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The Growing Unrepresentativeness and Potential Biases of U.S. Death Penalty Juries

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A series of U.S. Supreme Court cases on capital punishment have established a system in which potential jurors can be dismissed if they oppose the death penalty or even if they indicate any degree of doubt or discomfort about applying this ultimate penalty to a convicted felon. Unfortunately, eliminating jurors who have this doubt also skews juries in other ways. Research conducted in the 1990s and earlier has shown that Blacks and women are far more likely to oppose the death penalty than whites and men; consequently, they are far more likely than whites and men to be dismissed from death-penalty juries. The resulting juries end up over-representing whites and men at the expense of Blacks and women. Our research updates the previous studies through 2016 and expands the investigation of death penalty juries to consider ethnic, partisan, and ideological misrepresentations. We conclude that the constitutional right to an impartial jury may be increasingly difficult to guarantee in death penalty cases.

How Legal Cases have Influenced Death Penalty Juries

The right to a trial by a jury of one's peers dates back to early English history. The barons who forced King John to sign the Magna Carta regarded this right as sufficiently important to be included in that landmark social contract. When the American Constitution was written, the Sixth Amendment did not use the phrase "jury of one's peers," but it did guarantee the accused "the right to a speedy and public trial, by an impartial jury." In *Taylor v. Louisiana*, the Supreme Court declared in 1975 that "the selection of a petit jury from a representative cross-section of the community is an essential component of the Sixth Amendment." Jury panels must, therefore, be representative cross-sections of the communities in which criminal trials are held. But individual juries themselves need not be similarly composed, because their make-up depends on "voir dire process" questioning and possible challenges by prosecuting and defense attorneys.

In death-penalty cases, an additional set of Supreme Court decisions have furthered reshaped juries. In *Witherspoon v. Illinois* (1968), the Court ruled that jurors who do not support the death penalty can be challenged and excluded on the ground that they might nullify the law in death-penalty cases. In *Wainwright v. Witt* decided in 1985, the Court concluded that a juror could be excused if he or she had a "substantial impairment of the ability to impose the death penalty." In *Uttecht v. Brown* (2007), the Court moved even further in the direction of removing death-penalty opponents from juries – by ruling that trial courts should be given deference in determining what would be a substantial impairment. Essentially, if the judge agrees with a prosecutor's claim that a prospective juror was substantially impaired in his or her ability to impose the death penalty, the decision of the trial court should be final and difficult to appeal. In practice, this means that almost any expressed reservation about the application of the death penalty can be used to remove a juror, making it far easier for prosecutors to create a jury that is, in the words of Justice Stewart, "uncommonly

willing to condemn a man to die."

Findings about Juror Eligibility – and Their Worrisome Implications

Given established legal rules about jury composition, what can we say about the representativeness of U.S. juries? Our method for investigating who can be dismissed from a jury because of opposition to the death penalty is simple. Using data from 1973 to 2016 drawn from the National Opinion Research Center's General Social Surveys, we measured various social groups' answers to questions about the death penalty. Using those answers to determine likely eligibility to serve on death penalty juries, we measured jury representativeness by the ratio of the number of respondents who are death-penalty eligible to the number who are in the entire population. For example, in 2016, the latest year for which we had data, 74 percent of the sample was white, but 80 percent of the respondents eligible to serve on death-penalty juries were white. The ratio of 80 to 74 equals 1.09, which indicates that whites were about nine percent over-represented. In contrast, Blacks were under-represented by 32 percent, because about one-third of African Americans are automatically excluded from death-penalty juries because of their political beliefs. Beyond demographics, Republicans were over-represented by 26 percent, whereas Democrats were under-represented by 23 percent; conservatives were over-represented by 17 percent and liberals under-represented by 30 percent.

In total, we find that support for the death penalty is strongest among whites, males, Republicans, and conservatives – and weakest among Blacks, Asians, Latinos, women, Democrats, and liberals. Since the late 1990s, overall American support for the death penalty has declined from 80 percent in 1994 to 61 percent in 2016. Not surprisingly, during this span, the under-representation of Blacks, Asians, Latinos, women, Democrats, and liberals among death-penalty-qualified jurors has substantially increased. Among Republicans, meanwhile, over-representation grew from 10 to 15 percent to become a whopping 26 percent by 2016.

The swelling of unrepresentative jury pools and the growing unrepresentativeness of death penalty juries are both worrisome realities. The issue is more than just a matter of the relative absence of Blacks, Latinos, and women, because the kinds of citizens who end up overrepresented on juries making life and death choices – whites, males, Republicans, and conservatives – have been found by scholars to be more likely to hold a variety of socially consequential prejudices. Americans need to worry about the de facto emergence of a jury selection system that leans toward selecting jurors who may make fateful decisions based on greater readiness to accept severe penalties – and also skew their decisions based on the race, ethnicity, or religion of the defendant. The very principle of impartial trial by jury may be at stake.