NOTE

Qualified Support: Death Qualification, Equal Protection, and Race

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I. Introduction

The trial of Mumia Abu-Jamal, an African-American, for murder demonstrates how pernicious death qualification can be for minority prospective jurors.[1] In Philadelphia, which at that time had a population that was forty-four percent African-American, the prosecutor was successful in striking twenty African-Americans from the venire using death qualification.[2] The prosecutor then used his peremptory challenges to strike another eleven African-American prospective jurors who had not expressed any opposition to the death penalty, resulting in a jury that did not have any African-American members.[3] Prosecutors in general have been known to utilize the death qualification process to produce a jury they believe is more favorable to the state.[4]

Death qualification has been described as an ethnic cleansing of the jury pool in capital cases due to its disproportionate effect on minority populations.[5] Jurors must be "death qualified" in order to sit on a capital jury.[6] During death qualification, prospective jurors are questioned concerning their attitudes on the death penalty.[7] Prospective jurors may not be challenged for cause based on their views on capital punishment unless those views would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and their oath.[8]

Death qualification has a significant racial dimension. Much of the academic literature and litigation concerning death qualification has focused on its tendency to create juries that are more "guilt prone."[9] The racial effects of death qualification are just as dangerous. I will argue that death qualification should be ruled unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. I will also argue that the Equal

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1. *See* David Lindorff, *The Death Penalty's Other Victims: When Prosecutors Eliminate Jurors Opposed to Capital Punishment, They Also Weed Out Women and Minorities and Stack the Deck Against Defendants*, SALON.COM (Jan. 2, 2001), http://dir.salon.com/news/feature/2001/01/02/death_penalty/index.html.

2. *Id.*

3. *Id.*

4. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 786–87 (2006) (describing the Andrea Yates case, where prosecutors unexpectedly sought the death penalty, probably to reap the benefits of having a death-qualified jury); s*ee also* Lindorff, *supra* note 1 (describing a tape made by a former Assistant District Attorney in Philadelphia urging prosecutors to seek the death penalty in as many cases as possible in order to get death-qualified juries).

5. Lindorff, *supra* note 1.

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

7. *Id.*

8. Wainwright v. Witt, 469 U.S. 412, 420, 424 (1985).

9. *See infra* note 96 and accompanying text.

Protection Clause, as interpreted in *Batson v. Kentucky,*[10] could be applied to racially discriminatory applications of death qualification in particular trials.

In Part II, I will show how current Supreme Court jurisprudence on death qualification has created a system that accords too much discretion to the actors at the trial level, allowing room for racial discrimination to flourish. In Part III, I will explore the historical and sociological evidence behind the public support of capital punishment and the opposition to it. Support for capital punishment, which is directly related to the likelihood that a juror will be struck for cause under death qualification, continues to be heavily influenced by general racial attitudes and by past and present racism in the implementation of capital punishment. I will then explore the damaging effects death qualification has on the criminal justice system in Part IV. In Part V, I will discuss the most important challenge to death qualification to date, *Lockhart v. McCree*.[11] Finally, in Part VI, I will apply Equal Protection analysis to death qualification.

II. The Overly-Discretionary Nature of Modern Death Qualification

Inherent in the death qualification process is the question of what the threshold level of opposition to the death penalty must be in order for a prospective juror to be considered unfit for service. *Witherspoon v. Illinois* was the first landmark case that attempted to articulate what constitutes sufficient opposition to the death penalty to allow a juror to be excused.[12] At the petitioner's trial, the prosecution eliminated nearly half of the members of the venire by challenging any prospective juror who had qualms about imposing a death sentence.[13]

The Supreme Court reversed the petitioner's conviction and held that a death sentence "cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[14] A prospective juror could not be struck for cause unless the prospective juror "states *unambiguously* that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal . . ."[15]

The Court thought Illinois's statute would only leave a small minority of jurors who were "uncommonly willing to condemn a man to die" to decide a capital case.[16] At a time when half of Americans opposed the

10. Batson v. Kentucky, 476 U.S. 79 (1986) (applying the Equal Protection Clause of the Fourteenth Amendment to forbid prosecutors from using their peremptory strikes to strike prospective jurors solely on account of their race).

11. 476 U.S. 162 (1986).

12. 391 U.S. 510 (1968).

13. *Id.* at 513.

14. *Id.* at 522–23.

15. *Id.* at 515 n.9 (emphasis added).

16. *Id.* at 519–21.

death penalty, having such a "distinct and dwindling minority" control the fate of those charged with capital crimes produced an inherently one-sided "tribunal 'organized to convict.'"[17]

Lower courts generally refused to enforce the decision, and the Supreme Court vacillated between enforcing *Witherspoon* and subtly contracting it over time.[18] After a turbulent re-engineering of the capital punishment system, the Court, in the aftermath of *Furman v. Georgia*,[19] eventually decided *Wainwright v. Witt* in 1985.[20]

The Supreme Court's decision in *Wainwright v. Witt* has become the legal standard for determining whether a prospective juror can be excluded for cause under death qualification.[21] The petitioner challenged the exclusion of veniremember Colby under the *Witherspoon* standard.[22] Colby's opposition to the death penalty seemed tentative, but he also stated that his opposition would probably interfere with his ability to judge the guilt or innocence of the defendant.[23] Under the prevailing interpretation of *Witherspoon*, veniremember Colby would most likely not have been excludable for cause as he did not unambiguously state that he would not impose the death sentence under any circumstances.[24] Yet the Supreme Court reversed the Eleventh Circuit's granting of habeas relief and affirmed the petitioner's conviction.[25]

The Supreme Court adopted a new, comprehensive test to determine whether a prospective juror is "death qualified": a prospective juror may not be challenged for cause based on their views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.[26] No longer is the state required to prove with "unmistakable clarity" that a juror could not render a death verdict.[27] The Court also made it clear that appellate courts will defer to the trial judge's determination, even if the judge's reasoning and the juror's full views on capital punishment are not clear on the record.[28] *Witt* also accorded extremely high deference to the trial judge due to the Court's characterization of the trial judge's determination that a juror is not death

17. *Id.* at 520–21 (quoting Fay v. New York, 332 U.S. 261, 294 (1947)).

18. Stanton D. Krauss, *The* Witherspoon *Doctrine at* Witt's *End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 31–32, 43 (1986); *see also* Wainwright v. Witt, 469 U.S. 412, 419–21 (1985) (describing the Supreme Court's subtle departure from the *Witherspoon* standard over time).

19. Furman v. Georgia, 408 U.S. 238 (1972).

20. *See generally* Krauss, *supra* note 18, at 43–70 (chronicling the evolution of the Supreme Court's death-qualification jurisprudence through Lockett v. Ohio, 438 U.S. 586 (1978) and Adams v. Texas, 448 U.S. 38 (1980)).

21. *See* Uttecht v. Brown, 551 U.S. 1, 9 (2007).

22. *Witt*, 469 U.S. at 415.

23. *See id.* at 415–16 (voir dire transcript).

24. *See supra* 115 and accompanying text.

25. *Witt*, 469 U.S. at 415, 418.

26. *Id.* at 420, 424.

27. *Id.* at 424.

28. *Id.* at 425–26.

qualified as a question of "fact" instead of a mixed question of both law and fact, which significantly limits a federal court's power to review a state court judgment under habeas corpus law.[29]

The *Witt* standard grants substantial deference to the trial judge in death-qualification strikes. No reasoning was given by the trial judge on the record, yet the Court held that "whatever ambiguity respondent may find in [the] record, . . . the trial court, aided as it undoubtedly was by its assessment of [the juror's] demeanor, was entitled to resolve it in favor of the State."[30] One commenter remarked that "no exclusion of a juror with stated reservations about capital punishment who has been asked if he would obey his oath and follow the law should ever be subject to reversal in the federal courts after *Witt*."[31] The trial judge has little incentive to properly qualify juries due to her nearly limitless power to exclude a prospective juror as long as that juror articulates at least some reservations in imposing the death sentence.[32] The Supreme Court has continued to expand this substantial deference in *Uttecht v. Brown*.[33]

The *Witt* standard also excludes more prospective jurors than the *Witherspoon* standard. *Witherspoon* only permitted the exclusion of prospective jurors who unambiguously stated they would automatically vote against the imposition of the death penalty in every circumstance.[34] *Witherspoon*-excludables are clearly excludable under *Witt*'s standard.[35] Intuitively, the *Witt* standard also permits the exclusion of more prospective jurors than the *Witherspoon* standard.[36] One study found a nearly fifty percent increase in the number of prospective jurors who were subject to exclusion under the new *Witt* standard.[37]

At its core, the *Witt* standard substitutes a subjective standard for an objective one at the trial level, resulting in substantially more deference being accorded to the trial judge and many more prospective jurors being subject to exclusion. With that heightened discretion comes the heightened risk of discrimination. When the statements different jurors make can vary significantly in their severity of opposition to the death penalty and still result in strikes for all of them, a disparate impact on minority groups is not only possible, but it is likely.[38] Relying on the trial judge to evaluate a prospective

29. *See id.* at 429; Krauss, *supra* note 18, at 78.

30. *Witt*, 469 U.S. at 434; *see also* Krauss, *supra* note 18, at 79–80.

31. Krauss, *supra* note 18, at 80.

32. *See id.* at 81.

33. *See* Uttecht v. Brown, 551 U.S. 1 (2007) (holding that a state appellate court is not required to make particular reference to the excusal of each juror).

34. *See supra* note 15 and accompanying text.

35. *See* Wainwright v. Witt, 469 U.S. 412, 452–53 (1985) (Brennan, J., dissenting).

36. *See id.*

37. Craig Haney et al., *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 LAW & HUM. BEHAV. 619, 624 (1994).

38. *See infra* Part III (describing how African-Americans are more likely to be excused under death qualification).

juror's demeanor places too much trust in the human decision-making process surrounding death qualification, which is so contaminated by past and present racism that even a judge's good-faith effort to avoid discrimination may be fruitless.[39] In creating a more fair system of death qualification, courts must first acknowledge the substantial risk of racial discrimination.

III. Opinions on the Appropriateness of the Death Penalty Are Inextricably Intertwined With Past and Present Racial Discrimination

A. The Racial History of Capital Punishment

Capital punishment has a storied racial history. Capital punishment served an integral role in maintaining the institution of slavery: harsh punishments were necessary to prevent increasingly larger slave populations from rebelling.[40] Incarceration was largely ineffective as a deterrent to slaves' defiance because incarceration was not necessarily a worse fate than slavery, and southern whites doubted the notion that African-American criminals could ever be reformed in a penitentiary.[41] The Civil War, and subsequent emancipation, upended slavery and the South's racial caste system. After the withdrawal of federal troops from the Southern states in 1877, lynching became the prominent method of maintaining white hegemony in the absence of slavery.[42]

Between 1890 and 1910, it is estimated that at least 4,743 people were victims of lynching.[43] Seventy-three percent of lynching victims were African-American and ninety-five percent of those were tortured or killed in the former slave states.[44] Lynching was instrumental in perpetuating white supremacy, especially economically.[45] Continually emphasizing the inferiority and wickedness of African-Americans through lynching unified whites in the South and discouraged a political and economic alliance among poor whites and African-Americans.[46] Lynching was also carefully designed

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39. *See infra* notes 87–97 and accompanying text (implicit bias); *see also infra* Part VI.C (fallibility of for-cause strikes).

40. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 142 (2002).

41. *Id.*

42. Timothy V. Kaufman-Osborn, *Capital Punishment as Legal Lynching?*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 21, 28 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

43. Stephen B. Bright, *Discrimination, Death, and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 211, 215 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

44. James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 271 (1998).

45. Stewart E. Tolnay et al., *Vicarious Violence: Spatial Effects on Southern Lynchings, 1890–1919*, 102 AM. J. SOC. 788, 794 (1996).

46. Clarke, *supra* note 44, at 275; Tolnay et al., *supra* note 45, at 794.

to deter African-Americans' defiance of the racial order through terror.[47] Lynching physically re-inscribed the inferiority of African-Americans when slavery could no longer do so.[48]

In the beginning of the twentieth century, Southerners began to realize that mob violence threatened racial chaos and economic disaster.[49] The South faced growing criticism from other parts of the country, with the possibility of losing economic investment from the North.[50] There was also a growing threat of federal anti-lynching legislation, and African-Americans were leaving the South in response to the lack of economic opportunity and the atmosphere of fear, further crippling the Southern economy by reducing the cheap labor force available for agriculture.[51]

Southern whites turned to capital punishment, among other apparatuses, as a means to limit mob violence.[52] Mob violence was becoming too costly, and many prominent Southerners assured other Southerners of the efficacy of the death penalty in controlling and intimidating African-Americans.[53] The South used "legal lynching" to limit mob violence while maintaining white dominance.[54] They were successful—two thirds of those executed in the 1930s were African-American, roughly the same racial distribution seen in lynching.[55] The numbers of lynchings and executions during this time of transition were inversely related—lynching declined precipitously as executions increased sharply.[56]

Capital punishment continued to be infected with racism in the twentieth century. Southern states up until the mid-twentieth century had many statutes that were subjected to racial manipulation.[57] An African-American defendant accused of raping a white woman was met with almost certain death.[58] A defendant accused of killing an African-American was treated leniently, while African-Americans who killed whites faced near-certain death.[59]

Fear of federal intervention in the 1950s constrained and altered the South's overtly racist capital punishment system.[60] Yet the racial divide still exists today. States with the largest African-American populations are more likely to have retained the death penalty today, despite controlling for the

47. Clarke, *supra* note 44, at 274; Tolnay et al., *supra* note 45, at 811–12.
48. Kaufman-Osborn, *supra* note 42, at 30.
49. Clarke, *supra* note 44, at 282.
50. *Id.* at 282–83.
51. *Id.* at 283.
52. *Id.* at 284–85.
53. *Id.*
54. *Id.* at 284.
55. Bright, *supra* note 43, at 215; Clarke, *supra* note 44, at 286–87.
56. Clarke, *supra* note 44, at 285.
57. *See id.* at 286.
58. *Id.*
59. *Id.* at 288.
60. *Id.* at 289.

amount of violent crime and other factors.[61] Racial disparities in charging, convictions, and death sentences also continue to persist.[62] The link between race and the death penalty remains, even if it is less visible.[63]

B. How History Translates to the Present

Whites and African-Americans are sharply divided in their support for the death penalty today. Capital punishment's racial history continues to affect popular support for the death penalty, with explicit and implicit racial prejudice remaining an important predictor of white support for capital punishment.

A 2007 poll conducted by the Pew Research Center found that sixty-eight percent of whites and forty percent of African-Americans supported the death penalty, while twenty-seven percent of whites and fifty-one percent of African-Americans opposed the death penalty.[64] "Some of the sharpest differences" in the Pew poll were along racial lines.[65] Other studies have also shown race to be strongly correlated with attitudes towards the death penalty.[66] A poll conducted for the Death Penalty Information Center found that while thirty-nine percent of the general population believes they would be disqualified from capital juries due to their opposition to capital punishment, sixty-eight percent of African-Americans believe they would be disqualified.[67] A prospective juror's pre-existing belief that they will be struck from the jury may affect the confidence and assertiveness in their answers, increasing the likelihood that a judge will strike the prospective juror for cause.[68] Consistent with these racial disparities, African-Americans are excused from jury service under death qualification more than other demographic groups.[69] This effect has continued under the looser *Witt*

61. David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 109, 126–28 (2002).

62. Bright, *supra* note 43, at 228–30.

63. Jacobs & Carmichael, *supra* note 61, at 126–28.

64. Robert Ruby & Allison Pond, *An Enduring Majority: Americans Continue to Support the Death Penalty*, THE PEW FORUM (Dec. 19, 2007), http://pewforum.org/Death-Penalty/An-Enduring-Majority-Americans-Continue-to-Support-the-Death-Penalty.aspx.

65. *Id.*

66. Steven F. Messner et al., *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC'Y REV. 559, 566 (2006).

67. Richard C. Dieter, *A Crisis of Confidence: Americans' Doubts About the Death Penalty*, DEATH PENALTY INFORMATION CENTER, 2 (June 2007), http://www.deathpenaltyinfo.org/CoC.pdf.

68. *See infra* notes 202–09 and accompanying text (finding prospective jurors who were more confident and assertive were less likely to be struck for cause when controlling for other variables).

69. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984); *see also* Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 386 (1982) (finding only about twenty percent of whites were excludable while about fifty-five percent of African-Americans were excludable); James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 269 (1988) (finding that African-Americans were nonsignificantly more opposed to the death penalty than were whites, though another analysis showed a significant race

standard.[70]

Support for the death penalty is partially grounded in racial attitudes. Even controlling for a variety of other factors, such as politics, religion, and class, the racial gap in support for capital punishment persists.[71] Variables that measure racial prejudice, including the degree to which whites hold negative stereotypes about African-Americans, have been shown to be important predictors of white support for capital punishment.[72] One study, using a variable largely measuring the extent to which white participants believe African-Americans possess negative character traits, found racial prejudice to be the best predictor of support for capital punishment.[73] However, even when the study controlled for racial prejudice, the racial gap in support for the death penalty still existed.[74] Consistent with previous research, these results suggest unique experiences in African-American history that contribute to African-Americans' higher opposition to the death penalty.[75] A second study found that whites living in states with a history of frequent lynchings are significantly more likely to express support for the death penalty, despite controlling for many other individual and contextual factors.[76] In a third study, when participants were primed with the argument that capital punishment is unfair because of its racially discriminatory effects, support for capital punishment among white participants actually increased, from about sixty-five percent to about seventy-six percent.[77]

A complex array of prejudices affects white support for the death penalty. Overt racism certainly has a role, especially since studies tend to under-record the scope of racial prejudice because survey respondents are less likely to express beliefs that could be interpreted as prejudiced.[78] Some of this data can also be explained by a strong belief in individualism partially emanating from post-Civil Rights Era racial resentment, which has manifested itself in numerous contexts after African-Americans began making gains during the Civil Rights Era.[79] In addition to more easily measured forms of prejudice, hidden racism and implicit bias continue to

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effect regarding opposition to the death penalty); Gary Moran & John C. Comfort, *Neither "Tentative" nor "Fragmentary": Verdict Preference of Impaneled Felony Jurors as a Function of Attitude Toward Capital Punishment*, 71 J. APPLIED PSYCHOL. 146, 152 (1986) (study finding white jurors were significantly more likely to strongly favor capital punishment than were African-Americans).

70. *See* Haney et al., *supra* note 37, at 629–30 (noting difficulty in obtaining minority survey respondents, but still observing a disproportionate effect of death qualification on racial minorities).

71. James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281, 1281 (2007).

72. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 999 (2007); Unnever & Cullen, *supra* note 71, at 1291–93.

73. Unnever & Cullen, *supra* note 71, at 1291.

74. *Id.* at 1292.

75. *Id.* at 1292–93.

76. Messner et al., *supra* note 66, at 582.

77. Peffley & Hurwitz, *supra* note 72, at 1001–02.

78. Unnever & Cullen, *supra* note 71, at 1286.

79. Michael K. Brown, *The Death Penalty and the Politics of Racial Resentment in the Post Civil Rights Era*, 58 DEPAUL L. REV. 645, 646–54 (2009).

persist and affect whites' attitudes toward capital punishment.[80] In sum, white support for the death penalty is not race-neutral; racial prejudice is intertwined with public and legislative support for the death penalty.[81]

Death qualification, with its disproportionate effects on African-American prospective jurors, creates a self-reinforcing cycle. One analysis of voir dires in Texas capital cases found two major themes of statements African-American prospective jurors made in response to questions by the prosecution: (1) ambivalence towards the imposition of the death penalty, and (2) personal knowledge of a defendant in another criminal case.[82] Both of these themes are linked to racial prejudice,[83] with some African-American prospective jurors explicitly referencing racial discrimination in capital punishment.[84] Many African-Americans are ambivalent towards the death penalty as a result of racial discrimination, which prompts their removal, which could strengthen African-Americans' beliefs in the existence of racial prejudice in capital punishment.[85] Heightened opposition to capital punishment among African-Americans as a result of their exclusion from capital juries creates a vicious cycle that exacerbates the problem of unrepresentative juries in capital cases.

Even more subtle forms of bias influence the disproportionate exclusion of African-Americans under death qualification. The implicit biases of prosecutors and judges can affect the decision to strike a prospective juror for cause.[86] Many Americans continue to harbor implicit racial bias against African-Americans, which frequently conflicts with self-reported attitudes.[87] This bias is unintentional, but its prejudicial effects are powerful—studies show that implicit racial bias predicts discriminatory decision-making and behavior.[88]

Professor Justin Levinson posits what he calls the "Death Penalty Priming Hypothesis."[89] His hypothesis is grounded in the priming of racial stereotypes, defined as the "incidental activation of knowledge structures, such as trait concepts and stereotypes, by the current situational context."[90] Levinson hypothesizes that during death qualification, prospective jurors are

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80. *See infra* notes 87–88 and accompanying text.

81. Messner et al., *supra* note 66, at 582–83; Unnever & Cullen, *supra* note 71, at 1293.

82. *See* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 86 (2009).

83. *See id.* at 90.

84. *Id.* at 86.

85. *See id.* at 90 ("[T]he exclusion of African Americans with connections to the criminal justice system also reinforces perceptions of common fate and in turn, increased identification with criminal defendants among African Americans.").

86. Price, *supra* note 82, at 84–90.

87. Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 599–603 (2009).

88. *Id.* at 605, 612–13, 631–32.

89. *Id.* at 602.

90. *Id.* at 608 (quoting John A. Bargh et al, *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230, 230 (1996)).

asked a line of seemingly race-neutral questions concerning their support for the death penalty, which "acts as an indirect prime that triggers stereotypes of African Americans, including criminality, dangerousness, and guilt."[91] Death qualification can indirectly prime racial stereotypes of African-Americans in two ways: (1) by triggering racial associations from the history of the death penalty as a tool of racial control,[92] and (2) by activating media portrayals of crime that embed associations and stereotypes into Americans' subconscious—even race-neutral descriptions of crime activate stereotypes of the aggressive African-American.[93]

Once racial stereotypes are primed, they can significantly affect subsequent decision-making and behavior.[94] Levinson posits that the priming of racial stereotypes during death qualification could affect jury decision-making.[95] This hypothesis could also be extended to include effects on the decision-making by the judge and the lawyers involved in the death qualification process itself. Once racial stereotypes about African-Americans are primed during death qualification, a host of stereotypes about African-Americans are activated, which can also activate a variety of unrelated stereotypes of African-Americans, such as "laziness" or hostility to the criminal justice system.[96] These stereotypes can unconsciously affect the prosecutor's decision to move to strike a juror for cause and the judge's decision to grant the prosecutor's motion.[97]

The history of racial prejudice in the application of the death penalty continues to affect public support for the death penalty. African-Americans oppose capital punishment at a much higher rate than whites, which results in the disproportionate exclusion of African-Americans from capital juries due to death qualification.[98]

The large racial gap in support for capital punishment is no accident. For whites, racial prejudice and implicit bias against African-Americans are important factors affecting their support for capital punishment. Strong African-American opposition to capital punishment defies conventional

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91. *Id.* at 619.

92. *Id.* at 626–27.

93. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 179–80 (2001); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 561 (2000) (finding that merely thinking about murder can trigger racial constructs based on stereotypes of African-Americans); Levinson, *supra* note 87, at 627–31.

94. *See supra* note 88 and accompanying text.

95. Levinson, *supra* note 87, at 632.

96. *Id.* at 623–25.

97. *See supra* note 88 and accompanying text (citing research indicating that implicit bias can substantially influence decision-making). Other stereotypes of African-Americans, unrelated to criminal justice, that have been activated as a result of death qualification can also affect the overall desirability of a prospective juror to a prosecutor. For instance, if the prosecutor feels the prospective juror is hostile or lazy, she is probably more likely to endeavor to strike the juror. Likewise, if a judge also feels a prospective juror has more negative traits, she is also more likely to side with the prosecutor on a for-cause challenge.

98. *See supra* note 69 and accompanying text.

explanations of political, economic, or educational differences. The racial prejudice that infects capital punishment fosters strong opposition to capital punishment among African-Americans. Death qualification not only produces under-representative juries in capital cases, but it also reinforces the causes of that effect. The continuous exclusion of a large number of African-Americans from capital juries validates African-Americans' concern that the criminal justice system is racially biased, with largely white juries deciding the fates of minorities. The implicit biases of judges and lawyers, triggered as a result of death qualification, further add to the discriminatory effects of death qualification. The death qualification process and support for the death penalty are not race neutral.

IV. The Harms of Death Qualification

Many of the harms of death qualification have been well documented. Death qualification results in juries that are more prone to convict than a jury chosen without using death qualification.[99] The disproportionate exclusion of African-Americans from capital juries also does significant damage to the impartiality of capital juries, especially in cases with African-American defendants, and to the criminal justice system as a whole by enabling racial discrimination in jury deliberations to function largely unabated.

The disproportionate exclusion of African-American jurors from capital juries eliminates a much-needed viewpoint from deliberations. African-American jurors are less likely to convict and impose a death sentence.[100] African-American jurors "may be more critical in their interpretation of factual [issues] presented at trial."[101] They are also more likely to discern the existence of, and consider, mitigating evidence in the sentencing decision.[102] African-American jurors are more likely to have lingering doubts about guilt and to consider it in the punishment phase,[103] they are more likely to be attuned to the ways African-American defendants

99. *See generally* Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984) (finding death qualified juries were more "guilt prone" in a simulated jury study); Fitzgerald & Ellsworth, *supra* note 69 (death qualified jurors have more "crime control," versus "due process," attitudes that result in a jury that is more pro-prosecution); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984) (arguing that the process of death qualification itself results in more conviction prone juries); Haney et al., *supra* note 37 (biasing effects of death qualification remain even after changes in public opinion on capital punishment and the new *Witt* standard); Luginbuhl & Middendorf, *supra* note 69 (death qualified jurors are more likely to consider aggravating factors in capital sentencing and less likely to consider mitigating factors); William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984) (finding attitudinal differences between juries chosen by death qualification and other juries and that the differences result in conviction-prone juries).

100. Bowers et al., *supra* note 94, at 187–88.

101. *Id.* at 181.

102. *Id.*

103. *Id.* at 207–08; Price, *supra* note 82, at 64.

express remorse for their crimes,[104] and they are less likely to believe the defendant poses a risk of being dangerous in the future.[105] The stereotypes many white jurors believe in shape their evaluation of aggravating and mitigating circumstances.[106] White jurors tend to attribute an African-American's good conduct to the circumstances and his or her bad conduct to enduring character traits, making an African-American defendant's sentencing hearing an uphill battle from the start.[107] Whites are more likely to convict and impose a death sentence on an African-American defendant than they are on a white defendant and, in general, are more punitive.[108]

Even the mere presence of one African-American male juror on a capital jury substantially increases the likelihood of a life sentence when the defendant is African-American.[109] According to research conducted by the Capital Jury Project, this effect was more pronounced in cases involving an African-American defendant and a white victim.[110] In such cases, about a quarter of white jurors in racially mixed juries changed their votes from death to life between the first and final punishment votes, the largest change seen in the study, probably due to the effect of African-Americans on the jury.[111] In one case, a white juror explains how an African-American juror affected the deliberations:

> Q: In your own words, can you tell me what the jury did to reach its decision about defendant's punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements, and how were they resolved?
>
> J: I was the final person [to vote for life].
>
> I: What persuaded you?
>
> J: Another black juror.
>
> I: And he/she persuaded you?
>
> J: His manner and charisma, his compassion and his articulation did move me so much . . . . Here's a black man who was almost in the same situation [as the defendant] without the atrocities and the abuse and everything but black, poor, lower middle class from the South. [He] lead a very compassionate [life in the] army . . . . Finally, I guess after nothing more than a benefit of the doubt and compassion, I agreed it would be life without parole. (Inaudible). He's a wonderful guy, have you met him? He's wonderful. He's a wonderful, wonderful soul, such a person.[112]

Not only can African-American jurors be advocates for life, but they

104. Price, *supra* note 82, at 64.

105. Bowers et al., *supra* note 94, at 226.

106. Sheri Lynn Johnson, *Race And Capital Punishment*, *in* BEYOND REPAIR?: AMERICA'S DEATH PENALTY 121, 137 (Stephen P. Garvey ed., 2003).

107. *See id.*

108. Bowers et al., *supra* note 94, at 181–83.

109. *Id.* at 193; Price, *supra* note 82, at 64–65.

110. Bowers et al., *supra* note 94, at 202.

111. *Id.* at 202–03.

112. *Id.* at 257.

can also provide a voice to resist the misunderstanding and dehumanization of African-American defendants. One study examining interviews with capital jurors found disturbing patterns of racialized narratives among white jurors.[113] Many white jurors evoked narratives of racial inferiority when describing their decision-making process, ranging from explicit racial contempt to narratives that emphasize the cultural distance between the defendant and the juror.[114] These tales of racial inferiority provide the white juror with a justification for protecting "us" from "them."[115] African-American jurors can, and do, resist these racially discriminatory narratives.[116] Whether through direct confrontation or more subtle tactics, as seen in the story of the compassionate African-American man,[117] African-American jurors can influence the way the discussion unfolds, which can improve jury decision-making by lessening the effect racial bias has on the verdict or sentence.

An analysis of the Capital Jury Project research also shows deep resentment among African-American jurors who felt like they were outsiders on mostly-white juries.[118] One female African-American juror described her frustration with the paucity of African-American jurors on her jury and the white jurors' misunderstanding of the defendant's background:

> And I was frustrated. I felt there had to be more blacks on the jury. Because I think that was a big frustration for me. Because they were looking at this thing from a white middle-class perspective, and you have to put yourself into that black lifestyle this kid came out of. That particular lifestyle where there was not a good home, no supervision, there were no authority figures for this kid. So why waste time on talking about, my god, what time this kid comes in the house! There were a lot of little instances like that. That's why I felt like an outsider at times, because I felt I should have been more forceful at trying to get these people to understand. We had to look at it like the lifestyle he came out of, the background he came out of. But nobody wanted to listen. They all wanted to talk. I'm not strong-willed. I'm not forceful enough. That's why I felt like an outsider. So, rather, than get into it, I didn't say much. I mean, I deliberated, but I didn't say much about those types of things. So that was a biggie, and it didn't make me happy. And I felt there should have been more blacks on the jury to balance that out.[119]

African-American jurors in capital cases are more likely to feel like outsiders, less likely to be outspoken, and more likely to wish they had done

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113. Benjamin Fleury-Steiner, *Narratives of the Death Sentence: Towards a Theory of Legal Narrativity*, 36 LAW & SOC'Y REV. 549 (2002).

114. *Id.* at 572–73.

115. *Id.* at 550–52.

116. *Id.* at 569.

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

118. Fleury-Steiner, *supra* note 113, at 571–72.

119. *Id.* at 572.

something differently.[120] Death qualification's exclusion of disproportionate numbers of African-American jurors not only deprives capital juries of a much-needed voice to combat pernicious racialized characterizations of the defendant, but it can also weaken the resolve of African-Americans already on the jury who are too afraid to speak out when they would be the only ones doing so.[121]

The disproportionate exclusion of African-Americans due to death qualification is most troubling, especially when racial discrimination in capital punishment remains a serious problem. African-American jurors counteract racial prejudices in the jury room, which can result in the failure to properly weigh mitigating factors unique to African-Americans or the outright discriminatory application of the death sentence. Death qualification retards resistance to racial prejudice in capital juries.

V. *Lockhart v. McCree*

The Supreme Court considered the most serious challenge to death qualification to date in *Lockhart v. McCree*.[122] The claimant argued that death qualification violated his rights under the Sixth and Fourteenth Amendments to have an impartial jury from a representative cross section of the community because death qualified juries are more conviction prone.[123] The Supreme Court rejected McCree's challenges.[124]

The claimant's argument in *McCree* differs from the argument posited in this Note. This Note argues for the Equal Protection Clause of the Fourteenth Amendment to be applied to death qualification based on its effects on African-Americans—an argument not analyzed by the Court in *McCree*. However, some of the Court's analysis in *McCree* is relevant to the arguments presented here.

Justice Rehnquist, in the majority opinion, states "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance."[125] This analysis was a byproduct of McCree's challenge, which only challenged the exclusion of prospective jurors because they were not death-qualified.[126] However, those who oppose the death penalty are not a protected class of persons.[127] This

120. Bowers et al., *supra* note 93, at 230–31.

121. *See* Grutter v. Bollinger, 539 U.S. 306, 318–20, 330–33 (2003) (describing the substantial benefits realized by having a "critical mass" of minorities, including having minorities that do not feel isolated or like spokespersons for their race).

122. 476 U.S. 162 (1986).

123. *Id.* at 167–68.

124. *Id.* at 184.

125. *Id.* at 178.

126. *Id.* at 165.

127. *See id.* at 174–76 (holding that non-death-qualified jurors are not a "distinctive group," unlike African-Americans, women, and Mexican-Americans).

Note, on the other hand, argues that death qualification is untenable because it is a tool to exclude African-Americans. Justice Rehnquist's analysis could be applied to any case of racial discrimination in jury selection, but this analysis has rightfully been rejected because the Court recognizes a heightened scrutiny when the state discriminates on the basis of race.[128]

The Court also makes reference to the state's interest in death qualification,[129] which is analyzed later in this Note.[130]

VI. The Equal Protection Clause of the Fourteenth Amendment and Death Qualification

A. The Equal Protection Clause and Its Application to the Capital Punishment Context

In order to understand the vast differences between the capital punishment context and other contexts, how the Equal Protection Clause is applied in non-capital punishment contexts must be examined. The core of an Equal Protection claim is the requirement that the challenged state action must have a racially discriminatory purpose, which "may often be inferred from the totality of the relevant facts,"[131] including the different practical or statistical impact upon differing classifications of persons, the general history concerning the problems which the legislative rule seeks to solve, and the history of the enactment of the legislation.[132] This is not an exhaustive list of what could be presented as evidence to prove intent.[133] A racially discriminatory purpose need only be a motivating factor, not the sole motivating factor, of the challenged state action.[134] Once it has been established that the state action discriminates on the basis of race and that a racially discriminatory purpose was a motivating factor, the state action will be ruled constitutional only if it is a narrowly tailored measure that furthers compelling government interests.[135]

The Supreme Court in *McCleskey v. Kemp* raised the burden on petitioners even higher in the capital punishment context.[136] McCleskey

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128. *See* Batson v. Kentucky, 476 U.S. 79, 95 (1986) ("[T]he Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse."); *see also* Taylor v. Louisiana, 419 U.S. 522, 526–27 (1975) (citing Smith v. Texas, 311 U.S. 128, 130 (1940)) (noting that a state jury system that resulted in systematic exclusion of African-Americans from juries violated the Equal Protection Clause).

129. *McCree*, 476 U.S. at 167–69, 173, 175–76.

130. *See infra* notes 178–93 and accompanying text.

131. Washington v. Davis, 426 U.S. 229, 239–42 (1976).

132. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONST. L. § 18.4 (4th ed. 2010) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977)).

133. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 268 (1977).

134. *Id.* at 265–66.

135. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

136. McCleskey v. Kemp, 481 U.S. 279, 292–94 (1987).

argued that the Georgia capital sentencing system was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments.[137] In support of his claims, McCleskey proffered a sophisticated statistical study, the Baldus study, which found severe racial disparities in the Georgia capital punishment system, especially in cases involving an African-American defendant and a white victim.[138] The Supreme Court rejected McCleskey's two claims.[139]

To prove a violation of the Equal Protection Clause in the capital punishment context, the petitioner must prove that the state acted with purposeful discrimination, the state's action had a discriminatory effect on the petitioner, and that the actors in the petitioner's specific case acted with a discriminatory purpose.[140] The Court defined "discriminatory purpose" as "more than intent as volition or intent as awareness of consequences," which implies that a state legislature had a discriminatory intent when it "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[141] As long as there is a legitimate reason for the state's action, discriminatory purpose will not be inferred.[142]

The Court also made clear that statistical studies like the one proffered by McCleskey will not be enough to prove an Equal Protection claim unless it were "exceptionally clear proof" of discrimination.[143] As justification for this standard, the Court cited reasons why the capital punishment context is different from other contexts where statistical evidence is permitted to help prove an Equal Protection violation: (1) the inference of discrimination cannot be made from statistics because there are more entities and variables involved in a capital case;[144] (2) the state cannot adequately rebut the inference of discrimination in the capital punishment context because jurors cannot testify as to how they reached their verdict and policy considerations dictate not asking the prosecutor to do so years after their decisions were made;[145] and (3) discretion is a critical component of the criminal justice system, which should not be upset unless there was "exceptionally clear proof" that the discretion had been abused.[146] *McCleskey* established an Equal Protection standard in the capital punishment context that puts a higher burden of proof on the petitioner[147] and restricts what the

137. *Id.* at 282–86.

138. *Id.* at 286–87.

139. *Id.* at 313.

140. *Id.* at 292.

141. *Id.* at 298 (quoting Admin. of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)).

142. *Id.* at 299 n.21 ("[I]t is entirely appropriate to rely on the legislature's legitimate reasons for enacting and maintaining a capital punishment statute to address a challenge to the *legislature's* intent.").

143. *Id.* at 294–97.

144. *Id.* at 294–95.

145. *Id.* at 296.

146. *Id.* at 297.

147. *See* J. Thomas Sullivan, *Lethal Discrimination 2: Repairing the Remedies for Racial*

petitioner may use to prove a claim.[148]

The Court had a different approach in *Batson v. Kentucky*.[149] In *Batson*, the Court held that the Equal Protection Clause forbids a prosecutor from striking prospective jurors through peremptory challenges solely on account of their race.[150] The Court considered peremptory challenges to be a facially neutral system, but the Constitution required the Court to "look beyond the face of the statute defining juror qualifications" to afford protection against prohibited discrimination.[151] The Court found peremptory challenges to be a "selection mechanism . . . subject to abuse" that "permits 'those to discriminate who are of a mind to discriminate.'"[152] The petitioner can prove a prima facie case of discrimination by showing either proof of the systematic exclusion of members of a race from juries in the jurisdiction or from facts in the petitioner's specific case.[153]

After the petitioner has proven a prima facie case of discrimination, a trial court is to determine if the state's peremptory strike was racially motivated by considering the prosecutor's credibility, including assessing the rationality of the prosecutor's proffered race-neutral explanation for the strike.[154] In evaluating the race-neutral explanation, the trial judge may engage in a comparative analysis by comparing the explanation the prosecutor gave to how the same reasoning could be applied to jurors of other races to determine if the proffered explanation was pretextual.[155] While there may be flaws in the *Batson* system,[156] at the very least it would provide more

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Discrimination in Capital Sentencing, 26 HARV. J. ON RACIAL & ETHNIC JUST. 113, 130–31 (2010) (advocating for the use of strict scrutiny in reviewing capital punishment decisions).

148. *See McCleskey*, 481 U.S. at 347–51 (Blackmun, J., dissenting) (accusing the majority of ignoring relevant statistical evidence and evidence related to the prosecutor's motives in seeking the death penalty); Sullivan, *supra* note 147, at 129–31 (noting that the majority in *McClesky* discounted the statistical evidence supporting McClesky's claim that racial prejudice played a role in his sentencing).

149. Batson v. Kentucky, 476 U.S. 79 (1986).

150. *Id.* at 89.

151. *Id.* at 88.

152. *Id.* at 95–96.

153. *Id.* at 93–95 (establishing a three-part test to determine whether the prosecutor's use of peremptory challenges constitute impermissible discrimination subject to the Equal Protection Clause: (1) the petitioner makes out a prima facie showing of purposeful discrimination by showing that the totality of the circumstances give rise to an inference of discriminatory purpose, (2) the burden then shifts to the State to show that it used permissible racially neutral selection criteria, and (3) the Court then weighs the evidence to determine if the State's strike was motivated by purposeful racial discrimination).

154. Snyder v. Louisiana, 552 U.S. 472, 477 (2008); Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) ("Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.").

155. *See Snyder*, 552 U.S. at 483–85 (finding the prosecutor's proffered race-neutral explanation was not applied to white jurors in the same manner as it was applied to African-American jurors).

156. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 161–65 (arguing that implicit bias infects *Batson* proceedings, with biased judges believing biased prosecutors); Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155,156–61, 177–78, 234–36 (arguing that unconscious bias infects the *Batson* system); Sullivan, *supra* note 147, at 123–24 (arguing that judges are too willing to

protection against racial discrimination in death qualification than the status quo.

B. Equal Protection Analysis Applied to Death Qualification

1. Scenario 1: State Manipulation

Equal Protection analysis could be applied to death qualification in a situation where the prosecutor manipulates voir dire to encourage African-American prospective jurors to give responses that would result in excusal for cause under death qualification. In this scenario, the statements that the prosecutor would elicit from the minority jurors during death qualification proceedings would be used as a pretext to impermissibly discriminate against African-American prospective jurors.

Miller-El v. Cockrell, a case applying the *Batson* test, is an example of how this could occur. The prosecutor questioned members of the venire to determine their attitudes concerning the death penalty.[157] In so doing, over half of the African-American jurors, but only six percent of white jurors, were given a horrific and detailed description of the process by which someone is executed in Texas.[158] Responses that disclosed hesitation in imposing the death penalty were cited as justification for striking prospective jurors for cause or by peremptory challenge.[159] This disparate line of questioning demonstrated that the prosecutor intended to evoke statements of opposition to the death penalty from African-American prospective jurors in order to excuse them from the jury under death qualification, and the Court considered this as evidence of purposeful discrimination in support of the petitioner's *Batson* claim.[160]

The facts of *Miller-El* should be considered an unconstitutional application of death qualification. The rationale for applying the Equal Protection Clause to manipulations of death qualification is the same rationale as in *Batson*—prohibiting intentional racial discrimination by the prosecutor in jury selection. The primary difference is that *Batson* applies to peremptory challenges, but not to for-cause death qualification challenges.

Batson's rationale also applies to death qualification. The primary evil of peremptory challenges, as per *Batson*, is their overly discretionary nature—they are easily manipulated to discriminate on the basis of race.[161] Death qualification is also a "selection mechanism . . . subject to abuse,"

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accept a prosecutor's proffered race-neutral reasons for the peremptory strike and that *Batson* creates an unreasonable deference to the finder of fact).

157. Miller-El v. Cockrell, 537 U.S. 322, 331–32 (2003).

158. *Id.* at 332.

159. *Id.* at 331–32.

160. *Id.* at 344–45.

161. *See supra* Part II.

susceptible to racial discrimination.[162] While not as discretionary as peremptory challenges, death qualification has become sufficiently discretionary under *Witt* to warrant heightened scrutiny.[163] When the statements that different jurors make can vary significantly in their severity of opposition to the death penalty and still result in death qualification strikes for all of them, a disparate impact can occur.[164] It is conceivable that a juror whose opposition to the death penalty is relatively slight is excused for cause, while a juror whose level of opposition to the death penalty is either the same or greater is not excused for cause. Under *Witt*, this result is permissible, as *Witt* merely outlines when the state *could* excuse a prospective juror for cause, not when the state *must* excuse the prospective juror for cause.[165]

African-American prospective jurors are much more likely to be subject to death qualification strikes.[166] Combined with the high potential for inconsistent outcomes, the risk of racial discrimination is intolerably high in death qualification. When faced with a situation of intentional prosecutorial manipulation of death qualification for a discriminatory purpose, like in *Miller-El*, a court should have no hesitation in applying *Batson* to death qualification.

2. Scenario 2: Disparate Death Qualification Strikes Along Racial Lines

Equal Protection analysis should also be applied to situations where death qualification results in disparate strikes along racial lines. This scenario could exist when an African-American prospective juror is excused for cause under death qualification while a white juror is not, even when the white juror's responses in voir dire indicate the same, or a higher, degree of opposition to the death penalty. It could be argued that prosecutors would always attempt to strike a prospective juror who expressed reservations about imposing the death penalty. For various reasons, this is not always the case.[167] Most of these situations would occur on the margins, when both the African-American and white prospective juror did not voice extreme opposition to the death penalty. The prosecutor could consider the white prospective juror to be a valuable member of the jury for other reasons, despite her slight opposition to the death penalty. The disparate strikes could also be attributed to implicit racial bias when determining the desirability of

162. Batson v. Kentucky, 476 U.S. 79, 95–96 (1986); *see supra* Part II.

163. *See supra* Part II.

164. *See supra* notes 35–37 and accompanying text.

165. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) ("We . . . reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror *may* be excluded for cause because of his or views on capital punishment.") (emphasis added).

166. *See supra* Part III.B.

167. *See, e.g.*, Reed v. Quarterman, 555 F.3d 364, 378–79 (5th Cir. 2009) (examining the statement of an African-American prospective juror, who was struck on a peremptory strike due to his belief in an unlawfully high burden on the state to prove the defendant's death-worthiness, and finding similar responses made by white prospective jurors who were not struck); Currie v. Adams, 149 F. App'x. 615, 619–20 (9th Cir. 2005).

prospective jurors.[168] A petitioner should have the ability to use *Batson*'s comparative analysis[169] to show that the death qualification strike was merely a pretext for purposeful racial discrimination in his or her case.

3. Scenario 3: The Unconstitutionality of Death Qualification

The history of racial discrimination in capital punishment, the high risk of racial discrimination in death qualification today, and the lack of a sufficiently compelling state interest for the *Witt* standard counsels for the finding that death qualification is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, even without particularized evidence of discrimination.[170]

While the burden on a petitioner in the capital punishment context is onerously high, there are a number of critical distinctions between the claim advanced in this Note and the Equal Protection claim McCleskey advanced in *McCleskey v. Kemp*. Historical and statistical evidence can show that the intent of legislatures in enacting death qualification statutes was, at least in part, a result of a discriminatory purpose. Historical and statistical evidence of racial discrimination in capital punishment have become much more sophisticated since *McCleskey* was decided. The *McCleskey* decision rejected McCleskey's offer of historical evidence for not being "reasonably contemporaneous."[171] Yet, studies of implicit bias and advanced statistical analyses of public opinion have steadily tightened the nexus between historical racial discrimination in capital punishment and modern opinions on the appropriateness of capital punishment.[172] A petitioner making an Equal Protection claim under the shadow of *McCleskey* can rely on much improved statistical and historical evidence to show discriminatory intent by demonstrating the continued pervasiveness of race and its effects on legislative acts.

Because a challenge to death qualification is a relatively narrow challenge, there are fewer reasons for a court to depart from conventional Equal Protection analysis.[173] A challenge to death qualification only

168. *See supra* notes 87–97 and accompanying text.

169. *See supra* notes 154–55 and accompanying text.

170. *See supra* Parts II–IV (outlining the risks and harms of racial discrimination in death qualification); *see also infra* notes 178–93 (balancing the interests of the state, the defendant, and society in death qualification).

171. McCleskey v. Kemp, 481 U.S. 279, 298 n.20 (1987).

172. Much of the social science linking racial bias to attitudes on the appropriateness of capital punishment, especially research on implicit bias, only developed within the last twenty years. *See* Levinson, *supra* note 87, at 600 ("Since the 1990s, social scientists have demonstrated that many Americans harbor implicit racial biases."); s*ee also supra* notes 71–81 and accompanying text (studies on racial prejudice's effect on white support for capital punishment).

173. *See* Sheri Lynn Johnson, *Litigating For Racial Fairness After* McCleskey v. Kemp, 39 COLUM. HUM. RTS. L. REV. 178, 178–79 (2007) (finding three lessons from Equal Protection litigation after *McCleskey* – (1) think small, (2) if you can't change how people decide, change who decides, and (3) think small again).

questions the use of discretion on the part of the prosecutor and the trial judge, affording both actors an opportunity to rebut the inference of discrimination.[174] While the Court went to great lengths in *McCleskey* to emphasize the importance of discretion in the criminal justice system,[175] the Court has also constrained that discretion when a specific process within capital punishment is uncommonly subject to the influence of racial discrimination.[176] The limited scope of a challenge to death qualification counsels for moving towards the Equal Protection analysis used in other contexts, which includes an increased acceptance of the use of statistical evidence as proof of an Equal Protection claim.[177]

McCleskey's analysis of the state's interest in capital punishment poses the most substantial challenge to any petitioner making an Equal Protection claim in a capital case. The Court held that the legislature's legitimate reasons for maintaining a system of capital punishment disproved a racially discriminatory intent.[178] The Court, however, was still implicitly conducting a standard balancing test of the legislature's motivations.[179] The substantial re-working of Georgia's capital punishment system post-*Furman* aided the Court in finding that the legislature had reduced the risk of racial discrimination in capital punishment and had crafted a system that solely furthers the state's legitimate interests.[180] The recognition that racial discrimination in capital punishment continues to be a problem in the post-*Furman* world, the pervasiveness of racial discrimination in death qualification,[181] and *Witt* being too harsh a measure to satisfy the state's interest[182] suggest a different result on a challenge of death qualification today.[183]

If a discriminatory legislative intent were found to exist, death

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174. *See McCleskey*, 481 U.S. at 296 n.17 ("Requiring a prosecutor to rebut a study that analyzes the past conduct of scores of prosecutors is quite different from requiring a prosecutor to rebut a contemporaneous challenge to his own acts.") (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

175. *See supra* note 146 and accompanying text.

176. *See* Batson v. Kentucky, 476 U.S. 79 (1986) (applying the Equal Protection Clause of the Fourteenth Amendment to forbid prosecutors from using their peremptory strikes to strike prospective jurors solely on account of their race); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1145–46 (1989) ("The Court willingly eradicates discretion along the procedural margins of the criminal process but insists on protecting it within the substantive core.").

177. *See supra* notes 131–33 and accompanying text.

178. *See supra* note 142 and accompanying text.

179. The Court in *McCleskey* indicated that there may be a point where the evidence of discrimination outweighs the evidence of a legitimate purpose. *See McCleskey*, 481 U.S. at 296–97 ("[A]bsent far stronger proof, it is unnecessary to seek such a rebuttal [of discrimination], because a legitimate and unchallenged explanation for the decision is apparent . . . ."). *See also* Ortiz, *supra* note 176, at 1148–49 (arguing that *McCleskey*'s view of intent ultimately serves as a balancing mechanism between individual and state interests).

180. *See McCleskey*, 481 U.S. at 298–99 (citing Gregg v. Georgia, 428 U.S. 153 (1976)).

181. *See supra* Part III.

182. *See infra* notes 187–89 and accompanying text.

183. *See infra* notes 187–93 and accompanying text (balancing the interests of the state, the defendant, and society in death qualification).

qualification would be subject to strict scrutiny analysis.[184] Strict scrutiny demands that when political choices burden fundamental rights, the means employed must be the least restrictive available to achieve the desired end, and the ends themselves must be sufficiently compelling to justify infringement.[185] In *Witt* and *McCree*, the Supreme Court articulated the state's interest in death qualification: having jurors capable of following the law to ensure the administration of the state's capital sentencing scheme.[186]

Balanced against the risk of racial discrimination and the other harms of death qualification, death qualification should not survive strict scrutiny review. As mandatory sentencing schemes—where a death sentence was automatically imposed if the defendant was convicted of a capital crime—have been replaced by discretionary sentencing schemes, the state's interest in death qualification has become less compelling as the risk that non-death qualified jurors will nullify at the guilt phase has been reduced.[187] Capital juries' discretion to sentence the defendant to life has only increased over time to the point where a jury has almost "unconstrained discretion" to not impose death.[188] Even when the evidence for imposing death is overwhelming, the Supreme Court has effectively endorsed a capital juror imposing life for no reason at all. A juror who would vote for life in the vast majority of circumstances would still be able to follow the law because there are no substantive requirements that jurors give the reasons for imposing death a certain weight—or any weight at all.[189] Mitigation jurisprudence sheds light on why the *Witt* test vastly overreaches the state interest it is seeking to protect. The state interest in having capital jurors at least be able to consider death as a punishment continues to erode when the Supreme Court adopted, and has expanded on, the view that death need not be considered at all in the sentencing phase.

In *Batson*, the Court also found a strong societal interest in preventing racial discrimination in jury selection because racial discrimination undermines confidence in the criminal justice system.[190] The risk of racial discrimination and the other harms of death qualification are significant interests of both society and the defendant that must be accounted

184. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Susan Bandes, *Taking Some Rights Too Seriously: The State's Right to a Fair Trial*, 60 S. CAL. L. REV. 1019, 1050–51 (1987).

185. Bandes, *supra* note 184, at 1050–51.

186. Lockhart v. McCree, 476 U.S. 162, 175–76 (1986); Wainwright v. Witt, 469 U.S. 412, 423 (1985).

187. Mark Cammack, *In Search of the Post-Positivist Jury*, 70 IND. L.J. 405, 457 (1995).

188. Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring). *See also* Abdul-Kabir v. Quarterman, 550 U.S. 233, 246 (2007) (noting that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual"); Penry v. Lynaugh, 492 U.S. 302, 303–04 (1989) (jury must be allowed to consider and give effect to mitigating evidence so they can give a "reasoned moral response" to the defendant's background, character, and crime).

189. Rozelle, *supra* note 6, at 683–87.

190. Bandes, *supra* note 184, at 1047.

for.[191] While the state interest in obtaining a jury that can follow the law in capital cases may have strength, it is not compelling, especially in light of the defendant's and society's interests at stake.

Even if it were held that the state's interest in death qualification is compelling, modern death qualification is not narrowly tailored. Death qualification provides the trial judge with nearly unlimited discretion and almost no limits on her authority to excuse a prospective juror for cause.[192] The Supreme Court was faced with a similar situation in *Witherspoon* when it limited the scope of death qualification due to its impact on the defendant's right to an impartial jury.[193] The *Witherspoon* rule, or a similar rule meaningfully restricting death qualification, could be an example of a rule narrowly tailored to satisfy the state's interest in death qualification without overly burdening the interests of the defendant or society. The *Witherspoon* rule could exclude jurors who would not consider imposing death in any circumstance, putting death qualification jurisprudence on par with mitigation jurisprudence. Modern death qualification, which is devoid of any meaningful limits or guidelines, cannot be said to be narrowly tailored.

4. Equal Protection Alternatives

While it is possible to challenge death qualification under the *McCleskey* standard, it is an inferior method to remedy the harms of racial discrimination in death qualification. The Court did not consider McCleskey's historical and statistical evidence as proof of discriminatory legislative intent and deferred to other legitimate legislative reasons to reject McCleskey's claim.[194] The Court fundamentally misunderstood the operation of explicit and implicit discrimination in today's colorblind society. Unconscious racism is the dominant form of racial discrimination today, and the Equal Protection Clause, to remain true to its purpose of eliminating state action with racially discriminatory motives, must take into account this form of discrimination.[195] Historical and statistical evidence can better illuminate how this form of prejudice influences why legislators make certain decisions and how legitimate the legislature's reasons really are.[196] The alternative is an abdication of the Court's role in remedying the most prevalent and invidious form of racial discrimination today.

Much time and effort has been spent developing critiques of, and alternatives to, the traditional intent requirement.[197] While articulating an

191. *See supra* Part IV.

192. *See supra* Part II.

193. *See supra* notes 12–17 and accompanying text.

194. McCleskey v. Kemp, 481 U.S. 279, 292–99 (1987).

195. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987).

196. *See supra* Part III.

197. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating an anti-subordination doctrine); Barbara J. Flagg, *"Was Blind,*

alternative to the intent requirement is beyond the scope of this Note, death qualification can provide another example of why an alternative to the standard intent requirement is preferable. Most importantly, an alternative to the intent requirement should be able to take into account hidden conscious and unconscious racism in determining legislative intent. Death qualification appears race-neutral, but historical and statistical evidence belie that conclusion. The racial meaning of the death penalty mostly exists in the implicit biases of Americans. Such an alternative should also take into account the severity of the risk of racial discrimination in any given state action. Factors could include the racially symbolic nature of the act,[198] whether the system is vulnerable to racial discrimination, and the disparate impact of the state action on a protected racial class.

In certain situations involving discrimination by the prosecutor, the Equal Protection Clause, as interpreted in *Batson*, should be applied to death qualification. The Equal Protection Clause should also be applied to death qualification as a whole to rule it unconstitutional. Death qualification can be challenged generally under the Equal Protection standard in *McCleskey* due to the challenge's relatively limited scope and the advancement of historical and statistical evidence. While it may be possible to challenge death qualification under *McCleskey*'s very strict standard, alternative methods to establish a violation of the Equal Protection Clause should be considered in order to better fit the realities of racial discrimination in modern America.

C. The Hostility to an Examination of "For-Cause" Challenges

In his concurrence in *Batson*, Justice Marshall famously called for the elimination of peremptory challenges altogether as the only viable method of eliminating racial discrimination in jury selection.[199] This claim carries with it an implicit assumption that for-cause challenges are better suited than peremptory challenges in reducing racial discrimination in jury selection. This assumption proves flawed.

Modern death qualification presents many of the same problems seen in peremptory challenges due to the overly-discretionary nature of death qualification and the influence of race.[200] While not the unbridled discretion of peremptory challenges, the discretion afforded in death qualification is substantial enough to allow the operation of racial prejudice, especially due to the unconscious racism Justice Marshall cited in support of his argument

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But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 992–93 (1993) (calling for heightened scrutiny of state actions that have racially disparate effects); Lawrence, *supra* note 195, at 324 (advocating a "cultural meaning" test to determine whether government conduct conveys a symbolic message to which the culture attaches racial significance).

198. Lawrence, *supra* note 197, at 356–58.

199. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

200. *See supra* Parts II–III.

that peremptory challenges should be abolished.[201]

One study found that subtle variations in prospective jurors' confidence in their ability to be fair influence the likelihood that a judge will excuse a prospective juror for cause even if that judge originally felt differently based solely on objective facts about the juror.[202] The study constructed vignettes about different prospective jurors, all of which were problematic to some extent, but each juror also stated in more or less confident terms that they could be fair.[203] Participants, which included prosecutors, defense attorneys, and judges, were then given copies of a voir dire transcript for each of the prospective jurors—some responses were confident and others were equivocal.[204] The higher a prospective juror's confidence was in her answers, the more likely it was that the judges thought the prospective juror was impartial, even when the juror was not—based on the objective facts—more impartial.[205] In addition to demonstrating some fallibility in for-cause strikes,[206] this study also has implications for the racial dimensions of death qualification. How people speak can vary by race, class, and gender.[207] People with "less education and lower occupational status" are "more prone to 'powerless language'" than others.[208] Not only are for-cause challenges flawed, but the voir dire process itself could unintentionally increase the racially disparate effects of death qualification by placing undue emphasis on a prospective juror's confidence in her ability to be fair.

Courts should look beyond the "for cause" and "peremptory" labels when deciding whether a particular process is susceptible to discrimination. Only a little over forty years ago, the Supreme Court severely limited "for cause" death qualification challenges and recognized that "for cause" challenges are not unimpeachable.[209] "For cause" challenges should not be sacrosanct.

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201. *Batson*, 476 U.S. at 106 (Marshall, J., concurring); *see also supra* notes 87–97 and accompanying text.

202. Mary R. Rose & Shari S. Diamond, *Judging Bias: Juror Confidence and Judicial Rulings on Challenges for Cause*, 42 LAW & SOC'Y REV. 513, 514–15 (2008).

203. *Id.* at 519.

204. *Id.* at 519–20, 522–23.

205. *Id.* at 533.

206. The study articulated three reasons why this result shows for-cause challenges are flawed: (1) even if jurors know they are biased, they want to exhibit the desirable characteristic of fairness, (2) people have difficulty producing accurate self-assessments of bias, and (3) the limited availability of information in voir dire further reduces the accuracy of a juror's self-assessment. *See id.* at 515–17.

207. *Id.* at 541.

208. *Id.*

209. *See* Witherspoon v. Illinois, 391 U.S. 510, 522–23 (1968)

> [A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

VII. Conclusion

The Equal Protection Clause should be applied to death qualification, both in its application and more generally. Supreme Court precedent affords the trial judge wide discretion in evaluating a prospective juror's answers and overall credibility, with many limits on the ability of appellate courts to review the trial judge's decision. A disproportionate number of African-Americans are excused from juries in capital cases under death qualification. This effect is not by chance. The potent history of racial discrimination in capital punishment continues to linger in the present, creating a disparate racial gap in support for capital punishment. The disproportionate exclusion of African-Americans from capital juries only exacerbates the effects of racial discrimination in capital sentencing.

The Supreme Court's decision in *McCleskey* poses significant hurdles for a petitioner challenging death qualification generally. However, the small scope of this challenge, improved historical and statistical evidence, and the evolution of capital punishment law post-*Furman* still make it possible to challenge death qualification under *McCleskey*. Also, in specific instances of pretextual prosecutorial discrimination, courts can apply *Batson*'s well-established reasoning and holding to the expansive *Witt* system for death qualification.

This Note has attempted to illuminate how support for capital punishment is not race-neutral, the recognition of which can have effects beyond death qualification.[210] Further efforts should be made to study the claims made in this Note and the nature of racial discrimination in death qualification in general. Additional efforts should also be made to explore the theoretical bases for a challenge to death qualification.[211]

Some states have enacted legislation that may help ameliorate racial discrimination in capital cases.[212] Those states have recognized the widespread problem of racial discrimination in capital punishment. Perhaps more importantly, they understand that we should be concerned about more than just overt racism. These statutes are a large step forward in attempting to root out discrimination in capital punishment.

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210. This recognition could affect the extent to which courts consider ambivalence towards the death penalty a proper race-neutral reason for a peremptory strike under *Batson*. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 343 (2003) (prosecutors citing ambivalence about the death penalty as a justification for their peremptory strikes).

211. *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (exploring the connections between Equal Protection and Due Process in *Lawrence v. Texas*).

212. *See, e.g.,* North Carolina Racial Justice Act, N.C. GEN. STAT. §§ 15A-2010 to -2012 (2009) (declaring that "[n]o person . . . shall be executed pursuant to any judgment that was sought or obtained on the basis of race," and that statistical evidence can be used to help prove that race was a significant factor in the decision to impose death); Kentucky Racial Justice Act, KY. REV. STAT. ANN. §§ 532.300-532.309 (LexisNexis 1998) (forbidding the imposition of a death sentence where "race was a significant factor in decisions to seek the sentence of death" and allowing statistical evidence to be used to help demonstrate the influence of race in the petitioner's case).

Courts should create a death qualification jurisprudence that properly balances the state's interest and the harmful effects of death qualification on the defendant and on the capital punishment system. The modern standard does not properly strike this balance. The risk of racial discrimination is simply too high to justify the modern death qualification system.