

DEATH QUALIFICATION AND THE RIGHT TO TRIAL BY JURY: AN ORIGINALIST ASSESSMENT

INTRODUCTION

The Sixth Amendment of the Constitution guarantees criminal defendants the right to a trial “by an impartial jury.”¹ But criminal procedure has evolved substantially since 1791, raising the question of which changes are permissible under the original meaning of the Sixth Amendment. As now-Judge Joan Larsen notes, the modern jury “bears such faint resemblance to the jury of 1791, that if the Court decides to seriously engage the project of restoring the original jury it will find itself very busy indeed.”² However, the Court has shown some willingness to cut through precedent to return to the original public meaning in criminal procedure cases. Indeed, “the Court’s Sixth Amendment jurisprudence is in the midst of an originalist revolution. Starting with *Jones v. United States* and continuing through *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Crawford v. Washington*, the Court stands poised to refasten Sixth Amendment jurisprudence to its historical underpinnings.”³ This “originalist revolution” continued this year in *Ramos v. Louisiana*,⁴ where the Court held that non-unanimous jury convictions for serious crimes violate the Sixth Amendment.⁵ Given this trend, it is possible that the Court will reassess its death qualification jurisprudence on originalist grounds.

This Note analyzes whether death qualification—the process of removing potential jurors who are unwilling to impose the death penalty—survives an originalist assessment. It begins with the background of death qualification and then analyzes whether the process survives a number of potential originalist

1. U.S. CONST. amend. VI.

2. Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism’s Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 961 (2010) (footnote omitted).

3. G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 88 (2008) (footnotes omitted).

4. 140 S. Ct. 1390 (2020).

5. *Id.* at 1394–97.

objections. Ultimately, it concludes that although there was no direct analogue for death qualification at common law or in criminal procedure at the time of the ratification of the Constitution and Bill of Rights, death qualification does not violate an originalist understanding of the Sixth Amendment right to an impartial jury or of a constitutional criminal trial.

I. SUPREME COURT JURISPRUDENCE AND THE POLICY OF DEATH QUALIFICATION

A. *Legal Background*

Death qualification is a step in the jury selection process in capital cases in which potential jurors are dismissed if they would be categorically unwilling to impose the death penalty.⁶ This includes potential jurors who are unwilling to impose the death penalty as a sentence as well as those who are, regardless of the evidence, unwilling to find guilt when execution is a potential penalty.⁷ These potential jurors are excluded from the jury for cause, thus not requiring any of the prosecution's peremptory strikes.⁸ Only potential jurors who are unwilling to impose the death penalty are excluded: those who personally oppose the death penalty but would be willing to impose it are not.⁹

The question of whether death-qualified juries violate the original meaning of the right to an impartial jury is significant in criminal procedure. In *Lockhart v. McCree*,¹⁰ the Supreme Court rejected the argument that excluding jurors who are unwilling to impose the death penalty in capital cases violates a defendant's Sixth Amendment right to an impartial jury.¹¹ Writing for the Court, Justice Rehnquist stated:

[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on

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

7. *Id.* at 680.

8. See *id.* at 677.

9. *Id.* at 681–82.

10. 476 U.S. 162 (1986).

11. See *id.* at 183 (“[I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.”).

the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.¹²

However, Justice Rehnquist relied on precedent and reason rather than analysis of the original public meaning of the Constitution to arrive at this conclusion.¹³ As the current Court revisits various aspects of criminal procedure with an originalist lens, it is worth analyzing whether the original meaning of the Sixth Amendment would prevent the exclusion of jurors who would be unwilling to impose capital punishment.

B. *The Policy Significance of Death Qualification*

The impact of a constitutional ban on death qualification would be significant. Allowing those who are unwilling to impose the death penalty to serve on capital juries would effectively end the death penalty in America. Because the death penalty has become more controversial and less popular over the last several decades,¹⁴ it is likely that many capital juries would include at least one person that is unwilling to impose the sentence. But the elimination of the death penalty by objecting jurors could be just the tip of the iceberg if the Court found that jurors could not be excluded for cause if they were unwilling to uphold the law. Indeed, with the rise of the prison abolition movement and the increasing categorical opposition to imprisonment as well as the death penalty, objecting jurors could potentially alter the entire system of criminal justice in America.¹⁵

12. *Id.* at 184.

13. *See id.* at 178 (“The view of jury impartiality urged upon us by [the defendant] is both illogical and hopelessly impractical.”).

14. *See, e.g., Death Penalty*, GALLUP (2019), <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/3P2S-D7M2>] (charting the decline of American support for the death penalty for a person convicted of murder from a high of 80 percent in 1994 to 56 percent in 2019).

15. Prison abolitionism has gained increased publicity in recent years. Some self-described prison abolitionists are merely advocates of aggressive forms of criminal justice reform with the aspirational goal of eliminating the need for prison. *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015). However, others advocate for the wholesale end of prison even for the most violent criminals. As John Washington summarizes, “Abolitionists believe that incarceration, in any form, harms society more than it helps.” John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/what-is-prison-abolition/> [<https://perma.cc/GPA5-UFAZ>].

On the other hand, the exclusion of those who are unwilling to impose the death penalty from juries raises compelling questions of partiality as the word is commonly understood today. There is robust literature to suggest that death qualification disproportionately reduces the number of women and people of color on capital juries.¹⁶ There is also evidence to suggest that death-qualified juries are more conviction-prone than normal juries in criminal trials.¹⁷ However, the Court in *Lockhart* rejected these arguments, noting “serious doubts about the value of these studies in predicting the behavior of actual jurors.”¹⁸ The Court went further and said that, even assuming they accepted the studies as true, death qualification would still be constitutional.¹⁹ The Court noted that there is no “fair-cross-section” requirement for petit juries, but that even if there were such a requirement, the Court found that:

The essence of a “fair-cross-section” claim is the systematic exclusion of “a ‘distinctive’ group in the community.” In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not “distinctive groups” for fair-cross-section purposes.²⁰

In short, the Court found that the exclusion of potential jurors with beliefs that render them unwilling to impose a penalty

Indeed, the *Harvard Law Review* recently dedicated an entire issue to prison abolitionism. See *Introduction*, 132 HARV. L. REV. 1568 (2019) (introducing the *Harvard Law Review*'s issue focused on prison abolition).

16. See, e.g., Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 46 (1984); see also J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1133 (2014) (arguing that higher levels of opposition to the death penalty most likely contribute to lower participation in trials with capital charges).

17. See, e.g., Fitzgerald & Ellsworth, *supra* note 16, at 42–44. Robert Fitzgerald and Phoebe Ellsworth found that death-qualified jurors are less likely to believe that it is better to let some guilty parties go free than to convict the innocent. *Id.* at 42. They are also more likely to think that a non-testifying defendant is probably guilty and generally favored harsher sentences. *Id.* at 42–44.

18. *Lockhart v. McCree*, 476 U.S. 162, 171 (1986).

19. See *id.* at 173 (“Having identified some of the more serious problems with [the defendant’s] studies, . . . we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that ‘death qualification’ in fact produces juries somewhat more ‘conviction-prone’ than ‘non-death-qualified’ juries. We hold, nonetheless, that the Constitution does not prohibit the States from ‘death qualifying’ juries in capital cases.”).

20. *Id.* at 174 (citation omitted) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

does not violate the Sixth Amendment because they are not a “distinctive group,” but rather an ideological one.

However, death qualification can occasionally result in juries that substantially diverge from their communities’ values. The case of Dzhokhar Tsarnaev, the Boston Marathon Bomber, is an illustrative example. Though Massachusetts abolished the death penalty under state law, Tsarnaev was convicted under federal law for his attack which killed three people, and he was sentenced to death.²¹ However, a *Boston Globe* poll released shortly after Tsarnaev’s trial found that only a third of Massachusetts residents and only a quarter of Boston residents favor the death penalty for egregious crimes.²² This discrepancy between state law and public opinion and federal charges led to an unusual situation where the majority of potential jurors might be excluded based on their unwillingness to impose the death penalty.²³ Despite death qualification excluding ideological adherents rather than any specific demographic group, the fact that it likely removes the majority of the community as a whole from serving as jurors in some cases is uncomfortable.

II. POTENTIAL ORIGINALIST OBJECTIONS TO DEATH QUALIFICATION

An originalist, however, is not concerned with policy arguments or precedent in determining whether a constitutional right exists. Instead, an originalist looks to the public meaning of the document at the time of its enactment to determine the rights guaranteed by constitutional text.²⁴ In determining the

21. See Katharine Q. Seelye, *Dzhokhar Tsarnaev Given Death Penalty in Boston Marathon Bombing*, N.Y. TIMES (May 15, 2015), <https://nyti.ms/1d3IpCz> [<https://perma.cc/TF7V-KUQM>].

22. See Evan Allen, *Few favor death for Dzhokhar Tsarnaev, poll finds*, BOS. GLOBE (Apr. 26, 2015, 7:55 PM), <https://www.bostonglobe.com/metro/2015/04/26/globe-poll-shows-diminishing-support-for-death-penalty-for-tsarnaev/S3GMhFIGj5VUkZrmLzh1iN/story.html> [<https://perma.cc/RKC4-TA8Z>]. Interestingly, even fewer supported the death penalty for Tsarnaev specifically than supported the death penalty in general. *See id.*

23. See Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 115 (2016) (“Because Tsarnaev’s federal capital case was tried, extraordinarily, in an abolitionist state, the impact of death qualification was particularly noteworthy; yet death qualification shapes verdicts in death-penalty states nationwide . . .”).

24. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 37–39 (1997). Here, Justice Scalia outlines his methodology and distin-

original meaning of the right to trial by jury, Judge Larsen states that:

[I]f the jury provisions [of the Constitution] state a rule, demanding trial *by* a particular entity called a *jury*, then the originalist's task is to give effect to those terms as they were understood in 1791. Put differently, the question for an originalist is . . . what attributes comprised the jury trial of 1791? Those are retained because the text so demands.²⁵

In short, the originalist must try to determine the "attributes" that defined jury trials in 1791.

To determine these attributes and interpret the Constitution, Judge Larsen notes that an originalist must start with the text of the document, searching it for clear rules or standards.²⁶ The Sixth Amendment provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.²⁷

Unlike some provisions of the Constitution that provide clear rules,²⁸ the term "impartial jury" and its related protections are not apparent from the text.

In determining the protections guaranteed under the Sixth Amendment right to an impartial jury, Justice Thomas wrote in dissent in *Peña-Rodriguez v. Colorado*²⁹ that the right "is limited to the protections that existed at common law when the Amendment was ratified."³⁰ In other words, Justice Thomas asserts that the right to a trial by an impartial jury had a specific

guishes it from interpreting law based on the drafters' intent, specifically noting, "[w]hat I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." *Id.* at 38.

25. Larsen, *supra* note 2, at 992.

26. *See id.* at 989–90.

27. U.S. CONST. amend. VI (emphasis added).

28. *See* Larsen, *supra* note 2, at 988–89 (noting the age qualifications of congressmen, senators, and Presidents as examples of rules in the Constitution as opposed to other, less precise provisions).

29. 137 S. Ct. 855 (2017).

30. *Id.* at 872 (Thomas, J., dissenting).

legal meaning which governs its interpretation.³¹ Justice Thomas views the originalist interpretation of the term “impartial jury” to be the contemporaneous legal meaning.³² As evidence for his assertion that the original public meaning of the Sixth Amendment right to an impartial jury is derived from English common law, Justice Thomas cites Justice Story, stating that “‘the trial by jury in criminal cases’ protected by the Constitution is the same ‘great privilege’ that was ‘a part of that admirable common law’ of England.”³³ Thus, to determine the common law at the time of ratification, Justice Thomas looks to commentators on both English and American common law.³⁴

Justice Thomas also looks to state practice “[a]t the time of the founding” as evidence of the Sixth Amendment’s original public meaning.³⁵ This approach of looking to state practice for evidence of the original public meaning of constitutional provisions is consistent with the approach that Justice Scalia took in *District of Columbia v. Heller*,³⁶ where he looked to state constitutions and practices to discern the original public meaning of the Second Amendment right to bear arms.³⁷ Because the plain meaning of the Sixth Amendment’s text does not clearly answer whether the right to an “impartial jury” provides a right to defendants against the death qualification of juries, it is necessary to consult the common law and state practices.

31. See Mike Rappaport, *The Language of the Law and Peña-Rodriguez v. Colorado*, LAW & LIBERTY (Mar. 14, 2017), <https://www.lawliberty.org/2017/03/14/the-language-of-the-law-and-pena-rodriguez-v-colorado/> [<https://perma.cc/4KE7-X7R9>].

32. Originalist scholars debate whether some passages of the Constitution should be interpreted by their original public meaning (that is, what an average person would understand a passage to mean) or by their original legal meaning (that is, what a lawyer at the time of ratification would understand a passage to mean). See generally John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321 (2018). This Note assumes that Justice Thomas’s method is correct, and to the extent that lay and legal meaning diverge in interpreting the Sixth Amendment, the original legal meaning is the correct originalist interpretation.

33. *Peña-Rodriguez*, 137 S. Ct. at 872 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773, at 652–53 (1833)).

34. See *id.* (noting William Blackstone’s, Matthew Bacon’s, Edward Coke’s, and Thomas Cooley’s comments on the meaning of impartiality).

35. *Id.*

36. 554 U.S. 570 (2008).

37. *Id.* at 584–86 (noting the constitutions of nine states and their related practices as evidence of the meaning of the term “bear arms”).

There are several potential originalist attacks on death qualification that must be assessed to determine whether the practice is constitutional. First, because death qualification involves the removal of jurors based on their convictions, it changes the potential pool of jurors.³⁸ If such exclusion changes the composition of the jury such that it is no longer impartial under the original meaning of the Sixth Amendment, then the practice is unconstitutional. Second, death qualification inherently prevents juries from judging law by removing jurors who oppose it.³⁹ If the right to a trial by jury in criminal cases provides a robust right to defendants to have their respective jurors judge the law as well as the evidence, then death qualification cannot stand. Third, death qualification provides the court and prosecution a means to shape juries for which there was no analogue at common law or in state practice.⁴⁰ For death qualification to be legitimate under an originalist constitutional assessment, it must be able to survive these three objections. And it can.

A. *Objection One: The Right to an Impartial Jury*

The first objection is the most easily dismissed from an originalist perspective. In his dissent in *Lockhart*, Justice Marshall was persuaded by the literature suggesting that death-qualified juries are more prone to convict, stating that he believed the defendant had “succeeded in proving that his trial by a jury so constituted violated his right to an impartial jury.”⁴¹ This literature gives a reason to question death qualification as a policy choice. However, the defendant in *Lockhart* did not show that his jury was impartial in any sense that would violate the meaning of an impartial jury in 1791.

38. See Sullivan, *supra* note 16, at 1133.

39. See Larsen, *supra* note 2, at 968–69 (arguing that the “Founders’ jury . . . had the right to judge the law” in addition to their right to determine a defendant’s guilt or innocence based on evidence).

40. See *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968) (clarifying that death qualification is permissible when a juror’s “attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt”).

41. *Lockhart v. McCree*, 476 U.S. 162, 193 (1986) (Marshall, J., dissenting). However, Justice Marshall went on to concede that no “individual on the jury that convicted [the defendant] fell short of the constitutional standard for impartiality” but instead embraced the defendant’s argument “that, by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage at his trial.” *Id.*

There is substantial evidence of the original public meaning of an impartial jury as guaranteed by the Sixth Amendment that contradicts Justice Marshall's assessment. William Blackstone noted that partiality was one of the four for-cause challenges that either party could use against potential jurors.⁴² He wrote:

Jurors may be challenged *propter affectum*, for suspicion of bias or partiality. . . . A *principal* challenge is such, where the cause assigned carries with it *prima facie* evident marks of suspicion either of malice or favour: as, that a juror is of kin to either party within the ninth degree; . . . that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him⁴³

Blackstone further notes that out of "caution against all partiality and bias," a whole array of jurors would be "quash[ed]" if the officer or sheriff involved in gathering the array were "suspected to be other than indifferent."⁴⁴ Although Blackstone wrote here about selection of civil juries, he notes that the same criteria were used for selecting and challenging jurors in criminal cases.⁴⁵ Blackstone's definition of partiality is quite narrow. To be disqualified as impartial, a juror must either have a familial or other close personal association with the defendant or, alternatively, be financially interested in the case. For instance, a juror who took bribes "for his verdict" was disqualified as partial. These narrow criteria stand in contrast to the sources of impartiality that the defendant proposed in *Lockhart*, which involved ideological predisposition rather than any direct, personal bias.⁴⁶

Early post-revolutionary American case law also confirms that the original meaning of "impartiality" was narrow, though the case law indicates that a juror's public prejudging of a case

42. 3 WILLIAM BLACKSTONE, COMMENTARIES *361–64.

43. *Id.* at *363 (footnote omitted).

44. *Id.* at *365.

45. See 4 BLACKSTONE, *supra* note 42, at *346 ("Challenges may . . . be made, either on the part of the king, or on that of the prisoner . . . for the very same reasons that they may be made in civil causes.").

46. See *Lockhart*, 476 U.S. at 177 (rejecting the defendant's argument that the jury "lacked impartiality because the absence of [those unwilling to impose the death penalty] 'slanted' the jury in favor of conviction").

might also render him partial. In *Peña-Rodriguez*, Justice Thomas cited to *Pettis v. Warren*,⁴⁷ which echoed Blackstone's view that impartial jurors must "have no interest of their own affected, and no personal bias, or pre-possession, in favor [of] or against either party."⁴⁸ In *Goodright v. M'Causland*,⁴⁹ the Supreme Court of Pennsylvania found that a juror's small bet on the outcome of a case was insufficient evidence of partiality to overturn a verdict, as was the fact that jurors had eaten with (and possibly at the expense of) one of the parties.⁵⁰ And in *United States v. Worrall*,⁵¹ a federal court listed situations that could "prevent a federal officer" from being "impartial" in the "performance of his duty."⁵² Disqualifying relationships between an officer and a defendant included "assault and battery [against the officer]; or the [officer's] recovery of a debt, as well as the offer of a bribe."⁵³ Regarding prejudging cases, however, when a defendant in a high-profile murder case motioned for the right to ask potential jurors whether they had publicly prejudged his case, the sitting judges on the North Carolina Superior Courts of Law and Equity agreed that "there [was] no precedent of this kind," though they ultimately permitted it.⁵⁴ Similarly, a federal court in Pennsylvania granted a new trial when a juror had publicly declared before the trial that the defendant should be executed.⁵⁵ Thus, although the original meaning of an "impartial jury" as seen in early American case law may have been slightly broader than Blackstone's criteria, it remained very narrow, only potentially adding public prejudgment of a case.

Moreover, the history, both in England and colonial America, confirms a narrow definition of partiality. The right to a jury trial derived from Magna Carta's guarantee to trial by a jury of

47. 1 Kirby 426 (Conn. Super. Ct. 1788).

48. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 872 (2017) (Thomas, J., dissenting) (alteration in original) (quoting *Pettis*, 1 Kirby at 427) (internal quotation marks omitted).

49. 1 Yeates 372 (Pa. 1794).

50. *Id.* at 378.

51. 28 F. Cas. 774 (C.C.D. Pa. 1798) (No. 16,766).

52. *Id.* at 777.

53. *Id.*

54. *State v. Norris*, 2 N.C. (1 Hayw.) 429, 430 (N.C. Super. Ct. Law & Eq. 1796).

55. See *United States v. Fries*, 9 F. Cas. 826, 917–18, 921–23 (C.C.D. Pa. 1799) (No. 5,126).

one's peers.⁵⁶ The definition of "peers" was broad. Professor John Baker notes that "[p]eers . . . were of two classes only: temporal lords of Parliament, and commoners."⁵⁷ The ancient right to a trial by one's peers, then, did not historically guarantee a cross section of society or a group with which a defendant might have particular affinity. In late eighteenth-century England, there were, in fact, property requirements for jurors: they had to own land that produced at least ten pounds of income per year.⁵⁸ However, this did not leave only the wealthy to serve. Jurors often derived from "[t]he occupations of farmer, artisan, and tradesman," and "[t]he jury was . . . neither aristocratic nor democratic."⁵⁹ Jurors came from a wide socioeconomic spectrum, but juries in late eighteenth-century England were not a true cross section of society.

In colonial America, however, jurors better reflected their communities and had much in common with defendants. As Professor Bruce Mann writes of jurors in colonial Connecticut, "In background, experiences, and outlook [the jurors] were very much like the litigants whose disputes they determined, and not very different from the judges who oversaw them."⁶⁰ Indeed, juries often knew the parties personally or by reputation as "they were neighbors or from nearby towns."⁶¹ Inevitably, jurors would know of the alleged crimes and have preexisting notions of the defendants, which are biases that modern criminal procedure seeks to avoid. This familiarity suggests that impartiality from an originalist's perspective is quite narrow. Jurors in 1791 were far less insulated and brought far more per-

56. See J.H. Baker, *Criminal Courts and Procedure at Common Law 1550–1800*, in *CRIME IN ENGLAND: 1550–1800*, at 15, 23 (J.S. Cockburn ed., 1977) ("Nearly all lawyers in our period traced the right to trial by jury to chapter 29 of Magna Carta.").

57. *Id.*

58. John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, in *THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY: 1700–1900*, at 13, 25 (Antonio Padoa Schioppa ed., 1987).

59. *Id.*

60. BRUCE H. MANN, *NEIGHBORS AND STRANGERS: LAW AND COMMUNITY IN EARLY CONNECTICUT* 71 (G. Edward White ed., 1987).

61. *Id.* at 71. Professor Mann provides an illustrative example of the challenges that well-known parties faced in litigation by detailing the suit between the Wheeler and Winthrop families in Connecticut. "The parties were prominent, their differences well known, their antipathy implacable. Jurors, who were drawn from the county, could not help but know of the litigants and the context of the lawsuit." *Id.* at 72.

sonal knowledge than society would prefer today. As such, broad assertions of impartiality based on filtering out those of certain views are not supported by the original meaning of the Sixth Amendment.

B. Objection Two: Judging the Jury's Role

The second potential originalist objection is the most challenging to death qualification. Ben Cohen and Robert Smith have challenged the constitutionality of death qualification on originalist grounds.⁶² Central to their analysis is the argument that juries in 1791 judged both law and fact.⁶³ However, Cohen and Smith overstate the scholarly certainty on this issue. First, although juries judged law in some states in the colonial and early American period, in others they were clearly instructed not to do so. Second, even where juries did judge law as well as fact, it seems that they were exercising a power rather than fulfilling a duty. Indeed, based on evidence from the Judiciary Act of 1789⁶⁴ and the common law, the original public meaning of the Sixth Amendment did not grant juries the right to judge law, even if they had the power to acquit against the evidence.

The implications for the constitutionality of death qualification are clear. The ability of juries to judge law had two aspects: first, juries often interpreted the law, and, thus, lawyers could argue for their preferred legal interpretations at trial.⁶⁵ The second aspect of jurors judging the law is the ability to pass judgment on the law, declining to apply it if they thought it was unjust.⁶⁶ If jurors have the right to judge law in this second sense, then it is only a small step to say that it is unconstitutional to exclude a juror because she cannot uphold the law. Indeed, if jurors who cannot impose a given law are excluded outright, then it is not possible for juries to subsequently judge the law, unless the jury has a change of heart on the law in question during the trial and deliberations and only then decide to judge the law.

62. See Cohen & Smith, *supra* note 3.

63. See *id.* at 87 ("The Framers understood criminal petit juries to be responsible for making determinations of both fact and law.").

64. Ch. 20, 1 Stat. 73.

65. See William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1005 (2010).

66. See Cohen & Smith, *supra* note 3, at 118–19.

To determine whether the right to judge law is included within the original public meaning of the constitutional right to a jury in criminal trials, one must ask whether it was one of the “protections that existed at common law” when the Bill of Rights was ratified,⁶⁷ and whether state practice in 1791 provides evidence for such a right. This assessment will begin by reviewing the common law.

Two leading English commentators, Edward Coke and Blackstone, support the proposition that juries determined fact and judges determined law. For example, Coke stated, “The most usual triall of matters of fact is by 12 . . . men; for *ad quæstionem facti non respondent iudices*: and matters in law the judges ought to decide and discusse; for *ad quæstionem juris non respondent juratores*.”⁶⁸ Professor James Bradley Thayer infers from this passage that “[i]n a sense [it] emphasizes the limitations of the jury, — as saying that it is *only* fact which they are to decide.”⁶⁹ Professor Thayer restates his understanding of Coke’s view on the issue, saying:

In general, issues of fact, and only issues of fact, are to be tried by jury; when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgment upon these. That this determination by the jury involves a process of reasoning, of inference and judgment, makes no difference . . .⁷⁰

Professor Thayer’s summary of Coke’s view holds two implications. First, Coke clearly believed that the jury’s sole domain was fact rather than law. Second, Thayer firmly disputed the notion that applying the law to facts was the same as judging law. Juries, of course, must apply the law, but that does not

67. Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 872 (2017) (Thomas, J., dissenting) (explaining how to adduce whether the Constitution provides a jury-related right to defendants).

68. EDUARDO COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234, at 155b (Francis Hargrave & Charles Butler eds., London, Luke Hunsard & Sons 16th ed. 1809). Coke’s Latin maxim translates, “Judges do not answer questions of fact; juries do not answer questions of law.” THE DICTIONARY OF LEGAL QUOTATIONS 139 n.2 (James William Norton-Kyshe ed., 1904).

69. James B. Thayer, “Law and Fact” in *Jury Trials*, 4 HARV. L. REV. 147, 149 (1890).

70. *Id.* at 150.

make them masters over it.⁷¹ As Professor Thayer elucidates, Coke's commentary strongly suggests that juries did not have the right to judge law at common law.

Though less explicit on the issue, Blackstone seems to make the same delineation as Coke. Indeed, Blackstone refers to jurors explicitly as "judges of fact" without mentioning any ability to judge law.⁷² To be sure, this exclusion is not dispositive, but it is negative evidence of Blackstone's views of juries as finders of fact rather than judges of law. Furthermore, Blackstone's recounting of the jurors' oath in criminal cases is telling. He writes that jurors were "sworn 'well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to their evidence.'" ⁷³ Thus, Blackstone notes the jury's role in finding fact and weighing evidence rather than judging law. In discussing criminal verdicts, Blackstone provides no evidence that juries were to judge law. Instead, Blackstone states that juries had the option to rely on the judge to help them render a special verdict in cases "where they *doubt* the matter of law."⁷⁴ This consultation of the court is by the jury's choice, and the jury maintains "an unquestionable right of determining upon all the circumstances, and finding a general verdict."⁷⁵ However, Blackstone's comment on jurors' fears of violating the law through their verdict is telling. He states that juries might submit a special verdict to avoid risking "a breach of their oaths" through a "verdict [that is] notoriously wrong."⁷⁶ If Blackstone believed that juries had the right to judge the law as well as the evidence, he would not expect them to fear being wrong on points of law; instead, jurors

71. Professor Thayer's personal understanding of the delineation between law and fact was even more aggressive. Indeed, Professor Thayer argued that judges could even encroach on the judging of fact to some degree. He noted that "the allotment of fact to the jury, even in the strict sense of fact, is not exact," instead pointing out that judges would sometimes judge questions of fact "by calling them questions of law." *Id.* at 159. For instance, Professor Thayer points out that judges maintained the right to determine "the construction of writing" by using "historical and administrative" justifications despite the construal of documents not actually being a matter of law. *Id.* at 160.

72. 3 BLACKSTONE, *supra* note 42, at *361.

73. 4 BLACKSTONE, *supra* note 42, at *348 (emphasis added).

74. *Id.* at *354.

75. *Id.*

76. *Id.*

would have been solely concerned with what they personally thought was fair to the defendant rather than violating their society's laws. Put another way, if the proper role of Blackstone's jury were to judge law as well as fact, the jury's judgment, by definition, could not be "notoriously wrong."⁷⁷ Instead, in this hypothetical jury common law system, the law would largely be made via jury interpretation. However, Blackstone clearly rejects this hypothetical system. Blackstone's commentaries, like those of Coke, strongly support the proposition that juries did not have a right to judge law.

In practice, it was very rare for juries to acquit against the evidence in England during the late eighteenth century, and most cases where juries acquitted against the evidence were political offenses.⁷⁸ Professor Langbein's commentary on English jury instructions affirms Blackstone: "The judge's opinion upon a matter of law was in theory binding upon the jury."⁷⁹ However, he points out that in most criminal cases the law was not complicated, even though determining the facts might be.⁸⁰ As such, Professor Langbein "doubt[s] that the jury was much instructed in routine cases."⁸¹ Thus, the common law as well as contemporary practice in England shows that there was no right there for juries to judge law as well as fact.

The evidence of original public meaning from state practice in 1791 is less clear on whether juries have the right to judge law, but the stark differences among state practices suggests that the original public meaning of the Sixth Amendment did not guarantee a constitutional right for juries to judge law as well as fact. Legal scholars debate whether juries in early America judged law in addition to fact, and Judge Larsen argues it is "the dominant scholarly position" that juries had a

77. *Id.*

78. See Langbein, *supra* note 58, at 36 ("If the jury persisted in returning a verdict contrary to the judge's wishes, it mattered greatly whether the verdict was one of conviction or acquittal. . . . As a practical matter . . . acquittal was the important sphere of potential judge/jury disagreement. Even there, however, it is hard to detect instances of disagreement about acquittal in the later eighteenth century, apart from a few political offenses, of which seditious libel was the most important.").

79. *Id.* at 35.

80. *Id.*

81. *Id.*

right to judge law.⁸² Even the dissenting scholars acknowledge that they are arguing against “the conventional wisdom” that “juries acquired the right to determine the law as well as the facts in colonial times.”⁸³

Cohen and Smith cite Professors Akhil Amar and William Nelson, and leading early American lawyers, such as John Adams, to support the proposition that early American juries were entitled to judge law as well as fact.⁸⁴ They argue that what they view as the unconstitutional removal of juries’ right to judge law “is of particular consequence in cases involving the ‘death-qualification’ of jurors.”⁸⁵ Such an assertion that the modern arrangement is an unconstitutional shift from the original public meaning in 1791 is not without evidence. Indeed, Professor Amar argues:

Alongside their right and power to acquit against the evidence, eighteenth-century jurors also claimed the right and power to consider legal as well as factual issues—to judge both law and fact ‘complicately’—when rendering any general verdict. Founding-era judges might give their legal opinions to the jury, but so might the attorneys in a case, and the jurors could decide for themselves what the law meant in the process of applying it to the facts at hand in a general verdict of guilty or not guilty Jurors today no longer retain this right to interpret the law, but at the Founding, America’s leading lawyers and statesmen commonly accepted it.⁸⁶

According to Professor Amar, then, leading lawyers and even various judges sometimes asserted that juries had the right to judge both law and fact.⁸⁷

However, the dissenting scholars’ arguments are fairly modest and not necessarily inconsistent with Professor Amar’s recounting of history. They do not argue that juries lacked the right to judge law in *all* colonies or at *all* times. Rather, they

82. See Larsen, *supra* note 2, at 968 & n.47. Judge Larsen does, however, note that there is substantial scholarly disagreement on the topic. *Id.* at 968 n.47.

83. Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 116 (1998).

84. See Cohen & Smith, *supra* note 3, at 87–88, 93–94, 99–100.

85. *Id.* at 88.

86. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 238 (2005).

87. *Id.* at 581 n.73 (listing “Jefferson, Adams, Wilson, Iredell, and Kent, to name just a few”).

argue that, although juries may have determined law as well as fact in some colonies during some periods of time, this was far from a universal right in colonial and early America.⁸⁸ With state practices differing widely, it is incorrect to say that the Sixth Amendment includes a right for juries to judge law as well as fact in criminal cases.

The notion that juries could determine law as well as fact seems to have been a colonial American invention. Indeed, as Professor Stanton Krauss notes, “[n]o judge in England is known ever to have given . . . a charge” that encouraged criminal juries to find law in addition to fact.⁸⁹ The final establishment of judges as the undisputed masters of law and juries confined to finding fact would not come until 1895, when the Supreme Court settled the issue in *Sparf v. United States*.⁹⁰ However, this late uniformity on the issue does not prove that there was inverse uniformity in the past. Instead, the most comprehensive studies of court records suggest that colonial and early state practices were sharply divided and continuously evolving.⁹¹ Furthermore, although Cohen and Smith’s sources tend to emphasize the perspectives of leading lawyers and the opinions of judges, it is helpful to examine the actual court records to look for positive or negative evidence of such a right.⁹²

88. See, e.g., Krauss, *supra* note 83, at 121–22.

89. *Id.* at 115–16. Professor Krauss contrasts English trial histories with an early eighteenth-century American trial for treason in which Justice Duvall, presiding in a circuit court, advised the jury that juries “have a right, in all criminal cases, to decide on the law and the facts.” *Id.* at 113 (quoting *United States v. Hodges*, 26 F. Cas. 332, 334 (C.C.D. Md. 1815) (No. 15,374)) (internal quotation marks omitted). However, Professor Krauss further notes that another judge on the trial disagreed with this instruction, saying, “The opinion which [Justice Duvall] has just delivered . . . is not, and I thank God for it, the law of this land.” *Id.* at 113 (alteration in original) (quoting *Hodges*, 26 F. Cas. at 335) (internal quotation marks omitted).

90. 156 U.S. 51, 78 (1895) (“[U]nder the Constitution of the United States, juries in criminal cases have not the right to decide any question of law, and, . . . in rendering a general verdict, their duty and their oath require them to apply to the facts, as they find them, the law given to them by the court.”); see Cohen & Smith, *supra* note 3, at 100–01; cf. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 911 (1994) (“Today the constitutions of three states—Georgia, Indiana, and Maryland—provide that jurors shall judge questions of law as well as fact. In all three states, however, judicial decisions have essentially nullified the constitutional provisions.” (footnote omitted)).

91. See Krauss, *supra* note 83; Nelson, *supra* note 65.

92. See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 321 (1966) (“In assessing the eighteenth-century practice it is

Professors Nelson and Krauss are two leading scholars who argue that criminal juries in colonial America did not have a universal right to judge both law and fact. Both scholars have extensively reviewed colonial court records and have examined the statements of jurists and lawyers on the topic. Professor Nelson's view on the matter is particularly interesting: for over thirty years, he was a leading proponent of the theory that juries *did* have the right to judge law.⁹³ However, after surveying colonial court records, Professor Nelson changed his position, writing in 2010 that "the story of the jury's power is far more complex than I had thought before. If the question is simply whether colonial juries had the power to find law, the answer is sometimes yes and sometimes no."⁹⁴ Professor Krauss reaches the same conclusion, though noting a large degree of uncertainty arising from the relatively scarce historical colonial court records.⁹⁵

Professor Krauss also helpfully notes that some confusion on this question may come from failing to distinguish the criminal jury's rights from its powers. Although criminal juries had the *power* to acquit defendants against the evidence, Professor Krauss points out that "this does not mean that juries have a *right* to decide criminal cases without regard to the facts; it just means that they have the power to do so, and that in some cases that power is absolute."⁹⁶ Professor Krauss is correct that criminal juries had the power to render general verdicts of acquittal, which implicitly gave them the power, if not the right, to judge law if they disagreed with imposing it in a particular case.⁹⁷ However, although no scholars question that juries had the

necessary (as in every legal-historical investigation) to consider both what courts and laymen said about it and what the courts really did. What is said about criminal juries, even by judges, has changed a great deal in some American jurisdictions. What is really done in criminal cases has changed hardly at all since 1790, but it is more complex than either the modern or the older descriptions indicate.").

93. See, e.g., William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–17 (1978).

94. Nelson, *supra* note 65, at 1003. However, Professor Nelson argues that the question of juries' law-finding power is too narrow and that, instead, scholars should assess how much power localities held in deciding the law compared to the power held by "central political authorities." *Id.* at 1003–04.

95. Krauss, *supra* note 83, at 124–25.

96. *Id.* at 114 (emphasis added).

97. See, e.g., Henderson, *supra* note 92, at 326–27 ("[T]he jury's right 'to decide the law' or to give an uncontrolled general verdict was primarily a right to acquit.").

power to acquit against the evidence and, therefore, implicitly to judge the law or its application, it seems that in some jurisdictions there was no *right* to do so, and the right to find law was reserved for judges.

Both Professors Nelson and Krauss acknowledge that there is a shortage of evidence given the scarcity of colonial court records. Indeed, after reviewing the records of each colony, Professor Krauss concludes:

The truth is that . . . we just don't know whether, when, or where colonial criminal juries had the authority to judge the law. It seems reasonably clear that they had no such right in mid-eighteenth century Georgia, seventeenth and (at least) early eighteenth-century Maryland, and in Massachusetts on the eve of Independence. On the other hand . . . criminal juries were acknowledged to have some form of law-finding right in Rhode Island throughout the colonial period. The rest (to varying degrees) is a mystery.⁹⁸

Professor Nelson disagrees with Professor Krauss on some particular colonies⁹⁹ but arrives at the same general conclusions. Indeed, his more recent research fills in some of Professor Krauss's gaps. Professor Nelson states, "On the issue of the lawfinding power of colonial juries, the score is roughly tied . . . juries possessed ultimate power over the law in New England and Virginia, but not in the Carolinas, New York, and Pennsylvania."¹⁰⁰ He further clarifies, "[I]t seems clear that the Constitution of 1787, as its framers intended it to do, created a national government that gradually gained increasing power to

98. Krauss, *supra* note 83, at 212.

99. As their statements quoted in this paragraph show, Professors Krauss and Nelson arrive at different conclusions regarding the jury's right to judge law in Massachusetts. Professor Nelson, a leading authority on colonial Massachusetts legal history, probably has the better of the disagreement. However, Professor Krauss does effectively point out that there was disagreement among Massachusetts lawyers on the question. Cohen and Smith, as well as Professor Nelson, cite John Adams on the topic because he argued that juries had a right to judge both law and fact. See Cohen & Smith, *supra* note 3, at 99–100; Nelson, *supra* note 65, at 1005. However, Professor Krauss notes that Josiah Quincy, John Adams's co-counsel in the defense of the British soldiers tried in relation to the Boston Massacre, told the jury his interpretation of the law, but "he also admonished the jurors that they were bound to follow the law they would receive from the Bench. Though [the judge] told the jurors that Quincy was right about their duty, neither he nor [the other judges] interfered with Quincy or . . . Adams, when they argued the law to the jury." Krauss, *supra* note 83, at 128.

100. Nelson, *supra* note 65, at 1028.

impose national law on its recalcitrant peripheries.”¹⁰¹ With the states sharply divided in practice in 1791, it is wrong to conclude that the original public meaning of criminal juries guaranteed that they had a right to judge the law, though it would certainly include the power for criminal juries to acquit a defendant without judges reviewing their reasoning.

Even Professor Amar, a major proponent of the position that juries judged law as well as fact, does not contend that this practice rose to the level of a constitutional right. After reviewing the evidence in favor of the right of juries to review law (particularly laws that jurors believe to be unconstitutional), Professor Amar concedes, “I do not mean to suggest that I am wholly convinced. But the mere fact of [the argument’s] strong plausibility shows how strikingly powerful the jury might have become had post-1800 history unfolded differently.”¹⁰² Professor Amar also points out the difficulty of finding a right of juries to judge law based on the bare-bones text of the Constitution on juries, combined with the Judiciary Act of 1789’s focus on the jury’s role as factfinder in both civil and criminal cases. Professor Amar notes:

Jurors could point to no strong statements in constitutional text or the framework Judiciary Act of 1789 that forbade this shrinkage [of juries’ lawfinding power]. If anything, the Seventh Amendment highlighted the civil jury’s role in deciding issues of “fact,” and the Judiciary Act similarly stressed, in both criminal and civil cases, that the “trial of issues [of] *fact*” in all common-law cases would be “by jury.”¹⁰³

Indeed, the Judiciary Act of 1789 repeatedly states that issues of *fact* shall be decided by jury but makes no mention of juries judging law.¹⁰⁴ Thus, Professor Amar, based on the text of the Constitution and the Judiciary Act of 1789, declines to argue that the original public meaning of the Sixth Amendment included a right for criminal juries to judge law.

101. *Id.* at 1029.

102. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 103 (1998).

103. AMAR, *supra* note 86, at 241 (alteration in original) (quoting Judiciary Act of 1789, ch. 20, §§ 9, 12, 13, 1 Stat. 73, 77, 80–81).

104. See §§ 9, 12, 13, 1 Stat. 73, 77, 80–81.

C. *Objection Three: Quaker Oaths and Pious Perjurers*

Cohen and Smith point to early trials where Quakers were excused from juries to argue a third potential originalist objection against death qualification—that the process gives the court more control over jury selection than was provided at common law or by state practice in 1791.¹⁰⁵ However, the examples of the trials that Cohen and Smith cite do not support their argument. Instead, they demonstrate that the state held considerable control over the jury selection process at common law and in early American history. Moreover, Quakers' relationship with English and early American juries affirms the earlier argument that jurors had a duty to uphold the law rather than a right to judge it.

As Cohen and Smith point out, there was no explicit death qualification: after the jury pool convened, the potential jurors were sworn and then joined the petit jury unless challenged.¹⁰⁶ Yet, the fact that jurors were sworn to uphold the law challenges the notion that death qualification is contrary to common law controls, as this swearing may have served as a form of excluding those who would be unwilling to impose the law. Jurors were sworn to uphold the law, but, as previously discussed, both in England and America they held the power to acquit against the evidence. Professor Baker notes that such acquittals did sometimes occur in England in the sixteenth through eighteenth centuries, stating that jurors “could mitigate the rigours of the penal system by ‘pious perjury’—the merciful use of ‘partial verdicts’ or false acquittals contrary to the evidence.”¹⁰⁷ The nomenclature for these acquittals seems to undercut the proposition that juries had a right to judge the law. If jurors were forced to “perjure” themselves when they engaged in nullification, it logically follows that making jurors swear that they could, in fact, uphold the law (including in death penalty cases) was permissible at common law.

Furthermore, the account of Justice Story and the excluded Quaker jurors is informative on the question of state control over jury selection in early America. Cohen and Smith discuss at length two cases in which Quakers were excluded from juries

105. See Cohen & Smith, *supra* note 3, at 91–96.

106. See *id.* at 92.

107. Baker, *supra* note 56, at 23.

because of their opposition to the death penalty.¹⁰⁸ From these accounts, Cohen and Smith derive a number of inferences based on incorrect historical assumptions. The first case is *United States v. Cornell*,¹⁰⁹ in which Justice Story, sitting as a circuit judge, upheld a federal district court's exclusion of two Quakers who informed the court that they could not impose capital punishment in the case.¹¹⁰ Arguing that Justice Story erred in removing the Quakers from the jury, Cohen and Smith point out that he did not cite precedent in upholding the removal.¹¹¹ Although this is true, Justice Story did not cite precedent in his orders on most of the other nine objections in the case, and he did invoke general judicial practice in New England on this issue.¹¹²

Moreover, it seems that the defendant's objection in the case was not to the exclusion of jurors, but rather to the lower court's failure to make the Quakers swear that *the reason* they gave for seeking removal was true. Indeed, Justice Story states, "The objection . . . affects to place some reliance upon the fact, that the jurors were not sworn or affirmed to the truth of their statements."¹¹³ Justice Story agreed that the treatise the defendant cited supported such swearing.¹¹⁴ However, he declined to sustain the objection based on common law in New England, which would not require the sworn attestation of an undisputed fact.¹¹⁵ Considering the context of the objection, the defendant was likely not objecting to death qualification itself: instead, he sought to use the Quakers' inability to swear oaths to reverse his conviction on procedural grounds. In other words, the reason that the Quakers gave for seeking excusal was fine, but it was a violation of procedure that they could not *swear* that they were unable to implement the death penalty. Furthermore, that

108. See Cohen & Smith, *supra* note 3, at 93–96.

109. 25 F. Cas. 650 (C.C.D.R.I. 1820) (No. 14,868).

110. *Id.* at 655–56.

111. See Cohen & Smith, *supra* note 3, at 93.

112. See *Cornell*, F. Cas. at 656 ("I may add, that in all the courts of New-England, where I have seen practice, the course pursued on this occasion, has been uniformly adopted."). However, it is unclear if the practice to which Justice Story refers in alluding to New England practice is death-qualifying jurors or another contested aspect of the relevant criminal procedure.

113. *Id.*

114. *Id.*

115. *Id.*

Justice Story felt the objection could “be disposed of in a very few words” suggests that this was not a matter of first impression for him.¹¹⁶ Instead, Justice Story’s refusal “to compel [a Quaker] to decide against his conscience, or to commit a solemn perjury” is consistent with the notion that jurors did not have a right to find against the evidence based on their convictions; they simply had the *power* to acquit against the evidence.¹¹⁷

The second case is *Commonwealth v. Leshner*,¹¹⁸ which Cohen and Smith identify as the “origin[] of death-qualifications.”¹¹⁹ Cohen and Smith point to this case, where the Supreme Court of Pennsylvania upheld the for-cause strike of a juror based on his religious convictions against imposing the death penalty, as the first recorded death qualification of a juror in the United States.¹²⁰ However, although the court noted that this was the first time that it was imposing a for-cause strike, the history that the court recounts regarding such strikes strongly weighs against Cohen and Smith’s argument. Explaining the absence of previous for-cause strikes of anti-death-penalty objectors in Pennsylvania, the Court wrote:

Besides, the sheriff, until the year 1805, had the nomination of jurors; and it is not likely that he would summon, to serve on capital trials, those whose conscientious persuasions were known to be abhorrent from such service. We may easily discover wherefore this right of challenge, though always existing in the law, has been so rarely called into use.¹²¹

Thus, the court rejected the possibility that those who could not impose the death penalty had a right to serve on juries. And the issue was only novel because the sheriff had previously

116. *Id.* at 655.

117. *Id.*

118. 17 Serg. & Rawle 155 (Pa. 1828).

119. Cohen & Smith, *supra* note 3, at 94.

120. *See id.* at 94–95. However, at least one successful for-cause challenge to a juror who could not impose the death penalty occurred several years earlier in 1824 in Washington, D.C. *See United States v. Ware*, 28 F. Cas. 404 (C.C.D.D.C. 1824) (No. 16,641). In that case, the ruling was very simple, which could imply that this type of for-cause strike may not have been uncommon in some regions. Indeed, the opinion notes, “Mr. Taylor, for the United States . . . then challenged [the conscientious objectors] for cause, alleging that they did not stand indifferent,” and the Court simply stated “it was a good cause of challenge, and the jurors were set aside.” *Id.* at 404.

121. *Leshner*, 17 Serg. & Rawle at 159.

excluded such jurors before they reached the panel. The court did not find this control over jury selection to be problematic.

Furthermore, Cohen and Smith's argument relies on a speculative and unsound assumption about the Quaker community's beliefs regarding capital punishment in late eighteenth- and early nineteenth-century America. Cohen and Smith assert that Pennsylvanian Quakers in the early 1800s "largely opposed the death penalty and lived in the state in sufficient numbers to give [a defendant in a capital case] hope that a Quaker would serve on his jury."¹²² Cohen and Smith further argue that the defendant in *Leshner* had the bad luck of receiving "the one death-penalty-opposed juror who would decide to unilaterally inform the judge of his inability to sentence [the defendant] . . . to death."¹²³ However, Cohen and Smith do not present evidence to show that Quakers were quietly serving on juries in capital cases and, therefore, acquitting defendants or causing hung juries. Indeed, categorical opposition to capital punishment in Pennsylvania was actually rare until the early nineteenth century, even among Quakers.¹²⁴

In the eighteenth century, Quakers frequently served on juries or even as judges in capital cases and would convict if convinced of the defendant's guilt.¹²⁵ But as Timothy Hayburn notes, the Quakers' political system often "tempered [death penalty sentences] with a liberal application of pardons [from the governor and Provincial Council] to mitigate the harsher aspects of the penal code."¹²⁶ The Quakers also worked politically to construct a more lenient criminal justice system than in

122. Cohen & Smith, *supra* note 3, at 94.

123. *Id.*

124. See Albert Post, *Early Efforts to Abolish Capital Punishment in Pennsylvania*, 68 PA. MAG. OF HIST. & BIOGRAPHY 38, 42 (1944) ("For almost a generation the question of the death penalty lay in abeyance. . . . The capital punishment issue was suddenly revived in 1809 by a series of articles . . .").

125. See Timothy J. Hayburn, *Who Should Die?: The Evolution of Capital Punishment in Pennsylvania, 1681–1794*, at 93–95 (May 2011) (unpublished Ph.D. dissertation, Lehigh University) (on file with Lehigh Preserve, Lehigh University).

126. *Id.* at 23. The governor held the pardon power in colonial Pennsylvania, which he "exercised . . . through his council and invariably acted upon the recommendations of the judges who tried the culprits." Herbert William Keith Fitzroy, *The Punishment of Crime in Provincial Pennsylvania*, 60 PA. MAG. HIST. & BIOGRAPHY 242, 255 (1936). Pardons were common in colonial Pennsylvania: "Of one hundred and forty-one recorded convictions in capital cases before the Revolution, forty-one were pardoned and twenty-six reprieved." *Id.*

England and other states by legislatively establishing fewer (but still some) capital crimes.¹²⁷ Thus, even Quakers in the colonial era through the ratification of the Bill of Rights were often willing to impose the death penalty.

As noted earlier, the whole matter of juror oaths suggests that juror exclusion in capital cases arose as a necessary response to the small but growing portion of the population that was unwilling to impose the death penalty rather than as a disruption of historical practice. Indeed, in England in 1791, Quakers were unable to serve on juries simply because their religious convictions prevented them from taking oaths. Until 1833, Quakers were “disqualified from two offices—namely, any office under the Crown, and from serving on juries.”¹²⁸ And even the legislative history of the Quaker and Moravian Act of 1833 shows that, on at least one occasion, a criminal conviction was found to be defective because a Quaker, who had not taken an oath, had served on the jury.¹²⁹ The legislative history also shows an additional objection to allowing Quakers to serve on juries: that “the strong opinions entertained by members of the Society of Friends with respect to capital punishment might interpose some obstacle to their taking part in the administration of the criminal law.”¹³⁰ However, at a different point in the deliberations, the Duke of Richmond pointed out that at least some Quakers were willing to impose capital punishment, noting that “a Quaker was on a Jury last January at the Old Bailey, and did not hesitate to find a man guilty of felony.”¹³¹ The bill passed, and Quakers gained the right to serve on juries. However, the dual fears that Quakers could not swear oaths to uphold the law and that Quakers would be un-

127. *See id.* at 29–31.

128. 17 Parl Deb HC (3d ser.) (1833) col. 1040.

129. *See id.* at cols. 1041–42. The defendant argued on appeal that no citizen “could . . . be tried for any crime, unless it was on the oaths of twelve men. In the present instance, it would appear that only eleven men had been sworn.” *Id.* at 1042. The court agreed and would have overturned the verdict except that the defendant “solved the difficulty, by dying in the mean time in prison.” *Id.* at col. 1042. Interestingly, as this was a “wilful [sic] murder” case, the Quaker juror in question seems to have been willing to impose the death penalty. *See id.* at cols. 1041–42. This seems to be the same case to which the Duke of Richmond alluded discussed later in this paragraph. *See id.* at col. 1041.

130. *Id.* at col. 1043.

131. 17 Parl Deb HC (3d ser.) (1833) col. 1018.

willing to impose the law if they served as jurors suggests that juries had the power—but not a right—to judge law in England.

III. THE 1791 JURY: A MIXED BAG FOR DEFENDANTS

Assessing the common law and state practice, the death qualification of juries does not violate the original public meaning of juries under the Sixth Amendment. However, the exclusion of large numbers of jurors, such as in the Tsarnaev case, based on their opposition to the death penalty does seem divergent from the highly local and community-oriented image of the historic jury, even if it violates no constitutional right. But objectors who would like to appeal to the historic ideal of the jury should be careful what they wish for. Now-Judge Stephanos Bibas argues that, although “many defense lawyers cheer certain originalist [criminal procedure] decisions, they would not like the whole package that would result from applying a consistent originalist philosophy” to juries.¹³² For instance, most advocates of defendants’ rights would be appalled at the prospect of giving the prosecution or police a *greater* power in selecting juries than currently exists via prosecutorial peremptory strikes. However, a direct application of historical principles would do just that by imposing the “stand by” power, which gave the state jury selection power far greater than today’s peremptory strikes,¹³³ and by potentially giving sheriffs the statutory power to select the entire panel.¹³⁴ Similarly, many would balk at the idea of returning to a jury system where

132. Stephanos Bibas, *Two Cheers, Not Three, for Sixth Amendment Originalism*, 34 HARV. J.L. & PUB. POL’Y 45, 45 (2011).

133. Professor Baker describes the “stand by” power, which existed at common law, stating:

The Crown could not challenge potential jurors peremptorily, but could require them to ‘stand by’, [sic] which meant that their names were passed over; only when the panel was exhausted were the names called again, and then the Crown would have to show cause or acquiesce. In practice this could give the Crown a greater control over the composition of the jury than the prisoner had; but, like the challenge, it does not seem to have been widely exercised.

Baker, *supra* note 56, at 36. Blackstone also notes this power, saying “the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king’s counsel must shew the cause, otherwise the juror shall be sworn.” 4 BLACKSTONE, *supra* note 42, at *347.

134. See *Commonwealth v. Leshner*, 17 Serg. & Rawle 155, 159 (Pa. 1828).

those who knew (and may have disliked) the defendants personally could still serve on juries unless removed via peremptory strike.¹³⁵

Similarly, Cohen and Smith advocate for the return to a system where jurors are not asked any questions, much less questions about their willingness to impose the law. They argue that, under Blackstone's regime, "[t]here was no allowance for asking questions from which to determine whether a venireman could apply a death sentence."¹³⁶ But returning to a world in which jurors do not answer questions would cut both ways, and the judge could not uncover and exclude jurors who believe the death penalty *must* be imposed: these jurors are excluded under Supreme Court jurisprudence.¹³⁷ Furthermore, if jurors were not questioned, it would be difficult to filter out those with other forms of prejudice, such as racial animus, through either for-cause or peremptory strikes. But originalism does not require a direct return to all criminal procedure practices at common law, whether they broadly favor defendants or the prosecution. As Judge Bibas surmised, "[O]riginalism provides only a minimum, not a maximum."¹³⁸ An originalist looks to what rights existed under the original public meaning of the Constitution rather than simply imposing all historical practice on contemporary applications of criminal justice.

CONCLUSION

The differences between Blackstone's jury selection process and modern criminal procedure are substantial. Death qualification does not seem to have had a direct analogue at common law or early American practice. However, the original public meaning of the right to a jury trial in criminal cases offered in Article III¹³⁹ and to an impartial jury as provided in the Sixth

135. See, e.g., MANN, *supra* note 60, at 71–72.

136. See Cohen & Smith, *supra* note 3, at 92.

137. See *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

138. Bibas, *supra* note 132, at 52.

139. U.S. CONST. art. III, § 2, cl. 3.

Amendment¹⁴⁰ does not preclude such a process. The common law definition of an impartial jury was quite narrow and would have included the selection only of those who could take an oath to uphold the law. Although juries judged law as well as fact in some colonies and early states, in other states at the time of the ratification of the Constitution and Bill of Rights, they did not. Furthermore, the leading common law commentators do not support such a right: indeed, Coke argued clearly that such a right did not exist. Thus, the evidence does not suggest a right for citizens to sit on a criminal jury despite their unwillingness to apply the law if the evidence requires it. The importance of juries upholding the law was seen also in jurors' oaths, and those who acquitted against the evidence were sometimes called "pious perjurers," indicating that such a judgment of the law (or at least its application in the circumstances) was a violation of the "perjurer's" duty.

Finally, though death qualification, *per se*, did not occur in 1791, the state clearly had powerful tools to shape the jury in ways that likely led to the exclusion of jurors of whom the prosecution was skeptical. Indeed, in Pennsylvania, the sheriff was permitted by statute to select and exclude jurors during the Founding era.

Death qualification poses challenging policy problems in removing large numbers of potential jurors who might be more sympathetic to defendants than the jurors who remain. However, the original public meaning of the Sixth Amendment does not necessitate the inclusion of jurors who will not impose the law. The original public meaning of the Sixth Amendment offers defendants many protections, but it does not render the death qualification of juries unconstitutional.

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140. U.S. CONST. amend. VI.