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### Could the Pope's Call to End the Death Penalty Keep Catholics Off Juries?

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**Outlook** Perspective

# Could the pope's call to end the death penalty keep Catholics off juries?

## "Death qualified" juries shield capital punishment from social change

By Aliza Plener Cover

In August, Pope Francis declared the death penalty [morally unacceptable in all circumstances](#) and committed the church to its global abolition. This pronouncement broke from previous Catholic teaching, which permitted the death penalty in "very rare" cases of "absolute necessity."

Death penalty abolitionists hold out hope that the pope's new call to action may eventually sway the American public: Catholic voters and politicians might become more inclined to repeal the death penalty, Catholic prosecutors might increasingly exercise their discretion not to pursue capital punishment, and Catholic judges (including the five Catholic justices on the Supreme Court) might grow more receptive to legal arguments that limit the practice. A change in public opinion could also influence the Supreme Court, which considers society's "evolving standards of decency" in evaluating whether a punishment is "cruel and unusual" under the Eighth Amendment.

But because of the anomalous way we select juries in capital cases, greater opposition to the death penalty among Catholics could, counterintuitively, increase the number of death sentences imposed in this country. Such opposition could even solidify judicial support for capital punishment. This paradox is possible because of a process called "death qualification," in which a judge can disqualify certain prospective jurors who are opposed to executions. The pope's sharpening of the Catholic position on the death penalty helps reveal the problems with this system.

Death qualification produces a smaller, more adamantly pro-execution pool of jurors. Studies [show](#) that death-qualified juries are more inclined not just to impose the death penalty (because, somewhat obviously, those with qualms are excluded) but to convict in the first place. One [review of 14 studies](#) found that a "favorable attitude towards the death penalty translates into a 44% increase in the probability of a juror favoring conviction." [Research suggests](#) that death-qualified jurors are more persuaded by aggravating evidence at sentencing and less persuaded by mitigating evidence than those who are disqualified.

Death qualification weakens the connection between capital trial outcomes and the views of the broader community. In [a study of 11 capital trials in Louisiana](#) from 2009 to 2013, I found that more than 22 percent of prospective jurors were removed because they opposed the death penalty. And death qualification can disproportionately affect certain minority groups. One 2010 study found that in a mock capital sentencing

proceeding, Catholics [were already more than twice as likely](#) as others to be excluded from juries considering a death sentence. (African Americans are also more likely to be removed.)

After the pope's pronouncement, judges may disqualify even more Catholics during jury selection. And prosecutors may begin to more aggressively bar Catholics from juries using another method — “peremptory strikes.” Through peremptory strikes, prosecutors can exclude a limited number of prospective jurors for almost any reason.

Of course, not every Catholic follows every papal declaration, and American Catholics — who make up roughly a quarter of the U.S. population — have never been uniformly against capital punishment. In June, the Pew Research Center [reported](#) that 53 percent of American Catholics supported the death penalty (compared with 54 percent of all Americans), and 42 percent of Catholics opposed it (compared with 39 percent of all Americans). That was more than two decades after Pope John Paul II said justifiable exceptions were so rare as to be “practically nonexistent.”

Still, that's far less support than among other religious subgroups; 73 percent of white evangelicals, for instance, support capital punishment. And the poll figures possibly understate Catholic opposition, which may be more intense because it's rooted in explicit teachings of the church. Nor do the statistics capture the crucial question of whether prosecutors view Catholics as a bloc that disproportionately opposes executions.

Death qualification operates with the Supreme Court's blessing. [In 1968](#), the court decided that a prospective juror cannot be excluded simply because she has “general objections” to the death penalty, but it authorized disqualification of those who would automatically vote against death, regardless of the evidence. (Judges had been disqualifying jurors for anti-death-penalty views before the 1968 decision, but in an ad hoc way.) Later, [in 1985](#), the court made it even easier to exclude death penalty opponents, permitting the removal of any prospective juror found to be “substantially impaired” in the ability to fairly consider capital punishment, where legally authorized. Since then, the court has become increasingly lax in allowing for-cause strikes, [approving the exclusion of jurors](#) who voiced concerns about the death penalty, even when they expressly claimed they could still consider it.

To see the interplay between death qualification and the pope's declaration, imagine jury selection in a death penalty case. One prospective juror is a devout Catholic, familiar with current doctrine. “Could you consider imposing the death penalty?” the prosecutor asks her. Before August, her response might have been, “Yes, under rare circumstances.” Now, she might respond, “Well, I want to follow the law, but it's against the teachings of my church.” The judge would be more likely to find her “substantially impaired” and strike her for cause. The jury selected as a result would probably be less Catholic and more strongly pro-capital-punishment.

Then peremptory strikes would come into play. Explicitly race- and gender-based strikes are impermissible, but the Supreme Court has not ruled on the constitutionality of strikes based on religion — especially when faith maps fairly closely with strong views on punishment. And the peremptory-strike process is opaque enough to allow plenty of backdoor discrimination.

2/20/2019 Could the pope's call to end the death penalty keep Catholics off juries? The Washington Post  
Repeated often enough, the combination of death qualification and peremptory strikes could exacerbate the split between community sentiment and trial outcomes. Widespread and growing opposition to the death penalty may simply lead to the exclusion of a higher percentage of death-averse jurors, which may lead to a steady, or even increasing, number of death sentences.

The Supreme Court [has identified](#) two supposedly objective data points it uses to evaluate evolving standards of decency related to capital punishment: laws authorizing it and numbers of death verdicts. If increased juror disqualification paves the way for more death sentences, the justices might conclude that support for the death penalty remains robust, despite a mounting societal movement against it.

Over the past half-century, the Supreme Court has repeatedly affirmed the practice of death qualification, without fully recognizing the mischief it has wrought. The pope's recent pronouncements heighten the tensions caused by an unjust system that allows only the most punitive Americans to serve on death penalty juries. It's time for death qualification to go.

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