the one hand, the judiciary may not "allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests" of one side over the other.³⁴⁷ On the other hand, there is an objective element to impartiality: A rational outsider must also have the impression that the judiciary is fair and unbiased. For example, if a trial is held by a judge who, contrary to domestic law, was not eliminated despite the existence of a reason for disqualification, and the outcome is impacted significantly, the appearance of impartiality is lost.³⁴⁸ Unfortunately, the HR Committee does not address the opposite case, namely if a judge (or, in this case, juror) who should have been allowed to sit is excluded improperly. A trial can be considered fair only if there is no "direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever

³⁴² Human Rights Committee, *General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to a Fair Trial)*, U.N. Doc. CCPR/C/GC/32, of 23 August 2007, §4.

³⁴³ Committee, *General Comment 32*, §59.

³⁴⁴ Committee, *General Comment 32*, §51.

³⁴⁵ Committee, *General Comment 32*, §59.

³⁴⁶ Committee, *General Comment 32*, §19.

³⁴⁷ Committee, *General Comment 32*, §21.

³⁴⁸ Committee, *General Comment 32*, §21.

motive,” which is not the case if the judiciary displays hostile feelings or support for either side.³⁴⁹

Furthermore, “expressions of racist attitudes by a jury [...] or a racially biased jury selection” will result in an unfair trial.³⁵⁰ If the laws governing a State’s criminal procedure allows for distinctions enumerated in Art 2(1) or 26 of the Covenant (both of which contain as grounds ‘political or other opinion’), the HR Committee warns that equality before the courts may be violated in conjunction.³⁵¹ By this, the HR Committee likely means distinctions regarding the defendant, not the jury – however, it also discusses the right to access public service of Art 25, and finds the unfair dismissal of a judge may violate the right to a fair trial as well.³⁵²

Regarding the right to review by a higher tribunal, the HR Committee finds that an appeal which excludes factual findings and is restricted to only questions of law or formality is not enough to satisfy the requirements of Art 14(5); however, it is sufficient if the facts can be reviewed by the appeals court, such as the renewed consideration of the incriminating evidence.³⁵³

5.1.2.4. State Reports

Out of the many NGO submissions on the latest US state report to the HR Committee, there are four which draw attention to issues surrounding death-qualification:

Amnesty International: In their submission of September 2013, Amnesty expressed concern over racial disparities in the administration of the death penalty in the US. They reference *McCleskey v. Kemp*, calling the ruling “notorious” in its rejection of statistical evidence, and noting that Justice Powell, who had written the majority opinion in the 5-4 split Court, had later gone on record to say he had changed his mind and regretted his decision to vote with the majority.³⁵⁴ Amnesty specifically addressed death-

³⁴⁹ Committee, *General Comment 32*, §25.

³⁵⁰ Committee, *General Comment 32*, §25.

³⁵¹ Committee, *General Comment 32*, §65.

³⁵² Committee, *General Comment 32*, §64.

³⁵³ Committee, *General Comment 32*, §48.

³⁵⁴ Amnesty International. *USA: A Submission on the Death Penalty to the UN Human Rights Committee 109th Session*. London: Amnesty International Publications, 2013. Accessed 10 June 2016, at

qualification, stating that “death-qualified jurors harbour stronger racial biases,” which has been proven by empirical studies.³⁵⁵ They also mention this issue with regards to Puerto Rico, where the federal government regularly seeks the death penalty in federal cases despite Puerto Rico’s rejection of this punishment: Amnesty calls the government’s argument that Puerto Rican juries will make sure the local values are represented in court “promoting a myth” since these juries must be death-qualified.³⁵⁶ Amnesty also devoted a chapter to AEDPA and its effect on federal habeas corpus review, arguing that it “compromises fairness in pursuit of finality,”³⁵⁷ quoting Special Rapporteurs’ concerns about the law as well as a US Circuit judge deploring the “perverse consequences” of AEDPA, resulting in erroneous state trials, which can nevertheless not be reviewed by a federal court.³⁵⁸

American Civil Liberties Union: In their 2013 submission, the ACLU likewise expressed concern over racial disparities in capital sentencing,³⁵⁹ and deplored the failure of the US government and Supreme Court to improve habeas corpus relief under AEDPA, pointing out that defendants who “have suffered serious constitutional violations, such as inadequate defence council, racially discriminatory jury selection, and the suppression of exculpatory evidence by the prosecution have been left without judicial recourse.”³⁶⁰ They recommend that the US conduct studies as to the racial impact of the death penalty (which it had committed to in its UPR) and amend AEDPA to guarantee access to federal review.³⁶¹

<http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15186_E.pdf>, p. 11

³⁵⁵ Amnesty International, 2013, p. 12.

³⁵⁶ Amnesty International, 2013, p. 18.

³⁵⁷ Amnesty International, 2013, p. 19.

³⁵⁸ Amnesty International, 2013, p. 20.

³⁵⁹ American Civil Liberties Union. *United States’ Compliance with the International Covenant on Civil and Political Rights: Shadow Report to the Fourth Periodic Report of the United States*. New York: ACLU, 2013. Accessed 10 June 2016, at

<http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15191_E.pdf>, p. 35.

³⁶⁰ ACLU, 2013, p. 36.

³⁶¹ ACLU, 2013, p. 37.

Reprieve and Advocates for Human Rights: This joint submission argues briefly that racial disparities in capital punishment are exacerbated by “racial discrimination throughout charging, jury selection, and sentencing.”³⁶²

The Sentencing Project: The shadow report of the Sentencing Project broadly addresses racial disparities throughout the capital trial and sentencing process; however, the racial impact in jury selection is only explicitly addressed regarding peremptory challenges, not challenges for cause.³⁶³

Death-qualification is only brought up explicitly by one of the four submissions; two only address racial disparities in jury selection in general terms; one only explicitly mentions peremptory challenges, but does go on to explore the general racial disparities in sentencing, which have been found to be exacerbated by death-qualification (see section 4.3). Perhaps as a result, the Concluding Observations published by the HR Committee in response to the respective US reports also only address the issue in general terms: In 2014, considering the 4th US report, the HR Committee notes its ongoing concern about “racial disparities at different stages in the criminal justice system” including sentencing;³⁶⁴ this concern is reiterated specifically regarding the death penalty, with a recommendation to “strengthen safeguards” to prevent errors in sentencing and execution.³⁶⁵ Essentially the same observations were made in 2006,³⁶⁶

³⁶² Advocates for Human Rights, Reprieve. *Shadow Report on the Death Penalty in the United States for Consideration during the 109th Session of the United Nations Human Rights Committee*. Minneapolis: 2013. Accessed 10 June 2016, at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15229_E.pdf>, p. 46.

³⁶³ The Sentencing Project. *Report of the Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*. 2013. Accessed 10 June 2016, at <http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15214_E.pdf>, p. 17.

³⁶⁴ Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, U.N. Doc. CCPR/C/USA/CO/4, of 23 April 2014, §6.

³⁶⁵ Committee, *Concluding Observations*, 2014, §8.

³⁶⁶ Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, of 18 December 2006, §§24, 29.

and in 1995, there was no mention of racial disparities or fair trial concerns regarding the death penalty at all.³⁶⁷

In conclusion, there is not much to be learned about the HR Committee's opinion on death-qualification from the state reporting procedure, except perhaps that its reference to the exacerbating effect of "the rule that discrimination has to be proven on a case-by-case basis" (likely referring to the standard set by *McCleskey v. Kemp*, see section 2.1.2) to existing racial disparities concerning the death penalty³⁶⁸ suggest that the HR Committee may be open to challenges based on statistical and empirical data.

5.1.2.5. Relevant Case Law

General Views on Impartiality and Jury Selection

The HR Committee places considerable importance on fair trial guarantees in the context of capital trials. In *Hamilton v. Jamaica*, it stressed the "obligation of States Parties to observe rigorously all the guarantees for a fair trial" when it comes to the death penalty.³⁶⁹

In the 1992 communication *Karttunen v. Finland*, the HR Committee considered the case of a Finnish man who claimed the State had violated his fair trial guarantees. He claimed that two of the five lay judges who served in his bankruptcy trial were impartial due to personal connections they had with complainants in the case and should have been disqualified, an issue which he raised on appeal,³⁷⁰ an issue of interest prejudice. In this communication, the HR Committee established its views on impartiality, stressing the need for the judiciary to "not harbour preconceptions about the matter" and "not act in ways that promote the interests of one of the parties" in the trial.³⁷¹ It also established that impartiality is flawed by the inclusion of a judge who should have been disqualified.³⁷² These considerations are reflected in General Comment No. 32, as

³⁶⁷ Committee, *Consideration*, 1995.

³⁶⁸ Committee, *Concluding Observations*, 2014, p.

³⁶⁹ *Hamilton v. Jamaica*, Communication No. 333/1988, U.N. Doc. CCPR/C/50/D/333/1988 (1994), §10.

³⁷⁰ *Karttunen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992), §§2.3f.

³⁷¹ *Karttunen v. Finland*, §7.2.

³⁷² *Karttunen v. Finland*, §7.2.

already discussed above, and since the appeals court in this case did not correct the flaw, a violation of Article 14 was found by the HR Committee.³⁷³

The communication *Katsuno, Masaharu et al. v. Australia* in 2006 dealt with juror selection: The prosecution had access to a list of jurors who, while not excluded from service, were still considered unsuitable, because of their criminal records or reputation for being “antagonistic towards police.”³⁷⁴ Because of this, the defendants claim the jury selection process was not conducted in accordance with the principle of equality of arms of Article 14(1), since they could not examine this list.³⁷⁵ This claim, however, was found by the HR Committee not to be admissible: The defendants failed to substantiate a violation according to Article 2 of the Optional Protocol, since the issue was considered in detail by the appeals court, which found that the list was not actually used by the prosecution.³⁷⁶

Cases on Interest and Specific Juror Bias

Most of the HR Committee jurisprudence on jury impartiality and jury selection deals with interest-based or specific juror prejudice: This is the case when members of a jury are alleged to be biased in regard to the person of the defendant in particular, due to jury tampering in the form of bribes, prejudicial media coverage, or jurors’ personal connections to the case.

In the 1994 case of *Berry v. Jamaica*, it was alleged by a death row prisoner that the foreman of the jury in his trial was bribed to ensure his conviction, which the defendant’s counsel was told, but failed to bring up to the court.³⁷⁷ This failure to raise the issue at trial, the HR Committee decided, precluded the finding of a violation: It could not be “attributed to the State Party, since the lawyer was privately retained.”³⁷⁸

³⁷³ *Karttunen v. Finland*, §7.3.

³⁷⁴ *Katsuno, Masaharu et al. v. Australia*, Communication No. 1154/2003, U.N. Doc. CCPR/C/88/D/1154/2003 (2006), §2.3.

³⁷⁵ *Katsuno, Masaharu et al. v. Australia*, §3.11.

³⁷⁶ *Katsuno, Masaharu et al. v. Australia*, §6.3.

³⁷⁷ *Berry v. Jamaica*, Communication No. 330/1988, U.N. Doc. CCPR/C/50/D/330/1988 (1994), §3.5.

³⁷⁸ *Berry v. Jamaica*, §11.3.

On the other hand, in 2004, the HR Committee decided *Mulai v. Guyana*, in which two death row prisoners alleged an unfair trial because two people supposedly attempted to bribe the foreman of the jury so he would argue to the jury *in favour of* the defendants. The foreman had reported this incident to the court and prosecution, but not to the defence. It is alleged that as a result of this (as well as the principal eyewitness claiming to have been approached by family members of the defendants) the jury was biased against the defendants.³⁷⁹ In its considerations, the HR Committee underscored the importance of impartiality specifically also in the context of a jury trial, and stated that jurors must be “placed in a position in which they may assess the facts and the evidence in an objective manner” and thus return a just decision, and where there are allegations of jury tampering, they must be dealt with in court.³⁸⁰ A violation of Article 14(1) was found in this case, though not because the HR Committee could undoubtedly establish jury bias, but because the appeals court did not properly address these concerns.³⁸¹ It also found a violation of Article 6, since the death sentence was imposed following an unfair trial.³⁸²

Juror bias due to negative publicity was considered in *Harward v. Norway* in 1994: The defendant, who was tried on drug charges, claimed that prejudicial media coverage of the case affected the impartiality of his jurors, since details about him and the charges were leaked.³⁸³ The HR Committee, however, ruled that he had failed to exhaust domestic remedies, siding with the State who argued that he had not brought the issue to the court’s attention and demanded the exclusion of the affected jurors, and held the communication inadmissible.³⁸⁴

A later case concerning media coverage was *Chadee et al. v. Trinidad and Tobago* in 1998, in which the HR Committee examined juror bias due to extensive pre-trial publicity of a capital case. The difficulty in empanelling an impartial jury in this case was evident from the record: Over the course of 14 days, the defence challenged 169

³⁷⁹ *Mulai v. Guyana*, Communication No. 811/1998, U.N. Doc. CCPR/C/81/D/811/1998 (2004), §3.1.

³⁸⁰ *Mulai v. Guyana*, §6.1.

³⁸¹ *Mulai v. Guyana*, §6.2.

³⁸² *Mulai v. Guyana*, §6.3.

³⁸³ *Harward v. Norway*, Communication No. 451/1991, U.N. Doc. CCPR/C/51/D/451/1991 (1994), §3.2.

³⁸⁴ *Harward v. Norway*, §6.1.

potential jurors for cause and used 36 peremptory challenges.³⁸⁵ When the contingent of potential jurors was exhausted, the judge ordered the ‘praying of a tales,’ a custom which allows “members of the public in the vicinity [to be] brought in to supplement numbers and complete the panel.”³⁸⁶ The defendants argue that instead, the judge should have discharged the jury and started over with a larger venire.³⁸⁷ The HR Committee, however, concluded that the State had taken appropriate measures to ensure a fair trial, by amending the law to allow the defence to challenge jurors in the first place. Regarding the ‘tales’ process, the HR Committee essentially deferred to the State courts, citing its jurisprudence of leaving the application of national laws to national authorities, unless “it is evident that the application was manifestly arbitrary or amounted to a denial of justice,” which was not the case here. No violation of Article 14 was found.

Finally, in *Smart v. Trinidad and Tobago*, a 1998 communication, the issue alleged to be affecting impartiality of the jury was a personal connection to the case: The defendant, a death row prisoner, alleged that a juror was related to the victim and should have been excluded.³⁸⁸ The HR Committee found this claim to be inadmissible, recalling again that it is “generally for the courts of States Parties [...] to review the facts and evidence,”³⁸⁹ unless the defects are substantial, the same standard used in *Chadee*. In the case at hand, the HR Committee did not find any defects amounting to this and found the complaint inadmissible, especially since the complaint was never raised at trial.³⁹⁰

Generic Prejudice in Jury Selection and Racial Discrimination in the US

The most pertinent category of HR Committee communications are the ones alleging general lack of fairness in jury selection and the administration of the death penalty.

³⁸⁵ *Chadee et al v. Trinidad and Tobago*, Communication No. 813/1998, U.N. Doc. CCPR/C/63/D/813/1998 (1998), §3.2.

³⁸⁶ *Chadee et al v. Trinidad and Tobago*, §2.2.

³⁸⁷ *Chadee et al v. Trinidad and Tobago*, §3.2.

³⁸⁸ *Smart v. Trinidad and Tobago*, Communication No. 672/1995, U.N. Doc. CCPR/C/63/D/672/1995 (1998), §3.3.

³⁸⁹ *Smart v. Trinidad and Tobago*, §6.6.

³⁹⁰ *Smart v. Trinidad and Tobago*, §3.3.

This is because death-qualification does not result in the kind of specific or interest prejudice discussed in the previous section, which stems from preconceived notions about the specific case or defendant at hand or a personal stake in the outcome. Rather, death-qualification concerns a generic bias: it is alleged to result in an unrepresentative jury, skewed in favour of death-penalty supporters, and to make a jury more conviction-prone in a more abstract way which does not hinge on the individual characteristics of the defendant. It is also said to exacerbate racial discrimination in the administration of the death penalty. Unfortunately, while the HR Committee has considered a number of such cases, there is little to be learned from them. The biggest obstacle is the lack of jurisdiction of the HR Committee to accept communications directly against the US, since the US has not ratified the Optional Protocol. The fact that it can only consider the US system's deficiencies indirectly, through extradition-related complaints, limits its ability to adjudicate considerably.

In the early 1990s, the HR Committee considered what has been called the 'Canadian Extradition Trilogy',³⁹¹ three cases of potentially capital defendants who had fled to Canada and were fighting extradition to the US. The first one of these was *Kindler v. Canada*, decided in 1993. Kindler, a white man, alleged that there was general racial discrimination in the application of the death penalty in the US, which was a violation of Articles 14 and 26 of the Covenant. However, the HR Committee noted that he did not substantiate how this would affect him, since he was Caucasian.³⁹² The fair trial and discrimination claims were therefore found to be inadmissible and not considered further.³⁹³ The HR Committee did specify the basis for its decision in extradition cases, namely whether or not there would be a "real risk"³⁹⁴ of the State seeking extradition violating the complainant's Covenant rights; if a violation was a "necessary and

³⁹¹ Harrington, Joanna. "How Canadian Lawyers Can Contribute to the Effectiveness of the UN Human Rights Committee." *The Measure of International Law: Effectiveness, Fairness and Validity*. Ed. Canadian Council on International Law. The Hague: Kluwer Law International, 2004, p. 143.

³⁹² *Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993), §3.

³⁹³ *Kindler v. Canada*, §12.2.

³⁹⁴ *Kindler v. Canada*, §13.1.

foreseeable consequence” of extradition, the extraditing State itself could be found in violation of the Covenant.³⁹⁵

Next came *Ng v. Canada*, a landmark decision from 1994, ruling that execution by gas asphyxiation violated Article 7 of the Covenant, as it is comparatively slow and “may cause prolonged suffering and agony.”³⁹⁶ It was a controversial decision, with a lot of individual opinions published, including four by dissenters.³⁹⁷ For the fair trial claims, however, it proved less fruitful. The complainant also alleged that the capital punishment process does not “meet the basic requirements of justice” due to racially discriminatory administration of the death penalty.³⁹⁸ However, the HR Committee concluded simply that there were no indications he would not have a fair trial in the US, and that the claims of racial discrimination both in the selection of jurors and in capital sentencing were “advanced in respect of purely hypothetical events.”³⁹⁹ A violation of Article 14 was denied. It is worth noting that the communication does not specify the details of the claim of racial discrimination – for example, if by bias in the jury selection the complainant was focussing on peremptory challenges or challenges for cause – and that the complainant himself was born in Hong Kong and is Asian,⁴⁰⁰ rather than African American, which may have given his claim more weight. Again, the HR Committee used the “real risk”⁴⁰¹ and “necessary and foreseeable consequence”⁴⁰² standard set up in *Kindler*.

Finally, in the same year, the HR Committee considered *Cox v. Canada*, also a possibly capital extradition case. Cox, the only African American out of the Canadian extradition complainants,⁴⁰³ alleged that capital trials in Pennsylvania were

characterized by inadequate legal representation of impoverished accused, a system of assignment of judges which resulted in a 'death penalty court',

³⁹⁵ *Kindler v. Canada*, §6.2.

³⁹⁶ *Ng v. Canada*, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994), §§16.1.-16.5.

³⁹⁷ Nowak, pp. 139f.

³⁹⁸ *Ng v. Canada*, §3.

³⁹⁹ *Ng v. Canada*, §15.3.

⁴⁰⁰ *Ng v. Canada*, §1.

⁴⁰¹ *Ng v. Canada*, §14.2.

⁴⁰² *Ng v. Canada*, §6.2.

⁴⁰³ Harrington, p. 150.

selection of jury members which resulted in 'death qualified juries' and an overall problem of racial discrimination.⁴⁰⁴

This remains the only communication to the HR Committee in which death-qualification is mentioned and alleged to be a violation of Articles 14, 26 and 6 of the Covenant.⁴⁰⁵ However, the HR Committee found that the claim was inadmissible, because the applicant, through the evidence presented, did not substantiate that “in the specific circumstances of his case, the Courts in Pennsylvania would be likely to violate his rights under articles 14 and 26, and that he would not have a genuine opportunity to challenge”⁴⁰⁶ these violations on appeal. A general assertion that the criminal justice system violated the Covenant is not enough to consider the issue on the merits, as the HR Committee “cannot examine in abstracto the compatibility with the Covenant of the laws and practice of a State.”⁴⁰⁷ The complaint failed the “foreseeable and necessary consequence” test.⁴⁰⁸ The HR Committee still ruled on the merits on “allegations of systemic racial discrimination” in the criminal justice system, but only stated that it found nothing in the submissions which would suggest the applicant would be discriminated against because of his race.⁴⁰⁹ It also concluded that lethal injection as it was used at the time in the state did not violate Article 7,⁴¹⁰ but it was another controversial decision, with 13 out of 18 HR Committee members issuing individual opinions.⁴¹¹

There was one other pertinent case, which has nothing to do with the US, but did concern systemic jury exclusion of a large, definable group of people in a death penalty case. In *Poongavanam v. Mauritius*, another 1994 case, the HR Committee could have considered the situation of women being excluded from juror service. At the time, the law in Mauritius provided for a trial by a jury of ‘nine men,’ which the complainant alleged violated Article 3 (equal rights of men and women), Article 25 (access to public

⁴⁰⁴ *Cox v. Canada*, Communication No. 539/1993, U.N. Doc. CCPR/C/52/D/539/1993. (1994), §6.3.

⁴⁰⁵ *Cox v. Canada*, §8.2.

⁴⁰⁶ *Cox v. Canada*, §10.4.

⁴⁰⁷ *Cox v. Canada*, §10.4.

⁴⁰⁸ *Cox v. Canada*, §10.4.

⁴⁰⁹ *Cox v. Canada*, §16.7.

⁴¹⁰ *Cox v. Canada*, §17.3.

⁴¹¹ Nowak, p. 140.

service, the service in question being jury service), Article 26 and Article 14(1), since he had an unrepresentative jury.⁴¹² However, the HR Committee declared the communication inadmissible, since the author did not show “how the absence of women on the jury actually prejudiced the enjoyment of his rights under the Covenant” and was not a victim according to the Optional Protocol.⁴¹³

Right to an Effective Appeal

In 2002, another Canadian extradition case was considered by the HR Committee, but there was a marked difference to the earlier cases: *Judge v. Canada* concerned a convicted fugitive, who had already been tried and sentenced to death by electric chair in the US, but escaped from prison and fled to Canada. Any fair trial violations brought up would, therefore, concern a trial which was already concluded. However, the only claims brought against Canada were a violation of Article 7 due to ‘death row phenomenon,’ a violation of Article 6 for threatening to extradite him to certain execution, and the denial of a full appeal due to the fact that he was a fugitive.⁴¹⁴ The HR Committee, once again, found the claim related to Article 14 to be unsubstantiated, since despite certain limits on appeals for fugitives, the verdict and sentence were both reviewed by the State Supreme Court, proceedings in which the defendant had legal counsel to represent him, and both the conviction and the sentence were upheld. The communication was, therefore, inadmissible.⁴¹⁵

The HR Committee did go on to find a violation of Article 6 due to Canada, an abolitionist State, extraditing someone to be executed. Acknowledging that international legal opinion has undergone some changes, the “broadening international consensus in favour of abolition” and the need for the Covenant to be interpreted as a “living instrument,”⁴¹⁶ the HR Committee ruled that abolitionist States may not return a person to another State where a death sentence or execution can be “reasonably anticipated,”

⁴¹² *Poongavanam v. Mauritius*, Communication No. 567/1993, U.N. Doc. CCPR/C/51/D/567/1993 (1994), §§3.1.-3.5.

⁴¹³ *Poongavanam v. Mauritius*, §4.2.

⁴¹⁴ *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003), §§3.1.-3.3.

⁴¹⁵ *Judge v. Canada*, §7.7.

⁴¹⁶ *Judge v. Canada*, §10.2.

even if that death sentence is not handed down in violation of the Covenant, for example due to an unfair trial.⁴¹⁷ It acknowledged the differential treatment of abolitionist and retentionist States, but considered it an “inevitable consequence” of the Covenant’s wording.⁴¹⁸ So at the very least, the HR Committee showed that it was taking steps towards a stricter abolitionist standard by 2002.

5.1.3. SUMMARY OF FINDINGS

There has not been a definitive ruling on death-qualification or systemic juror exclusion, highlighting just how peculiar this practice is in the international comparison – there simply is no other country with a comparable system. Even though it specifically came up in *Cox* as used in the US, the HR Committee refused to rule on a purely hypothetical/abstract case, rather than a case which was already decided and therefore specifically flawed in the alleged way. The abstract US-related cases under consideration never met the ‘necessary and foreseeable consequence’ and ‘real risk’ test of the HR Committee, and therefore were not adjudicated. What would be needed is a case like *Judge*, communicated to the HR Committee after the conclusion of a capital trial, which specifically alleges impartiality of the jury on account of death-qualification. This, of course, is nearly impossible to achieve, since it must concern a State which has ratified the Optional Protocol – the US itself is not an option, so it would take another ‘convict escaped to Canada’ scenario. It is doubtful if the HR Committee will ever rule on a specific case in abstracto before a trial has actually happened.

However, if their draft General Comment No. 36 on the right to life is any indication, the HR Committee does seem to be strengthening its oversight on capital punishment, and especially with regards to fair trial guarantees in capital cases. In doing so, it is very much following the international trend, as will be discussed in the next section. The HR Committee now requires every State to be on the “irrevocable path towards complete abolition”⁴¹⁹ and is explicitly speculating that it may in the future conclude that the

⁴¹⁷ *Judge v. Canada*, §10.4.

⁴¹⁸ *Judge v. Canada*, §10.5.

⁴¹⁹ Committee, *General Comment 36*, §52.

death penalty amounts to a violation of the Covenant, whatever the circumstances.⁴²⁰ Therefore, there is a possibility, especially if the amount of empirical research on death-qualification and jury impartiality in capital cases in the US continues to increase, that the HR Committee either loosens its standard on the foreseeability of such breaches, or that it considers this standard met, in some future extradition case, which would provide a definitive ruling. If this ever occurs, the HR Committee should not be deterred by their usual deference to trial courts when it comes to juror exclusion, which it has exhibited in the cases of individual juror bias, because these are two different things: Death-qualification is not a problem of individual juror bias in an individual case, but a problem of systemic juror exclusion on the basis of political or other opinion. It is a general policy which affects impartiality, a discriminatory practice, used in all capital cases in the US.

If they do decide at one point to present their views on such a case, absent any overt evidence of racial bias in the jury (such as a racially tinged remark by a juror), the outcome of such a case would most likely depend on how convincing the HR Committee finds the empirical studies on the effects of death-qualification. If the HR Committee members are susceptible to over 50 years of unanimous empirical data – or generally find that representative juries are worth pursuing in their own right – they may well find that their impartiality guarantees as set down in *Karttunen* and *Mulai* are not met, and find the US in violation of Article 14. In fact, given the strength of the research, as well as the HR Committee’s repeatedly proclaimed concern over racial disparities and ineffective safeguards in the US capital justice system, it would be a shame if they did not.

5.2. The Inter-American Human Rights System

As a member State of the Organisation of American States, the US is also part of a regional human rights system, although on a very limited basis: Together with all other independent States of the Americas, the US has ratified the Charter of the Organisation

⁴²⁰ Committee, *General Comment 36*, §53.

of American States with all its Protocols of Amendments,⁴²¹ which lists “fundamental rights of the individual without distinction as to race, nationality, creed, or sex” as one of its fundamental principles⁴²² and obligates States to respect these rights.⁴²³ The OAS Charter was adopted at the Ninth International Conference of American States in Bogotá in 1948, together with the universal human rights instrument of the OAS, the American Declaration of the Rights and Duties of Man. The American Declaration actually constitutes the first human rights instrument of a general nature world-wide, preceding the Universal Declaration of Human Rights of the United Nations by about eight months.⁴²⁴

This was followed in 1969, by the American Convention on Human Rights, which currently has 23 State Parties (after Venezuela denounced it in 2012).⁴²⁵ The US has actually been a signatory to the American Convention since 1977, but the Convention was never ratified.⁴²⁶ The Vienna Convention on the Law of Treaties, in its Article 18, addresses this situation by determining that through its signature, a State takes on the obligation “to refrain from acts which would defeat the object and purpose” of the treaty in question.⁴²⁷ Of course, the US is only a signatory to this treaty as well, since it has not ratified this treaty either. This leads to the unusual question of what the provision in the Vienna Convention, on the legal effects of signature, but not ratification, mean to a State which has signed but not ratified that specific provision. The Vienna Convention

⁴²¹ Secretariat for Legal Affairs, OAS. “Current Status of Signatures and Ratifications of the Inter-American Treaties: United States of America.” *Department of International Law, OAS*. 2014. Accessed 10 July 2016, at http://www.oas.org/dil/treaties_signatories_ratifications_member_states_united_states_of_america.htm

⁴²² *Charter of the Organisation of American States* of 30 April 1948, as amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washinton in 1992, and by the Protocol of Managua in 1993, Art 31.

⁴²³ *OAS Charter*, Art 17.

⁴²⁴ Organisation of American States. “Basic Documents in the Inter-American System.” *Organisation of American States*. 2011. Web. Accessed 15 May 2016, at <http://www.oas.org/en/iachr/mandate/Basics/intro.asp>.

⁴²⁵ Secretariat for Legal Affairs, OAS. “American Convention On Human Rights (Pact of San Jose, Costa Rica): Signatories and Ratifications.” *Department of International Law, OAS*. 2014. Web. Accessed 10 July 2016, at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

⁴²⁶ Secretariat for Legal Affairs, OAS, “USA.”

⁴²⁷ *Vienna Convention on the Law of Treaties* of 23 May 1969, Art 18.

on the Law of Treaties codifies existing international customary law, though, and the US State Department has confirmed it considers this to be the case as well.⁴²⁸ There are even indications that Article 18 specifically reflects international customary law in force for the US.⁴²⁹ For further elaboration on the relevance of the American Convention, see section 5.2.2.2.

The dedicated organ charged with the promotion and protection of human rights in the Inter-American system is the Inter-American Commission on Human Rights (“the I-A Commission”), which was created in 1959 at the Fifth Meeting of Consultation of the Ministers of Foreign Affairs.⁴³⁰ In 1965, the Commission was given the power to examine individual communications alleging violations of the Inter-American human rights instruments, and make recommendations to the State to promote observance of these rights,⁴³¹ and by 1967, it was established as a principal organ in the OAS Charter.⁴³² Its current Statute was adopted by the OAS General Assembly in 1979,⁴³³ and the I-A Commission is authorised in the Statute to adopt its own Rules of Procedure.⁴³⁴ Its headquarters are in Washington, DC,⁴³⁵ where it meets at least twice a year for regular sessions or for special sessions as needed,⁴³⁶ and decides generally by majority.⁴³⁷

The Statute of the I-A Commission defines the ‘human rights’ of its mandate as

- a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;

⁴²⁸ United States Department of State. “Vienna Convention on the Law of Treaties.” *United States Department of State*. Accessed 10 July 2016, at <<http://www.state.gov/s/l/treaty/faqs/70139.htm>>.

⁴²⁹ Bradley, Curtis A. “Unratified Treaties, Domestic Politics, and the US Constitution.” *Harvard International Law Journal* 48 (2007), p. 333.

⁴³⁰ OAS, “Basic Documents.”

⁴³¹ OAS, “Basic Documents.”

⁴³² *OAS Charter*, Art 53e.

⁴³³ *Statute of the Inter-American Commission on Human Rights*, OAS General Assembly Resolution 447, 9th Session, of October 1979.

⁴³⁴ *IACHR Statute*, Art 22(2).

⁴³⁵ *IACHR Statute*, Art 161.

⁴³⁶ *Rules of Procedure of the Inter-American Commission on Human Rights* of 13 November 2009, as modified on 2 September 2011 and 1 August 2013, Art 14.

⁴³⁷ *IACHR Statute*, Art 17(3).

b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.⁴³⁸

It has various powers set down in its Statute, such as the preparation of thematic studies, awareness-raising, and State visits by invitation,⁴³⁹ but the most important is the aforementioned competence to consider individual complaints and issue recommendations “in order to bring about more effective observance of fundamental human rights.”⁴⁴⁰ The procedure for the consideration of petitions, from admissibility to the publication of the final report on the merits, is laid down in detail in Articles 28-44 and 47-49 of the Rules of Procedure.

Aside from the I-A Commission, the Inter-American system also has a genuine judicial organ, the Inter-American Court of Human Rights, which was already foreseen in 1948, when the OAS States acknowledged that, “no right is genuinely assured unless it is safeguarded by a competent court.”⁴⁴¹ It was finally established by the Entry into Force of the American Convention in 1978, and set up in 1979, headquartered in San José, Costa Rica.⁴⁴² Since its main function is to interpret the American Convention, and its contentious jurisdiction is subject to a declaration of recognition by a State,⁴⁴³ it is not highly relevant in regards to the US; however, its advisory jurisdiction presents a more complicated matter.

According to Article 64 of the American Convention, the I-A Court is available to OAS Member States and OAS organs wanting clarification “regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.”⁴⁴⁴ This raised the question if the I-A Court was also competent to interpret the American Declaration, which it decided in an Advisory Opinion requested by Colombia. The I-A Court held that while the Declaration is not a treaty as defined by the Vienna Convention on the Law of Treaties, that does not mean it cannot be interpreted by the I-A Court: The Declaration has to be interpreted in the context of the

⁴³⁸ *IACHR Statute*, Art 1.

⁴³⁹ *IACHR Statute*, Art 18.

⁴⁴⁰ *IACHR Statute*, Art 20.

⁴⁴¹ OAS, “Basic Documents.”

⁴⁴² OAS, “Basic Documents.”

⁴⁴³ *American Convention*, Art 62.

⁴⁴⁴ *American Convention*, Art 64(1).

evolution of Inter-American law, which mirrors the international development.⁴⁴⁵ Due to the recognition of the Declaration subsequent to its adoption by the OAS General Assembly, in the OAS Charter as a standard for the I-A Commission, and in the Convention, the Member States have decided that the Declaration contains those human rights OAS Charter refers to in an act of authoritative interpretation;⁴⁴⁶ as a consequence, the I-A Court is competent to interpret it in its advisory jurisdiction.⁴⁴⁷ The United States rejected this view in the public hearing.⁴⁴⁸ This issue is further discussed below in section 5.2.2.1.

Generally, the US has approached the Inter-American system the way it seems to approach almost all instruments of international human rights law: While supporting the Inter-American institutions for human rights protection politically in a very strong manner, and actively engaging with the I-A Commission when it find itself the subject of a petition,⁴⁴⁹ its position in litigation is to “resist new obligations, vigorously contest everything, comply with nothing.”⁴⁵⁰

5.2.1. RELEVANT ARTICLES OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN (1948)

5.2.1.1. *Article I of the American Declaration: Right to Life*

Every human being has the *right to life*, liberty and the security of his person.⁴⁵¹

⁴⁴⁵ *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, IACtHR, Advisory Opinion OC-10/89 (14 July 1989), §§37f.

⁴⁴⁶ IACtHR, *American Declaration*, §§39-43.

⁴⁴⁷ IACtHR, *American Declaration*, §§44.

⁴⁴⁸ IACtHR, *American Declaration*, §17.

⁴⁴⁹ Wilson, Richard J. “The United States’ Position on the Death Penalty in the Inter-American Human Rights System.” *Santa Clara Law Review* 42 (2001), p. 1164.

⁴⁵⁰ Wilson, p. 1163.

⁴⁵¹ *American Declaration of the Rights and Duties of Man* of 1948, Art I (emphasis added).

5.2.1.2. *Article II of the American Declaration: Right to Equality before the Law*

All persons are *equal before the law* and have the rights and duties established in this Declaration, *without distinction as to race, sex, language, creed or any other factor*.⁴⁵²

5.2.1.3. *Article XVIII of the American Declaration: Right to a Fair Trial*

Every person may *resort to the courts* to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.⁴⁵³

5.2.1.4. *Article XXVI of the American Declaration: Right to Due Process of Law*

Every accused person is presumed to be *innocent until proved guilty*. Every person accused of an offense has the right to be given an *impartial and public hearing*, and to be *tried by courts previously established in accordance with pre-existing laws*, and *not to receive cruel, infamous or unusual punishment*.⁴⁵⁴

5.2.2. INTERPRETATION OF THE DECLARATION BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

5.2.2.1. *Legally Binding Force of the Declaration*

It will come as no surprise to anyone familiar with the US' attitude to international human rights law that it does not exactly see eye-to-eye with the Commission on the exact nature of its obligations. The second published report on the merits concerning the US, and the first death penalty case, was *Roach and Pinkerton v. United States* in 1987, which concerned two death row prisoners awaiting execution for crimes committed while they were still juveniles. The US government, in its submission, insisted that the American Declaration was not a binding treaty,⁴⁵⁵ and disagreed with the I-A Commission's finding in the first published case (which concerned abortion), in which it had held that "the international obligation of the United States [...] is governed by the

⁴⁵² *American Declaration*, Art II (emphasis added).

⁴⁵³ *American Declaration*, Art XVIII (emphasis added).

⁴⁵⁴ *American Declaration*, Art XXVI (emphasis added).

⁴⁵⁵ *Roach and Pinkerton v. United States*, IACHR, Case 9647, Report No. 3/87 (1987), §38d.

Charter of OAS,” whose amendment in the Protocol of Buenos Aires gave binding force of law to the American Declaration and the I-A Commission’s Statute and Rules of Procedure.⁴⁵⁶ However, the I-A Commission in its opinion reiterated its earlier ruling as to the binding force to the Declaration as a clarification of the Charter’s human rights standards for States not party to the American Convention, and that the I-A Commission was the body charged with their promotion and protection.⁴⁵⁷ The I-A Commission did side with the US in finding that the American Convention, which the petitioners had brought up since it contained a provision forbidding the death penalty for juveniles, was not applicable to the US, since it had not ratified the Convention, and it could not be imposed “by means of interpretation.”⁴⁵⁸ In the end, the I-A Commission considered the existence of a norm of *jus cogens* regarding the execution of juveniles – which the petitioners had not brought up, but since the I-A Commission was not a judicial body, it was “not limited to considering only the submissions presented by the parties”⁴⁵⁹ – but found it to be only just emerging.⁴⁶⁰

The US has continued to contest that the Declaration is not legally binding: In its submission to the I-A Court Advisory Opinion in 1989, it asserted that the Declaration lacked precision and was never meant to be a binding legal obligation, only containing “basic moral principles and broad political commitments [...] to impose legal obligations on States through a process of ‘reinterpretation’ or ‘inference’” was not acceptable.⁴⁶¹ The I-A Court itself concluded that the Declaration did have the force of law.⁴⁶² The US is not changing its tune, though, having affirmed its “political commitment” to a “non-binding instrument”⁴⁶³ in 2010 and contesting the status of the

⁴⁵⁶ *White and Potter v. United States*, IACHR, Case 2141, Report No. 23/81 (1981), §§15f.

⁴⁵⁷ *Roach and Pinkerton v. United States*, IACHR, §§46, 48-49.

⁴⁵⁸ *Roach and Pinkerton v. United States*, IACHR, §47, citing *White and Potter v. United States*, §31.

⁴⁵⁹ *Roach and Pinkerton v. United States*, IACHR, §54.

⁴⁶⁰ *Roach and Pinkerton v. United States*, IACHR, §60.

⁴⁶¹ IACtHR, *American Declaration*, §12.

⁴⁶² IACtHR, *American Declaration*, §§42, 47.

⁴⁶³ United States. “Submission of the Government of the United States to the Inter-American Commission on Human Rights with Respect to the Draft Report on Immigration in the United States: Detention and Due Process” *Organisation of American States*. 2 August 2010. Web. Accessed 2 July 2016, at <<http://cidh.org/pdf%20files/ReportOnImmigration.USG.Response10.15.2010.pdf>>, p. 3.

Declaration as recently as 2014.⁴⁶⁴ The I-A Commission, however, also remains steadfast in its opposing conclusion, echoing the I-A Court.⁴⁶⁵

5.2.2.2. *Other Sources of Interpretation*

The US has accepted the competence of the I-A Commission to interpret the American Declaration and the US' compliance with its standards, although the I-A Commission's opinions are seen as "strictly advisory" recommendations on whether or not the US has "lived up to its political commitments" under the Declaration.⁴⁶⁶ On the other hand, the US has rejected the Commission's practice of citing the I-A Court's Advisory Opinions in its interpretations of the Declaration, which the US views as binding only on States Parties to the American Convention, and expressed its view that the I-A Commission should only use the American Declaration as a point of reference for its interpretation, and nothing else.⁴⁶⁷

This is another point where the I-A Commission and the US will continue to disagree for the foreseeable future, because the I-A Commission has established a practice of referring to other international human rights treaties and developments in its deliberations. It essentially reconsidered the issue of executing juvenile offenders that had been decided in *Roach and Pinkerton* fifteen years later in *Domingues v. United States*. In doing so, it found that the "context of the broader international and inter-American human rights systems, [...] other relevant rules of international law

⁴⁶⁴ *Tamayo Arias v. United States*, IACHR, Case 12.873, Report No. 44/14 (2014), §200.

⁴⁶⁵ *Tamayo Arias v. United States*, IACHR, §214: "With regard to the legal status of the American Declaration, the IACHR considers that the fact that the Declaration is not a treaty *strictu sensu*, does not lead to the conclusion that it does not have legal effect. The American Declaration is, for the Member States not parties to the American Convention, the source of international obligations related to the OAS Charter. The Charter of the Organization gave the IACHR the principal function of promoting the observance and protection of human rights in the Member States. Article 106 of the OAS Charter does not, however, list or define those rights. The General Assembly of the OAS at its Ninth Regular Period of Sessions, held in La Paz, Bolivia, in October, 1979, agreed that those rights are those enunciated and defined in the American Declaration. Therefore, the American Declaration crystallizes the fundamental principles recognized by the American States. The OAS General Assembly has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS. In this respect, the Inter-American Court of Human Rights noted that by means of an authoritative interpretation, the member states of the Organization have signalled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter."

⁴⁶⁶ United States, "Submission", FN1.

⁴⁶⁷ United States, "Submission", p. 4.

applicable to Member States, [...] as well as developments in the corpus juris gentium of international human rights law over time and in present conditions” should be considered in the interpretation of the Declaration,⁴⁶⁸ including “other international and regional human rights instruments and customary international law” and *jus cogens*.⁴⁶⁹ It also stressed the need to see human rights treaties as ‘living instruments,’ and found that since *Roach and Pinkerton*, the prohibition of the execution of juvenile offenders had attained the status of *jus cogens* internationally.⁴⁷⁰ It has in its deliberations referred to decisions by the Human Rights Committee,⁴⁷¹ the United Nations Committee on the Elimination of Racial Discrimination,⁴⁷² the European Court of Human Rights,⁴⁷³ and United Nations Special Rapporteurs.⁴⁷⁴ Interestingly enough, the US itself has cited cases outside the Inter-American system.⁴⁷⁵ The Commission has also argued that standing alone in the developed world in the use of a certain practice – being globally isolated – suggests that the standards of decency had evolved too far as to still cover the practice.⁴⁷⁶

The Commission has also, while still not *applying* the American Convention to the US, stated that its provisions may be used in interpreting the Declaration⁴⁷⁷ and has found the “broad hemispheric adherence” to the Convention (noting that the US is a signatory) “constitutes evidence of a regional norm,” in this case against execution of juvenile offenders.⁴⁷⁸ The US has, naturally, rejected this approach.⁴⁷⁹ Domestic jurisprudence, including US Supreme Court cases, has also been used by the Commission in the

⁴⁶⁸ *Domingues v. United States*, IACHR, Case 12.285, Report No. 62/02 (2002), §44.

⁴⁶⁹ *Domingues v. United States*, IACHR, §45.

⁴⁷⁰ *Domingues v. United States*, IACHR, §103 and FN 104.

⁴⁷¹ E.g. in *Martinez Villareal v. United States*, IACHR, Case 11.753, Report No. 52/02, (2002), FN 14; *Tercero v. United States*, IACHR, Case 12.994, Report No. 79/15 (2015), §153.

⁴⁷² See *Cooper v. United States*, IACHR, Case 12.831, Report No. 78/15 (2015), §143.

⁴⁷³ See e.g. *Cooper v. United States*, IACHR, §120; *Martinez Villareal v. United States*, IACHR, §46.

⁴⁷⁴ See e.g. *Martinez Villareal v. United States*, IACHR, FN 14.

⁴⁷⁵ Citing the ECtHR and the HR Committee: *Garza v. United States*, IACHR, Case 12.243, Report No.52/01 (2001), §57.

⁴⁷⁶ *Sankofa v. United States*, IACHR, Case 11.193, Report No. 97/03 (2003), §84.

⁴⁷⁷ *Domingues v. United States*, IACHR, FN 32.

⁴⁷⁸ *Domingues v. United States*, IACHR, §64.

⁴⁷⁹ *Domingues v. United States*, IACHR, §95.

consideration of cases; such was the case in *Edwards v. Bahamas*, which cited *Furman v. Georgia* as well as the Constitutional Court of South Africa.⁴⁸⁰

5.2.2.3. *The Legality of the Death Penalty, the Commission's "Heightened Scrutiny" Standard, and Compliance with Precautionary Measures*

In reviewing all published I-A Commission Reports on the Merits concerning the United States,⁴⁸¹ one thing is immediately apparent: The majority of them are death penalty cases – in fact, they make up a little over two thirds of the total number. That ratio even seems to be increasing, since 80% of the cases decided since the beginning of 2010 are capital cases. Also noticeable is that in all US death penalty cases decided on the merits, only one was found not to be in violation of the American Declaration.

These numbers may seem surprising, since the American Declaration is in fact silent on the matter of capital punishment. In *Andrews v. United States*, the Commission considered the right to life and its relationship with the death penalty. It noted that the original draft had included a provision stating that capital punishment can only be imposed in accordance with pre-existing law and for “crimes of exceptional gravity,”⁴⁸² but this provision was dropped given the “diversity in legislation” concerning death penalty in the Americas.⁴⁸³ It concluded that the American Declaration

does not define nor sanction capital punishment by a member State of the OAS. However, it provides that a member State can impose capital punishment if it is prescribed by pre-existing law for crimes of exceptional gravity. Therefore, inherent in the construction of Article I, is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes guarantees contained in its Constitution, and its international obligations, including those rights and freedoms enshrined in the American Declaration.⁴⁸⁴

⁴⁸⁰ *Edwards et al. v. Bahamas*, IACHR, Case 12.067/12.068/12.086, Report No. 48/01 (2001), §§158f.

⁴⁸¹ To be found at: Inter-American Commission on Human Rights. “Merits Reports.” Organisation of American States. 2015. Web. Accessed 3 July 2016, at <<http://www.oas.org/en/iachr/decisions/merits.asp>>.

⁴⁸² *Andrews v. United States*, IACHR, Case 11.139, Report No. 57/96 (1996), §175.

⁴⁸³ *Andrews v. United States*, IACHR, §176.

⁴⁸⁴ *Andrews v. United States*, IACHR, §177.

Especially crucial in this context are the right not to be arbitrarily deprived of one's life, the right to equality before the law, the right to a public and impartial trial, the right to due process, and the prohibition of cruel, infamous or unusual punishment.⁴⁸⁵

In *Baptiste v. Grenada*, the I-A Commission set out its standard of review for death penalty cases, necessitated by the broad recognition of the right to life as “the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights.”⁴⁸⁶ The I-A Commission has an “enhanced obligation” to make sure that any imposition of the death penalty occurs in strict compliance with the international human rights obligations, especially the rights mentioned above; therefore the Commission considers that a “heightened level of scrutiny” must be applied, in line with the restrictive direction which other international human rights bodies have taken.⁴⁸⁷ This exact phrase has been repeated consistently in capital cases concerning the US,⁴⁸⁸ with emphasis on the stringent observation of fair trial and due process guarantees – and here the I-A Commission references a US Supreme Court case – because

due in part to its irrevocable and irreversible nature, the death penalty is a form of punishment that differs in substance as well as in degree in comparison with other means of punishment, and therefore warrants a particularly stringent need for reliability.⁴⁸⁹

This approach is appropriate even in light of the so-called ‘fourth instance formula’ developed by the I-A Commission, which generally precludes it from reviewing domestic court judgements when these courts act “within their competence and with due judicial guarantees;” however, an alleged violation of the American Declaration must always be considered by the Commission, ‘fourth instance’ preclusion notwithstanding.

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One very important and often-used instrument of the I-A Commission in capital cases is the possibility of requesting precautionary measures when there are “serious and urgent

⁴⁸⁵ *Andrews v. United States*, IACHR, §177.

⁴⁸⁶ *Baptiste v. Grenada*, IACHR, Case 11.743, Report No. 38/00 (2000), §64.

⁴⁸⁷ *Baptiste v. Grenada*, IACHR, §64.

⁴⁸⁸ E.g. *Martinez Villareal v. United States*, IACHR, §51.

⁴⁸⁹ *Martinez Villareal v. United States*, IACHR, §52, referencing

⁴⁹⁰ *Andrews v. United States*, IACHR, §170; and *Martinez Villareal v. United States*, IACHR, §53.

situations presenting a risk of irreparable harm,”⁴⁹¹ since an execution represents perhaps the definition of irreparability. In *Garza*, the US audaciously stated that it considered such a request from the Commission to be only a “non-binding recommendation.”⁴⁹² The Commission responded by condemning this stance which undermined its ability to investigate alleged human rights violations and debilitated its effectiveness, and found it to be irreconcilable with the obligations under the Inter-American human rights system, due to the serious consequences and effective denial of the complainants’ right to petition.⁴⁹³ By creating the I-A Commission, States had “implicitly undertaken” an obligation to respect measures essential to the functioning of the Commission,⁴⁹⁴ which is a common feature of international (quasi-)judicial bodies.⁴⁹⁵ The US has an especially bad record in respecting precautionary measures issued by the Commission, with at least 37 death row inmates executed while the Commission was considering their petitions.⁴⁹⁶ It would seem that the conclusion of the consideration of a petition before an execution takes place is a rare exception.

In *Lackey et al. v. United States*, the I-A Commission joined 16 pending cases with the common element of the alleged victims having been executed by the US despite requests for precautionary measures.⁴⁹⁷ It explicitly stated that all possible remedies, including international ones, must be exhausted before the State can execute a prisoner,⁴⁹⁸ and concluded that the failure to respect precautionary measures constituted “an aggravated violation of the State’s obligation to protect the right to life” as well as their right to petition according to Article 23 of the Rules of Procedure.⁴⁹⁹

⁴⁹¹ *IACHR Rules of Procedure*, Art 25.

⁴⁹² *Garza v. United States*, IACHR, §11.

⁴⁹³ *Garza v. United States*, IACHR, §117.

⁴⁹⁴ *Garza v. United States*, IACHR, §117.

⁴⁹⁵ *Suarez Medina v. United States*, IACHR, Case 12.421, Report No. 91/05 (2005), §90.

⁴⁹⁶ Inter-American Commission on Human Rights. *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*. OEA/Ser.L/V/II. Doc. 68. 2011. Accessed 15 May 2016, at <<http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>>, FN 51.

⁴⁹⁷ *Lackey et al. v. United States*, IACHR, Cases 11.575/12.333/12.341, Report No. 52/13 (2013).

⁴⁹⁸ *Lackey et al. v. United States*, IACHR, §243.

⁴⁹⁹ *Lackey et al. v. United States*, IACHR, §245.

5.2.2.4. *Fair Trial Violations in Capital Cases and the Objective Impartiality Standard*

In *Edwards et al. v. Bahamas*, the I-A Commission then underscored the importance of “strict observance *and* review of the procedural requirements governing the imposition or application of the death penalty” and the “fundamental significance of ensuring full and strict compliance with due process protections” in capital trials.⁵⁰⁰ It came to this observation by considering the American Convention in the interpretation of the Declaration, which the Bahamas, like the US, has neither signed nor ratified, but which the Commission found to embody an “authoritative expression” of the Declaration’s principles in many respects.⁵⁰¹ It has also expressed support for the finding by the I-A Court,⁵⁰² in an Advisory Opinion sought by Mexico concerning violations of the right to consular assistance (in the framework of the Vienna Convention on Consular Relations and the American Declaration) of Mexican nationals on death row in the US, that there was an

internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. [...] If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement that every human rights treaty and declaration recognizes and protects is at stake: human life.⁵⁰³

These considerations were reiterated in *Garza v. United States*, with additional support found in US Supreme Court jurisprudence, and demanded States give stringent effect to due process guarantees in all stages of a criminal trial, specifically also when there is a bifurcated sentencing phase⁵⁰⁴ and even extending as far as the method of execution.⁵⁰⁵

⁵⁰⁰ *Edwards et al. v. Bahamas*, IACHR, §144.

⁵⁰¹ *Edwards et al. v. Bahamas*, IACHR, §108.

⁵⁰² *Edwards et al. v. Bahamas*, IACHR, §144.

⁵⁰³ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, IACtHR, Advisory Opinion OC-16/99 (1 October 1999), §135.

⁵⁰⁴ *Garza v. United States*, IACHR, §§100ff.

⁵⁰⁵ *Teleguz v. United States*, IACHR, Case 12.864, Report No. 53/13 (2013), §§123f, finding that a confidential untested lethal injection protocol constitutes a violation of due process and the prohibition of inhumane treatment.

The *Andrews* case dealt specifically with jury impartiality: The I-A Commission identified that there was an objective impartiality test for the international standard that demanded "reasonableness, and the appearance of impartiality," which necessitated that a "reasonable suspicion of bias" must prompt an investigation by the State and an effective remedy, such as juror disqualification.⁵⁰⁶ Elaborating on this objective test, it expressed support for considerations of the existence of "guarantees sufficient to exclude any legitimate doubt"⁵⁰⁷ and "a real danger of bias affecting the mind"⁵⁰⁸ of a juror. It concluded that States imposing the death penalty had an obligation to "observe rigorously all the guarantees for an impartial trial."⁵⁰⁹

The I-A Commission has since given expression to the importance it places on fair trial rights in capital cases by finding that when these guarantees are violated in the imposition of a capital sentence, the right to life itself is violated, since they are "inherent in the construction of Article I" of the Declaration.⁵¹⁰

5.2.2.5. *Death-Qualification and Jury Selection in the View of the Inter-American Commission*

The I-A Commission first ruled on death-qualification in one of the first published reports against the US, *Celestine v. United States*, in 1989. *Celestine* is technically an admissibility decision, but since the admissibility hinged on the question of whether or not the petition stated facts which establish a violation of the American Declaration, it does consider the merits at least preliminarily, which is likely why it is also published on the IACHR website as a Report on the Merits.⁵¹¹ This case remains the landmark decision on death-qualification to date since the issue has not yet been substantially reconsidered, even though, as will be laid out in this section, there are persuasive reasons why it might be time for the Commission to do just that.

⁵⁰⁶ *Andrews v. United States*, IACHR, §159, citing in support the UN CERD Committee and the European Court of Human Rights.

⁵⁰⁷ *Andrews v. United States*, IACHR, FN 95.

⁵⁰⁸ *Andrews v. United States*, IACHR, FN 96.

⁵⁰⁹ *Andrews v. United States*, IACHR, §172.

⁵¹⁰ *Andrews v. United States*, IACHR, §177; also found in *Medellín, Ramírez Cardenas and Leal García v. United States*, IACHR, Case 12.644, Report No. 90/09 (2009), §§154f; *Teleguz v. United States*, IACHR, §131; *Tercero v. United States*, IACHR, §154.

⁵¹¹ IACHR, "Merits."

Celestine concerned the case of a death row prisoner in Louisiana who was executed on the electric chair despite a request for a stay of execution by the Commission while it considered the complaint.⁵¹² The petition alleged both racial discrimination in the application of the death penalty in Louisiana generally and lack of impartiality in the jury due to death-qualification, both based social scientific studies. The I-A Commission gave its opinion in a single paragraph, in which it conflated the two issues (racial discrimination and jury selection) and stated simply that it was “persuaded by the US Government’s argument that ‘an entire criminal justice system cannot be proved invalid by mere citations to statistical studies without more’ and that the petitioner had not proven his allegations to the degree required to shift the burden of proof to the State. It also suggested that *Celestine*’s case was “a poor case upon which to recommend a reversal of the US criminal justice practice” since it was a “particularly heinous crime and the jury which unanimously convicted and sentenced him contained several black members.” It seems that the Commission agreed with the State and the Supreme Court’s *McCleskey* decision, which was extensively discussed in the report, and that discrimination must be proven in every individual case with specific intent,⁵¹³ and that because each jury is unique and does not have unlimited discretion, statistical studies are not persuasive of a biased system.⁵¹⁴

There are several aspects of *Celestine* which bear critiquing: Firstly, it seems from the report that the I-A Commission was basing its deliberations on the wrong standard, namely *Witherspoon*, or more accurately, half of *Witherspoon*. Death-qualification is described as the exclusion of jurors who would automatically vote against the death penalty,⁵¹⁵ which is half of *Witherspoon*’s infamous Footnote 21.⁵¹⁶ The other half, which concerned guilt nullifiers, is not mentioned, nor is the *actual* standard in force at the time, namely *Witt*, established in 1985. (As previously discussed in section 3.3, *Witt* overturned *Witherspoon* in favour of the much broader standard of “prevent or substantially impair the performance of [their] duties” which must not be proven with

⁵¹² *Celestine v. United States*, IACHR, Case 10.031, Report No. 23/89 (1989), §§1f.

⁵¹³ *Celestine v. United States*, IACHR, §29.

⁵¹⁴ *Celestine v. United States*, IACHR, §§30f.

⁵¹⁵ *Celestine v. United States*, IACHR, §§19, 36.

⁵¹⁶ *Witherspoon v. Illinois*, 391 U.S. 510, FN 21.

“unmistakable clarity”.)⁵¹⁷ Essentially, the I-A Commission considered only the state of US law regarding death-qualification that was in force between 1968 and 1985 – Celestine was tried and sentenced in 1982, which would explain the discrepancy.

The second critique stems from the conflation of the issues of jury impartiality and racial discrimination.⁵¹⁸ While it may be too much to demand, as the Commission finds, the overthrow of the entire criminal justice system based on statistical data or empirical studies – though as section 5.2.2.6 below will show, that does not mean the State does not have any obligations in this regard – this finding relates only to the allegations of racial discrimination, which were broad and of a general nature. The death-qualification process is a comparatively miniscule part of the criminal justice system – though in capital cases, it can be crucial – and certainly a specific procedural practice used in jury selection can be challenged using data on its effects. At the very least, it may be able to affect the burden of proof.

Thirdly, it is questionable if the I-A Commission’s close adherence to the *McCleskey* ruling would also inform its opinion on a new death-qualification case today, at least to the degree it did in 1989, given the criticisms of *McCleskey* discussed in section 2.2, and the Commission’s subsequent cases on racial discrimination, see below.

Therefore, the *Celestine* ruling – cursory as it was, based on a significantly different legal situation, and conflating two very different issues – has not closed the door on the I-A Commission finding that death-qualification violates the Inter-American human rights standards forever. Additionally, as only the second published case against the US, the only precedent it had to draw from was *Roach and Pinkerton*, which concerned very different subject matter in its considerations of customary law governing the execution of juveniles, and the diversity of US state legislations on the matter. In fact, nearly all of the I-A Commission’s standards discussed above – the ‘heightened scrutiny’ standard, the ‘rigorous’ application of fair trial standards in capital cases, the objective impartiality standard – as well as all the Commission’s views discussed below were developed subsequent to the *Celestine* opinion. In the last 26 years, the I-A Commission

⁵¹⁷ *Wainwright v. Witt*, 469 U.S. 412, §1.

⁵¹⁸ Noted also in Quigley, 2004, pp. 277f.

has accumulated a substantial body of jurisprudence, not to mention the other actors in international human rights law.

In fact, another death-qualification case *was* brought to the I-A Commission recently: In the aforementioned 2013 report of *Lackey et al. v. United States*, one of the 16 joined petitions was brought on behalf of David Powell, a man sentenced to death in Texas.⁵¹⁹ The complaint, alleging violations of Articles I, II, XVIII and XXVI of the American Declaration, was submitted by S. Adele Shank, a public defender, and John Quigley, a professor at Ohio State University who has previously written on the death-qualification and international human rights law, as mentioned in the introduction to section 5. It concerned death row phenomenon as a consequence of an excessively long stay on death row, as well as death-qualification, which the petitioners argued is practiced only in the United States and no other jurisdiction, and which results in a biased jury.⁵²⁰ Powell was white, so any racial bias implications of death-qualification could not be alleged in this case.⁵²¹ Quigley has confirmed that the complaint relied on the arguments made in his 2004 article,⁵²² and the hope was for a ruling against death-qualification, especially on the basis of the ‘heightened scrutiny’ standard and insistence on close scrutiny of fair trial rights by international bodies in capital cases, as well as the fact that internationally the US stands alone in the use of this practice.⁵²³ The State did not submit any observations on Powell’s case.⁵²⁴

However, ultimately the Powell case was a missed opportunity on the part of the I-A Commission: Since the case was joined to the others who had been executed while beneficiaries of precautionary measures, the I-A Commission decided not to address the alleged due process violations (with the exception of those relating to consular assistance and effective legal counsel).⁵²⁵ Instead, it found simply that Powell’s case

⁵¹⁹ *Lackey et al. v. United States*, IACHR, §72.

⁵²⁰ *Lackey et al. v. United States*, IACHR, §§75f.

⁵²¹ Texas Department of Criminal Justice. “David Lee Powell Offender Information” *Texas Department of Criminal Justice*. 7 April 2016. Web. Accessed 15 July 2016, at <http://www.tdcj.state.tx.us/death_row/dr_info/powellldavid.jpg>.

⁵²² Cited in footnote 287 above and discussed in more detail in section 5.3.2.

⁵²³ Quigley, John. Personal communication via e-mail. 26 July 2016.

⁵²⁴ *Lackey et al. v. United States*, IACHR, §122.

⁵²⁵ *Lackey et al. v. United States*, IACHR, §180.

presented an aggravated violation of the right to life by virtue of the State executing the petitioner while the Commission was still considering the petition.⁵²⁶ Unfortunately, there is little to learn from this report, except that clearly the Commission now considers that violation of fair trial rights by death-qualification is an admissible claim, contrary to the *Celestine* ruling 24 years prior. Quigley confirms that he believes it was the fact that the cases got consolidated made it easier to overlook the details.⁵²⁷

A case in 2015 – *Cooper v. United States* – briefly touched on jury selection, alleging that prejudicial media coverage of the crime had biased the jury, and that a request for transferral of the trial to a more racially diverse forum from which a more racially representative jury could be picked had been rejected.⁵²⁸ However, the I-A Commission noted that the petitioner did not allege that the “composition of the jury, its conduct or the manner in which the members of the jury were chosen” constitute a violation of the American Declaration, and found that the courts had given reasons for their actions, and barring “more specific allegations, information or proof on the record” did not establish any fair trial and due process violations in the court procedure.⁵²⁹ It did go on to consider the case under the allegations of racial discrimination, which will be discussed in the next section.

5.2.2.6. Racial Discrimination

The I-A Commission first addressed racial discrimination in the imposition of the death penalty in *Andrews*, the first report published after *Celestine*. The main difference between the two cases is that in *Andrews*, there was specific evidence of racial bias in the jury which decided his case. Two black jurors were stricken peremptorily from the jury, leaving it all-white,⁵³⁰ and he was tried in Utah, a predominantly Mormon state, which influenced the racial attitude of the jury, since the Mormon “Apartheid-type teachings” denies African-Americans basic compassion.⁵³¹ The most compelling piece

⁵²⁶ *Lackey et al. v. United States*, IACHR, §§244f.

⁵²⁷ Quigley, personal communication.

⁵²⁸ *Lackey et al. v. United States*, IACHR, §§51, 136

⁵²⁹ *Lackey et al. v. United States*, IACHR, §144.

⁵³⁰ *Andrews v. United States*, IACHR, §3.

⁵³¹ *Andrews v. United States*, IACHR, §§27-30.

of evidence, though, was a napkin handed over to the court by one of the jurors, which depicted a drawing of a gallows with a hanged black figure, accompanied by the words “hang the niggers.”⁵³² As a consequence, the judge simply instructed the jury to “ignore communications from foolish people” rather than grant the defence counsel’s request for a mistrial.⁵³³

With this explicit evidence, the Commission ruled that the totality of the facts indicated that the trial was biased and violated the American Declaration, citing the influence of the Mormon church in the jury, whose teachings saw black people as inferior beings,⁵³⁴ and the lack of consequences when the napkin was discovered, with the judge deciding that an instruction to the jury to ignore the note was enough, when he should have held an evidentiary hearing and *voir dire* to assess the influence the note had had on the jury.⁵³⁵ It also found a resultant violation of the right to life,⁵³⁶ and the right not to be subjected to cruel, infamous or unusual punishment.⁵³⁷ Finally, the Committee explicitly stated that the finding of racial bias was limited to this one case and not a sweeping ruling on the US criminal justice system.⁵³⁸

Racial discrimination in capital cases was again brought up in *Lackey et al.*, in the petition on behalf of Anthony Green, an African American, which cited statistical evidence on the influence of race on capital trials and concluded that it had been a determining factor in his trial.⁵³⁹ The State did not submit any observations on the case.⁵⁴⁰ The Committee never ruled on these allegations: Although it stressed that it takes allegations of this kind very seriously, it concluded that since it never received observations on the merits from the petitioners or the State, it did not have sufficient information and therefore could not apply the general allegations to the case.⁵⁴¹

⁵³² *Andrews v. United States*, IACHR, §150.

⁵³³ *Andrews v. United States*, IACHR, §4.

⁵³⁴ *Andrews v. United States*, IACHR, §165.

⁵³⁵ *Andrews v. United States*, IACHR, §§168-171.

⁵³⁶ *Andrews v. United States*, IACHR, §177.

⁵³⁷ *Andrews v. United States*, IACHR, §178.

⁵³⁸ *Andrews v. United States*, IACHR, §182.

⁵³⁹ *Lackey et al. v. United States*, IACHR, §23.

⁵⁴⁰ *Lackey et al. v. United States*, IACHR, §99.

⁵⁴¹ *Lackey et al. v. United States*, IACHR, §181.

Finally, in 2015, the Commission considered the issue again in *Cooper v. United States*, which stated that the petitioner, an African American man, had been sentenced to death after a trial marred by evidence both planted and withheld, an ineffectual review, and racism.⁵⁴² It was alleged that a “racially charged atmosphere” tainted his trial: During the pre-trial phase, a demonstration with Nazi imagery and a “hand the nigger” sign took place, after which a change of venue was granted, but it is alleged that the move of the trial from San Bernardino to San Diego offered little relief, due to the proximity and similar media coverage and racial homogeneity of the population.⁵⁴³ Statistical evidence regarding racial differences in the imposition of the death penalty was cited as well.⁵⁴⁴

The I-A Commission expressed “growing concern over the treatment of African-Americans by the United States criminal justice system” and cited troubling information received at a public hearing it had convened on the issue, including in the US Government’s own studies about the “undeniable influence” of the race of the offender and victim in a criminal trial.⁵⁴⁵ It concluded that given the “accepted existence of statistical disparities based on race” in the criminal justice system, the “courts were on notice” and any allegations of trial deficiencies (in this case, planted and withheld evidence) should have been subject to a “full and fair inquiry.”⁵⁴⁶ The Commission stopped short of finding that the trial was tainted as a result of racial discrimination, but did conclude that questions of due process rights and racial discrimination were intertwined, and as such, the State was found in violation of the American Declaration for not fully investigating allegations of racial discrimination in the trial.⁵⁴⁷ It also concluded that consequently, an execution would violate the right to life.⁵⁴⁸

Clearly, the I-A Commission’s opinion about the US criminal justice system is growing more and more sceptical as it has evolved from *Celestine* to *Cooper*, and it is growing more and more receptive to statistical and empirical evidence. While it still seems to

⁵⁴² *Cooper v. United States*, IACHR, §§2, 10.

⁵⁴³ *Cooper v. United States*, IACHR, §§46-48.

⁵⁴⁴ *Cooper v. United States*, IACHR, §50.

⁵⁴⁵ *Cooper v. United States*, IACHR, §§138-141.

⁵⁴⁶ *Cooper v. United States*, IACHR, §146.

⁵⁴⁷ *Cooper v. United States*, IACHR, §146.

⁵⁴⁸ *Cooper v. United States*, IACHR, §151.

require that little something extra on top of allegations of statistically proven racial discrimination and fair trial violations – such as fair trial issues which were not investigated sufficiently, or overt expressions of racial bias – the burden of proof for bias seems to have shifted closer to the State, even if it has not reversed completely yet. It seems realistic that at some point, the Commission may require the State to undertake comprehensive studies on the fairness of its criminal justice system, and address any concerns uncovered.

5.2.2.7. AEDPA and the Right to Review/Effective Remedy

One aspect of death-qualification has been explicitly ruled on, namely the right to effective judicial review, which is included in the right to a fair trial and the right to due process,⁵⁴⁹ and its violation by the federal Anti-Terrorism and Effective Death Penalty Act, which also guides the federal review of juror exclusion for cause based on the *Witt* standard (see section 3.5 on *Uttecht v. Brown*).

It was in *Sankofa v. United States*, in 2003, that the 1996 law was first addressed⁵⁵⁰ and a violation of Articles I, XVIII and XXVI, was found,⁵⁵¹ but AEDPA was most extensively discussed in *Teleguz* in 2013: The petitioners alleged that the AEDPA standard, which limited federal review “only to questions of law, as opposed to examination of the law and facts” violated the right to appeal under the American Declaration,⁵⁵² it “erodes the power of writ by requiring federal courts to give extreme deference to state court rulings,” meaning that federal courts “no longer independently review constitutional questions but consider only whether the decision ‘was contrary to, or involved an unreasonable application of, clearly established federal law,’ so factual errors can only be addressed if they reach the level of ‘unreasonable application.’⁵⁵³ This is the same question the Supreme Court decided regarding death-qualification in *White v. Wheeler*.

⁵⁴⁹ *Sankofa v. United States*, IACHR, §§47f.

⁵⁵⁰ *Sankofa v. United States*, IACHR, §38-41.

⁵⁵¹ *Sankofa v. United States*, IACHR, §§48f.

⁵⁵² *Teleguz v. United States*, IACHR, §40

⁵⁵³ *Teleguz v. United States*, IACHR, §45.

In its considerations, the I-A Commission affirmed that remedies must be *effective*, meaning that they “must provide results or responses to the end that they were intended to serve, which is to prevent consolidation of an unjust situation” and *accessible*, “without requiring the kind of complex formalities that would render this right illusory.”⁵⁵⁴ The scope of review was found to be crucial, since errors relating to the facts or the weighing of evidence are possible just like errors of law, and there must be a possibility of review without undue deference to lower courts,⁵⁵⁵ and “a material review of the interpretation of procedural rules” must be guaranteed.⁵⁵⁶ The Commission also emphasised the “enhanced obligation” of the State in capital cases in respect to fair trial rights, including the right to an appeal,⁵⁵⁷ and concluded that the AEDPA standard of review was insufficient in view of the rigorous fair trial guarantees required by the death penalty, the “exceedingly limited” review constituting a violation of the American Declaration.

Considering the irreversible nature of the death penalty, a federal post-conviction review limited by state court interpretations and by the state factual determination (i.e. “a determination of a factual issue made by a State court shall be presumed to be correct”) does not comply with the Inter-American standards, according to which the right to appeal is part of the body of procedural guarantees that ensures the due process of law.⁵⁵⁸

This conclusion seems applicable to the trial court’s exclusion of jurors during death-qualification, ruled by the Supreme Court to be a question of fact, not law, almost verbatim – both to AEDPA and the previously established deference standard of *Witt* (see section 3.3)

AEDPA was addressed again in 2015, first in *Tercero*, which reached the same conclusion as *Teleguz*⁵⁵⁹ and emphasised the “necessary link” between AEDPA’s procedural limitations of federal review and claims of inadequate and ineffective legal counsel;⁵⁶⁰ and again in *Cooper*, to the same effect, citing in addition a US Circuit

⁵⁵⁴ *Teleguz v. United States*, IACHR, §102.

⁵⁵⁵ *Teleguz v. United States*, IACHR, §103.

⁵⁵⁶ *Teleguz v. United States*, IACHR, §104.

⁵⁵⁷ *Teleguz v. United States*, IACHR, §106.

⁵⁵⁸ *Teleguz v. United States*, IACHR, §113.

⁵⁵⁹ *Tercero v. United States*, IACHR, §143.

⁵⁶⁰ *Tercero v. United States*, IACHR, §139.

Judge who expressed his concern that despite “serious questions as to the integrity of the investigation and evidence supporting the conviction, we are constrained by the requirements” of AEDPA.⁵⁶¹

AEDPA seems to be the only aspect of death-qualification in the Inter-American system which was found unequivocally and repeatedly to be a violation of the American Declaration.

5.2.3. SUMMARY OF FINDINGS

The legality of death-qualification under the American Declaration, which has been found to be legally binding on the US, nowadays seems questionable at best. The I-A Commission considers capital cases under a ‘heightened scrutiny’ standard – in fact, in regards to the US, it represents overwhelmingly an international review body for capital cases in particular – and has expressed the categorical importance of a strict adherence to fair trial and due process guarantees in all stages of a trial when imposing the death penalty. Given these high standards, it can be expected that in a new case, the Commission would approach the issue with a healthy scepticism and an eye for detail. It has shown that it is progressively more open to the consideration of statistical evidence and empirical studies proving fair trial violations. With regard to fair trial and due process, it has held that an objective standard must be applied in accordance with the practice of other international bodies, and that a reasonable suspicion of bias must give rise, at the very least, to an investigation by the State. It has recently expressed concern over wide-spread racial discrimination in the US criminal justice system, which is only exacerbated by death-qualification (see section 4.3). What can be concluded with considerable confidence is that the restriction of federal review of juror exclusion and the far-reaching deferral to state courts regarding death-qualification is not in accordance with the American Declaration, given its rulings on AEDPA.

Since its last consideration of death-qualification in *Celestine*, both the legal situation governing the practice and the Commission’s body of jurisprudence has changed drastically. If it were to consider a new case, especially one which shows the

⁵⁶¹ *Cooper v. United States*, IACHR, §§122-126.

deficiencies of death-qualification clearly – a case in which there was ambiguity in the record over whether or not a juror should be excluded, in which there were clear racially discriminatory effects through the exclusion of jurors belonging to minorities – and which was supported by a compilation of almost 50 years of empirical studies on the effects of death-qualification, it seems likely that it would find a violation of at least one of the rights guaranteed in the American Declaration.

5.3. Subsidiary Sources

In addition to the views of the HR Committee and the I-A Commission, this section will address two subsidiary sources of information: The views of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and a comparative legal analysis of jury selection in two other common law States: The United Kingdom and Canada.

5.3.1. UNITED NATIONS SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS

The relevance of the opinions of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions is such that they carry considerable weight due to the Rapporteur's status as a renowned UN-appointed expert in the system of Special Procedures which Kofi Annan has dubbed the “crown jewel” of the Human Rights Council system.⁵⁶² The Special Rapporteur's views are regularly cited by international bodies, including the I-A Commission, and contrary to the HR Committee, various holders of this mandate have actually addressed the issue of death-qualification directly.

In 1998, then-Rapporteur Bacre Waly Ndiaye reported on the findings of his mission to the US, describing the general sentencing and jury selection process used in capital trials, and expression concern also about the racially motivated use of peremptory

⁵⁶² United Nations News Centre. “Annan Calls on Human Rights Council to Strive for Unity, Avoid Familiar Fault Lines.” *United Nations News Centre*. 29 November 2006. Web. Accessed 20 July 2016, at <<http://www.un.org/apps/news/story.asp?NewsID=20770#.V5Dzz5N96V5>>.

challenges.⁵⁶³ He acknowledges the rather vague legal standard for exclusion, pointing out that jurors can be excluded even if they affirm their ability to at least consider handing down a death sentence.⁵⁶⁴ In the Special Rapporteur's opinion, death-qualification undermines the purpose of a jury system, since "the community can hardly be represented when those who oppose the death penalty or have reservations about it seem to be systematically excluded."⁵⁶⁵

He also addresses the racial aspect of death-qualification, noting that generally opposition against the death penalty is more prevalent among minorities due to the fact that they are more often targeted,⁵⁶⁶ and that the death penalty is still applied arbitrarily according to racial, ethnic and economic markers.⁵⁶⁷ He acknowledges that "a death qualified jury will be predisposed to apply the harshest sentence" and that "an impartial tribunal may be jeopardised by such juries,"⁵⁶⁸ and concludes that there is a "lack of respect for the restrictions and safeguards" surrounding capital punishment.⁵⁶⁹

Almost ten years later, Philip Alston, holding the same office, addressed racial disparities in the application of the death penalty after another mission to the US. He reported being met with "indifference or flat denial" when he brought the issue up with US officials⁵⁷⁰ and stressed that "there is a clear onus on states to systematically evaluate the workings of their criminal justice systems to ensure that the death penalty is not imposed unjustly."⁵⁷¹ Furthermore, he expressed his concern over the curtailing of federal habeas corpus review by AEDPA, calling the laws which govern the counsel provided by the state for this purpose "grossly inadequate" and the effect of the law on federal review "effectively eviscerating."⁵⁷² He concludes that AEDPA prioritises

⁵⁶³ ECOSOC, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mr. Bacre Waly Ndiaye*, U.N. Doc. E/CN.4/1998/68/Add.3, of 22 January 1998.

⁵⁶⁴ ECOSOC, §88.

⁵⁶⁵ ECOSOC, §89.

⁵⁶⁶ ECOSOC, §88.

⁵⁶⁷ ECOSOC, §148.

⁵⁶⁸ ECOSOC, §150.

⁵⁶⁹ ECOSOC, §151.

⁵⁷⁰ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston*, U.N. Doc. A/HRC/11/2/Add.5, of 28 May 2009, §18.

⁵⁷¹ Human Rights Council, 2009, §19.

⁵⁷² Human Rights Council, 2009, §21.

finality disproportionately over basic fair trial rights, and calls for reform based on the importance of federal review, since there is serious doubt as to the “fairness of state-level trials.”⁵⁷³

In 2012, current mandate-holder Christof Heyns followed up on the steps the US had taken to comply with the recommendations it was given, and again reiterated many of the same concerns: arbitrary imposition of the death penalty⁵⁷⁴ as well as racial disparities,⁵⁷⁵ and the too-strict AEDPA-imposed limits on federal review,⁵⁷⁶ none of which were effectively addressed by the US.

5.3.2. A COMPARATIVE PERSPECTIVE: JURY SELECTION AND CHALLENGES FOR CAUSE IN THE UNITED KINGDOM AND CANADA

It has been established that the United States is practically alone in the practice of extensively questioning jurors before trial.⁵⁷⁷ In this brief comparative section, the US practice of jury selection is contrasted with that of the United Kingdom, the jurisdiction where the common law jury system itself originated, and Canada, which does allow some juror questioning, but not anything approaching death-qualification.

5.3.2.1. *United Kingdom*

The common law jury system originated in England and was subsequently exported to its colonies, where it has mostly survived, seen as a protection from the State and its appointed officials, which brings community values and “a sense of equity and fairness” into criminal proceedings.⁵⁷⁸ Challenges to jurors, however, are increasingly more limited:

⁵⁷³ Human Rights Council, 2009, §22.

⁵⁷⁴ Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, U.N. Doc. A/HRC/20/22/Add.3, of 30 March 2012, §10.

⁵⁷⁵ Human Rights Council, 2012, §17.

⁵⁷⁶ Human Rights Council, 2012, §21.

⁵⁷⁷ Quigley, 2004, p. 276; Vidmar, pp. 33f.

⁵⁷⁸ Vidmar, p. 1.

Peremptory challenges were abolished across the entire United Kingdom between 1988 and 2007.⁵⁷⁹ A US trial judge, in his call to abolish peremptory challenges, chronicles that in England, they had previously been outlawed for use by the Crown prosecutor as early as the year 1305, though the defendant kept their right; however, the actual use of these challenges “appears almost non-existent over its entire seven-hundred year history,” so much so that even in 1979, it would not be used in more than one trial out of seven, and hardly ever more than once per trial.⁵⁸⁰

The Crown prosecution, while it lost its peremptory challenges early, still has special privileges, which amount to the same thing in practice: It can ask an unlimited number of jurors to *stand by*, which means that they are being passed over until the assembled juror contingent is exhausted, only then can they be asked to sit.⁵⁸¹ This right is retained in England and Wales, limited to cases of national security and terrorism, and is to be used “sparingly and in exceptional circumstances” and not “in order to influence the overall composition of a jury or with a view to tactical advantage.”⁵⁸² In fact, it is suggested that they are used just as rarely as peremptory challenges in practice.⁵⁸³

As far as challenges for cause are concerned, they exist in the United Kingdom, theoretically, for specific, generic and conformity bias; however, contrary to the US, jury questioning before the beginning of the trial is so limited that typically, neither party has enough information to gauge a juror’s beliefs and attitudes. There is a general presumption that jurors will adhere to their oaths and any bias will be nullified through the judge’s instruction and the jury’s deliberation, and the fact that a verdict is found by

⁵⁷⁹ Vidmar, p. 34.; *Criminal Justice Act 1988* of 29 July 1988, Section 118 (for England and Wales); *Criminal Justice (Scotland) Act 1995* of 8 November 1995, Section 8 (for Scotland); *Justice and Security (Northern Ireland) Act 2007* of 24 May 2007, §13.

⁵⁸⁰ Hoffman, Morris B. “Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective.” *The University of Chicago Law Review* 64.3 (1997), p. 821.

⁵⁸¹ Vidmar, pp. 22, 36.

⁵⁸² Attorney General of the United Kingdom. “Jury Vetting: Right of Stand By Guidelines.” *Gov.uk*. 20 November 2012. Web. Accessed 20 June 2016, at <<https://www.gov.uk/guidance/jury-vetting-right-of-stand-by-guidelines--2>>.

⁵⁸³ Hoffman, p. 822.

a majority, not unanimously.⁵⁸⁴ (This is similarly the case in the Republic of Ireland, where jurors may not be questioned, and challengers are “armed with little or no insight into [their] sympathies and prejudices,” so much so that in the past, some lawyers resorted to challenging peremptorily “anyone who wore a necktie.”⁵⁸⁵)

The United Kingdom abolished capital punishment in 1969,⁵⁸⁶ (1973 for Northern Ireland).⁵⁸⁷ John Quigley, in his study of sources describing juries in the 18th and 19th century, found that the evidence suggests that the Crown’s right to stand-by was not used to exclude opponents of capital punishment routinely, since the prosecutor had no way of knowing the beliefs of jurors beforehand. He describes that only one case can be found in which this actually happened, in 1857, when a juror informed the judge of his own accord that he had scruples regarding the death penalty, which the Crown followed by asking him to stand by. This was actually the subject of an appeal, in which it was found to amount to a peremptory challenge.⁵⁸⁸

5.3.2.2. Canada

Canada, as far as the criminal jury system is concerned, gained its legal and procedural tradition from England, but has been influenced also by the US, and as a result its system is somewhere in between the two.⁵⁸⁹ The right of the Crown to ask jurors to stand by was abolished in 1992 by the Supreme Court, but contrary to the United Kingdom, peremptory challenges were retained, and following the Supreme Court ruling, the Crown was given an equal number of peremptory challenges as the defence.⁵⁹⁰ Their use has not been as contentious as in the US or the United Kingdom before it abolished

⁵⁸⁴ Vidmar, p. 33; Scottish Government. “The Modern Scottish Jury in Criminal Trials.” *Scottish Government*. 17 September 2008. Web Accessed 20 June 2016, at <http://www.gov.scot/Publications/2008/09/17121921/9>, §§7.9-7.10.

⁵⁸⁵ Jackson, John D., Katie Quinn, and Tom O'Malley. “The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past.” *Law and Contemporary Problems* 62.2 (1999), p. 211.

⁵⁸⁶ *Murder (Abolition of Death Penalty) Act 1965* of 8 November 1965 (temporary suspension made permanent in 1969).

⁵⁸⁷ *Northern Ireland (Emergency Provisions) Act 1973* of 25 July 1973.

⁵⁸⁸ Quigley, 2004, pp. 274-276.

⁵⁸⁹ Vidmar, p. 12.

⁵⁹⁰ Vidmar, p. 22.

them, due to tougher restrictions and a reduced possibility to question the jurors; representation issues in this regard were addressed by the courts.⁵⁹¹

However, there is no US-style *voir dire* for the presumptive jurors, since in Canada, like in the United Kingdom, there is a legal presumption of impartiality for jurors.⁵⁹² This was first stated by the Ontario Court of Appeals in *R. v. Hubbert*, a case which was decided in 1975 – notably, at a time when Canada still had the death penalty: It was abolished for ordinary crimes in 1976 and for all crimes in 1998.⁵⁹³ *Hubbert* was then confirmed by the Supreme Court and held that Canadian criminal law based on the belief that jurors are able to follow their oath without bias towards the defendant or the prosecution.⁵⁹⁴ It noted that this was different from the approach in the US, and confirmed that a US-style *voir dire* was not desirable in Canada, since the “challenge for cause is not for the purpose of finding out what kind of juror the person called is likely to be – his personality, beliefs, prejudices, likes or dislikes.”⁵⁹⁵ Accordingly, when a challenge for cause is brought against a juror, the challenging party must show proof that there is an “‘air of reality’ or a ‘realistic potential’ that 1) widespread bias exists in the community; and 2) that some jurors may be incapable of setting aside this bias.”⁵⁹⁶

If this is accomplished, jurors may be questioned about bias, but unlike in the US, the questioning is under tight control by the judiciary, usually consisting only of one or two yes-or-no questions pre-approved by the court.⁵⁹⁷ Admissible questions have been, for example, whether or not a juror’s ability to judge a case impartially would be “affected by the fact that there are people involved in cocaine and other drugs” or “that the person charged is a black Jamaican immigrant and the deceased a white man?”⁵⁹⁸ In fact, courts

⁵⁹¹ Schuller, Regina, and Neil Vidmar. “The Canadian Criminal Jury” *Chicago-Kent Law Review* 86 (2011), p. 504.

⁵⁹² Schuller/Vidmar, pp. 502f.

⁵⁹³ Amnesty International Canada. “Death Penalty in Canada.” Amnesty International Canada. 2015. Web. Accessed 20 June 2016, at <<http://www.amnesty.ca/our-work/issues/abolish-the-death-penalty/death-penalty-in-canada>>.

⁵⁹⁴ Schuller/Vidmar, p. 515.

⁵⁹⁵ *R. v. Hubbert*, 29 C.C.C. (2d) 279, Ontario Court of Appeals (1975), §24.

⁵⁹⁶ Schuller/Vidmar, p. 515.

⁵⁹⁷ Schuller/Vidmar, pp. 515f.

⁵⁹⁸ *R. v. Parks*, 84 C.C.C. 3d 353, Ontario Court of Appeals (1993), §16.

have ruled that when the case concerns a member of a non-white minority, these questions are permissible even without showing formal proof of extensive bias.⁵⁹⁹ Contrary to death-qualification, which is proven to amplify racial bias in the jury, Canadian juror challenges seem to be aimed at extinguishing bias. It is also notable that this determination hinges on a juror's self-reflection alone, instead of a judge's determination, acknowledged in *Witt*, of a juror's entire demeanour, even contrary to their verbally given answer.

Finally, the courts in Canada have held that letting the jury know specific sentence possibilities for the defendant before it had returned a verdict on guilt constituted legal error in the trial.⁶⁰⁰ This is also in stark contrast with the American death-qualification process, which asks the juror to imagine sentencing someone to death before the trial has even begun.

5.3.3. SUMMARY OF FINDINGS

Various holders of the mandate of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have in the past 20 years expressed their concern over death-qualification and its fair trial implications explicitly, as well as the too-strict limitations on federal habeas relief by AEDPA. It can be shown that the US stands alone not only as the singular Western State to retain capital punishment, but also the only Western common law jurisdiction in which jurors are extensively questioned on their personal beliefs and attitudes, and asked to imagine a specific penalty before the trial has even begun. These two findings alone would not be sufficient reason to conclude that death-qualification is a violation of the US' accepted fair trial guarantees, but they lend support to the notion that it does, and may contribute to the HR Committee or the I-A Commission at some point finding that rights are violated by this practice.

⁵⁹⁹ Schuller/Vidman, p. 518.

⁶⁰⁰ Schuller/Vidmar, p.507.

5.4. Conclusion

In conclusion, until the HR Committee and the I-A Commission directly address the issue, we can only speculate. Both of them have expressed concern over on-going racial discrimination in the administration of capital punishment, as well as the failure of safeguards to guarantee a fair trial and an effective review. If they do rule on the issue in the future, it will come down, in large part, to how credible they find the empirical studies conducted on the topic, which, as was shown in section 4, are extremely convincing and basically unanimous. If they believe the effect death-qualification has on impartiality, and the effect of exacerbating racial discrimination, they would have to declare it a violation, especially in light of the stricter standards demanded in capital cases by both of these bodies. The one international entity which has specifically condemned death-qualification as a violation of the right to a fair trial is the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which may influence the future jurisprudence of the quasi-judicial bodies.

When turning to comparative legal analysis, the US is definitely an outlier in this practice – neither the United Kingdom nor Canada employ similar practices, and they did not even when they had the death penalty, which was not that long ago. Perhaps most importantly, there never was a practice of extended *voir dire* in which the prospective jurors were questioned on their views on the death penalty. Jurors may be questioned about personal bias against the defendant as an individual, based on personal relationships or media coverage of the case. However, the questioning would be very restrained and never amount to an interrogation of the juror's personal beliefs and opinions.

6. Conclusion

This thesis has discussed the effects of death-qualification on juries, whether in the process or the composition, and found that it produces juries which are less than impartial, conviction-prone, death sentence-prone and unrepresentative. A serious side-effect is the disproportionate exclusion of women and minorities, which results in an exacerbation of racial bias.

Since the courts in the US seem unwilling to take the issue on again, this thesis has turned to international law to find other avenues to challenge the practice. Section 5 has illustrated that the legality of death-qualification under international human rights law is questionable at best, and that there are compelling reasons for believing that the HR Committee and the I-A Commission would find it to be in violation of international fair trial and due process rights. Death-qualification is barely justifiable under the strict domestic standard of super due process and the ‘death is different’ doctrine; the ‘scrupulous respect for fair trial guarantees’ and ‘heightened scrutiny’ standard employed in international law, where context is a strongly abolitionist international environment, should demand that the practice be found in violation of international human rights standards. In the absence of an actual case decided on the issue, this is still speculation; nevertheless, any case which reaches international bodies will face intense scrutiny and likely disapproval.

While some analysts have suggested ‘true bifurcation’ as a solution,⁶⁰¹ which in different forms seeks to limit the effects of death-qualification at least only to the sentencing phase, this remains unsatisfactory: No matter how much one may try to limit the process effects in general, and the composition effects to at least not affect the guilt phase, the fact remains that a capital defendant would be sentenced by a jury more prone to hand down a death sentence, and that still unacceptable. The Only acceptable solution is a completely abolition of the death-qualification process – only it looks like the US is more likely to first abolish the death penalty itself.

⁶⁰¹ Rozelle; Salgado, Richard. “Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in *United States v. Green*.” *BYU Law Review* (2005): 519.

Death-qualification and the bizarre fair trial implications it leads to are an excellent illustration of the inherent problems of capital punishment: Given the ruthless finality and irrevocability of this ‘ultimate’ punishment, and the radical denial of the defendant’s dignity as a human being that goes along with it, a rigorous observance of fair trial standards in the implementation of capital punishment is absolutely essential. The Supreme Court has held that “the death penalty [must] be imposed fairly and with reasonable consistency, or not at all.”⁶⁰² However, if fair trial standards *are* rigorously observed – which necessitates, *inter alia*, an impartial, non-death-qualified tribunal, a competent defence counsel, and the possibility of appeals and habeas corpus relief without undue deference to the trial court – the death penalty is virtually impossible to implement. Without death-qualification, the chances that there is not at least one juror in twelve who does not oppose the death penalty, and will consequently take great care in implementing it, are extremely slim. And in the vast majority of US states a non-unanimous jury will mean the defendant does not get a death sentence. Death sentences would be so rare as to become unusual. Death-qualification proves that the death penalty is simply not feasible in the 21st century, or reconcilable with strong fair trial and due process guarantees.

Realistically, death-qualification is not the issue that will end the death penalty in the United States. There are too many other aspects at the forefront of the discussion, and rightly so: The scarcity of lethal injection drugs and the subsequent disastrous experiments with experimental cocktails as well as sharp decline in execution figures have, in recent years, contributed to an unprecedented demystification of the lethal injection as a humane and appropriate method of execution for the modern era. The push of several States to reinstate the electric chair as the default means of execution will likely spark more outrage and more questions of the adequacy of the death penalty in the 21st century. The Supreme Court will be called on to decide if forcing the electric chair on a death row prisoner amounts to cruel and unusual punishment in this day and

⁶⁰² *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), p. 112.

age (which the Nebraska and Georgia State Supreme Courts have already concluded), and in doing this, may have to consider again if lethal injection as practiced today is substantially different. And, perhaps most importantly, the Supreme Court will decide these matters with a full bench again, the composition of which is in the hands of the next President of the United States.

In Justice Scalia, a steadfast proponent of the death penalty has vacated a seat, and left the Supreme Court without a clear majority for either political wing. If he is replaced with a justice nominated by a President Clinton, the balance in the Court will shift in favour of the liberal wing; if this is done by a President Trump, Scalia's shoes will likely be filled by another conservative justice (although at this point, Trump is still something of a wild card). Additionally, Ruth Bader Ginsburg, the oldest member of the Court and, explicitly since *Glossip*, a staunch death penalty opponent, is expected to retire in the foreseeable future. The next President will therefore shape the Supreme Court for what will likely be a crucial window of opportunity for important death penalty challenges.

However, that does not mean that death-qualification is a *fait accompli* that is not worth debating anymore. On the contrary, it has not been discussed nearly enough: Death-qualification has important fair trial and due process implications, which feed into many of the pertinent issues with the death penalty of our time: its arbitrary and racially-discriminatory application; the overlong stays on death row because of procedural delays related to appeals (in very harsh conditions, giving rise to death row phenomenon); the unconscionably high cost of the death penalty (due to appeals, and the long death-qualification process during jury selection itself); the discrepancy between the number of death sentences and the number of actual executions (due to the fact that a non-representative death-qualified jury may want to see a prisoner executed to a higher degree than the general population). Death-qualification is one of many things that come together and make the death penalty in the United States what it is today – arbitrary, unfair, undemocratic, cruel and unusual.

When a State has to stack the deck for death in order to obtain a death sentence at all, it is time to rethink the fairness of that judicial system.

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Abstract

Death-Qualification is a controversial practice used in US capital cases to disqualify jurors who are opposed to the death penalty. This thesis discusses the legality of death-qualification in international human rights law, specifically in the UN and the Inter-American human rights system and their fair trial and due process rights. First, the context of the modern American death penalty, with regard to guiding constitutional principles, sentencing modalities, recent developments, including public opinion, is illustrated. Secondly, an overview of the development of death-qualification is given, from its origins to the Supreme Court cases which govern it today (*Witherspoon v. Illinois*, *Wainwright v. Witt*, *Lockhart v. McCree*, *Uttecht v. Brown* and *White v. Wheeler*). In the third part, the social-scientific studies undertaken to explore the effects of death qualification on juries are summarised, to show the human rights implications of death-qualification: They conclude that it results in biased, unrepresentative juries which are disproportionately composed of white men. Finally, the legality of death-qualification in international human rights law is explored, with an analysis of the Human Rights Committee jurisprudence interpreting the ICCPR, the Inter-American Commission jurisprudence interpreting the American Declaration, and, as subsidiary sources, the views of the UN Special Rapporteur on Summary, Extrajudicial and Arbitrary Executions, as well as a short comparative analysis of jury selection in the UK and Canada. It is concluded that while without a concrete case decided by the international bodies, there is no straightforward answer to the question of the legality of death-qualification; however, it is doubtful that it is legal, as there are compelling reasons to think the practice violates the international standards. The only legitimate course of action would be to end the practice altogether.

Abstract (German)

“Death-Qualification,” zu deutsch Todes-Qualifikation, ist eine kontroverse Praxis in den USA, die verwendet wird, um Geschworene in Todesstrafen-Fällen zu disqualifizieren, die die Todesstrafe ablehnen. Diese Master-Arbeit untersucht, ob Todes-Qualifikation im Einklang mit den internationalen Menschenrechtsnormen ist, speziell mit dem UNO- und dem Inter-Amerikanischen Menschenrechtssystem und deren Rechten auf ein faires Verfahren. Zunächst wird der Kontext der modernen Todesstrafe in den USA beschrieben, bezüglich der konstitutionellen Prinzipien, der Strafzumessungs-Modalitäten, und der neuesten Entwicklungen inklusive der öffentlichen Meinung. Darauf folgt ein Überblick über die Entwicklung der Todes-Qualifikation, von den Wurzeln bis zu den Supreme Court-Fällen, die ihr ihre heutige Form gegeben haben (*Witherspoon v. Illinois*, *Wainwright v. Witt*, *Lockhart v. McCree*, *Uttecht v. Brown* und *White v. Wheeler*). Im dritten Teil werden die sozialwissenschaftlichen Studien zusammengefasst, die die Effekte der Todes-Qualifikation untersucht haben: Sie sind sich einig, dass Todes-Qualifikation zu voreingenommenen, nicht repräsentativen Gruppen von Geschworenen führt, die überproportional von weißen Männern besetzt sind. Zuletzt wird die Legalität der Todes-Qualifikation im Lichte der internationalen Menschenrechtsnormen erforscht, in einer Analyse der Praxis des UN-Menschenrechtsausschusses sowie der Inter-Amerikanischen Menschenrechtskommission, und als subsidiäre Quellen die Meinung des UN-Sonderberichterstatters für außergerichtliche, summarische oder willkürliche Hinrichtungen, sowie eine kurze rechtsvergleichende Analyse von Geschworenen-Auswahl-Praktiken im Vereinigten Königreich und in Kanada. Die Arbeit endet mit dem Fazit, dass es zwar schwierig ist, ohne konkreten Anlassfall eine Prognose über die Rechtmäßigkeit der Todes-Qualifikation abzugeben; aber es überzeugende Gründe anzunehmen, dass das nicht der Fall ist und die Praxis internationale Menschenrechtsnormen verletzt. Der einzig legitime Kurs wäre die Abschaffung der Todes-Qualifikation.