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Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A Witherspoon Qualification

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COMMENT

Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A *Witherspoon* Qualification

I. INTRODUCTION

In *Witherspoon v. Illinois*,[1] the United States Supreme Court barred a state's exclusion of veniremen based on their general objections to the death penalty.[2] Petitioner had contended that this exclusion produced a jury that was biased in favor of conviction and did not represent a cross section of the community.[3] The Court observed that the data before it were insufficient to determine whether jury proneness to convict resulted from the death-qualification process, but concluded that it was "self-evident that, in its role as arbiter of the *punishment* to be imposed, the jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments."[4] Writing for the majority, Justice Stewart fashioned a footnote

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1. 391 U.S. 510 (1968).

2. *Id.* at 521-22. Whether *Witherspoon* rests upon the sixth amendment right to a fair trial or upon fourteenth amendment due process grounds—or both—is not clear. In reaching the conclusion that Illinois' procedure had produced a jury "uncommonly willing to condemn a man to die," *id.* at 521, the Court seemed to utilize elements of both. In stating that in a country where most people no longer believe in capital punishment a jury that excludes death penalty opponents "cannot speak for the community," *id.* at 519-20, the Court seemed to use the sixth amendment cross-section requirement established in Glasser v. United States, 315 U.S. 60, 84-86 (1942). Simultaneously, the Court relied on the impartial-jury ground of the sixth amendment, noting that in excluding "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State [had] crossed the line of neutrality." 391 U.S. at 520. The Court elsewhere indicated that impartiality was guaranteed by both the sixth and fourteenth amendments. *Id.* at 518.

The California Supreme Court, while noting that there is some language in *Witherspoon* that suggests a pure cross-section analysis, nevertheless viewed its primary basis to be "due process, as seen through the filter of Sixth Amendment values." Hovey v. Superior Court, 28 Cal. 3d 1, 11 n.17, 616 P.2d 1301, 1304 n.17, 168 Cal. Rptr. 128, 131 n.17 (1980).

Defendants using *Witherspoon* as a basis for challenging capital convictions have developed due process, cross-section, and impartial-jury arguments. *See, e.g.*, cases in notes 6, 8, 18 & 20 *infra*. *See also* the cross-section analysis developed in Note, *Constitutional Law*—Grigsby v. Mabry: *Are Death-Qualified Juries No Longer Qualified To Assess Guilt?*, this issue.

3. 391 U.S. at 516-17.

4. *Id.* at 518 (citing Turner v. Louisiana, 379 U.S. 466, 471-73 (1965); Irwin v. Dowd, 366 U.S. 717, 722-23 (1961); and Glasser v. United States, 315 U.S. 60, 84-86 (1942)) (emphasis supplied).

Regarding petitioner's data on the proneness of death-qualified juries to convict, the Court noted that defense counsel had failed to secure an opportunity to submit evidence during post-conviction hearings. The Court could "only speculate, therefore, as to the precise meaning of the terms used in these studies, the accuracy of the techniques employed, and the validity of the generalizations made." 391 U.S. at 517 n.11. Hence the Court could not "conclude, whether on the basis of the record now before [it] or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Id.* at 517-18.

See also the dissent of Justice White, *id.* at 541 n.1, who "would not wholly foreclose the

warning that selection of a jury neutral with respect to choosing *punishment* might nevertheless produce a jury less than neutral for determining *guilt*, and that a defendant's interest in a fair trial might best be protected by "a bifurcated trial, using one jury to decide guilt and another to fix punishment."[5] A recent proliferation of *Witherspoon* challenges[6] has raised serious questions regarding the predispositions of death-qualified[7] jurors toward the determination of guilt, and has elevated Justice Stewart's footnote to center-page for full consideration.

Since 1968 defendants have attempted to demonstrate that allowing the state to strike jurors unalterably opposed to the death penalty creates either a jury biased on the question of guilt or a jury that does not comprise a cross section of the community.[8] Their arguments frequently have been based on

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possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt."

5. *Id.* at 520 n.18. The entire footnote reads:

> Even so [*i.e.*, granting, *arguendo*, that a state might be able to show that a jury purged of persons unalterably opposed to capital punishment was neutral with respect to penalty], a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accomodating both interests by means of a bifurated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its power resolution. [Emphasis in original]

6. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark. 1980); People v. Jackson, 28 Cal. 3d 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); People v. Sand, 81 Cal. App. 3d 448, 146 Cal. Rptr. 448 (1978), *cert. denied*, 439 U.S. 1117 (1979); Hooks v. State, 416 A.2d 189 (Del. 1980); Riley v. State, 366 So. 2d 19 (Fla. 1978); Dampier v. State, 245 Ga. 427, 265 S.E.2d 565 (1980); Bowen v. State, 244 Ga. 495, 260 S.E.2d 855 (1979), *cert. denied*, 446 U.S. 970 (1980); Harris v. Hopper, 243 Ga. 244, 253 S.E.2d 707 (1979); Davis v. State, 241 Ga. 376, 247 S.E.2d 45, *cert. denied*, 439 U.S. 947 (1978); Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Corn v. State, 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied*, 436 U.S. 914 (1978); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), *cert. denied*, 436 U.S. 950 (1978); Douthit v. State, 239 Ga. 81, 235 S.E.2d 493 (1977), *cert. denied*, 445 U.S. 938 (1980); Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976), *cert. denied*, 430 U.S. 956 (1977); State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979), *cert. denied*, 446 U.S. 911 (1980); State v. Taylor, 298 N.C. 405, 259 S.E.2d 502 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

7. The terms "death-qualified jury" and "*Witherspoon*-qualified jury" indicate juries meeting the standards of *Witherspoon*. "Scrupled juror" is used broadly to indicate a person either unalterably favoring *or* opposing the imposition of the death penalty. "Death-scrupled" and "death-opposed" are used to describe persons unalterably opposed to the death penalty. "Death-qualification" is the voir dire process which identifies and excludes those jurors not meeting *Witherspoon* standards. The short-cut terminology may seem troubling at first but it avoids needless repetition of even longer terms and phrases.

8. *See, e.g.*, cases listed in note 6 *supra* and in notes 18 & 20 *infra*. For analysis of the cross-section argument, *see* Note, *supra* note 2. For cases prior to 1976, *see, e.g.*, Craig v. Wyse, 373 F. Supp. 1008 (D. Colo. 1974); People v. Thornton, 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974), *cert. denied*, 420 U.S. 924 (1975), *overruled on other grounds*, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979); People v. Washington, 71 Cal. 2d 1061, 458 P.2d 479, 80 Cal. Rptr. 567 (1969); *In re* Arguello, 71 Cal. 2d 13, 452 P.2d 921, 76 Cal. Rptr. 633 (1969); People v. Tolbert, 70 Cal. 2d 790, 452 P.2d 661, 76 Cal. Rptr. 445 (1969), *cert. denied*, 406 U.S. 971 (1972); State v.

one or more hypotheses originating in a 1961 article by Professor Walter Oberer,[9] cited by the Court in *Witherspoon*.[10] Oberer suggested that there are distinct personality and attitudinal differences between proponents and opponents of capital punishment; that jurors who are proponents are more likely than opponents to find guilt; that opponents share systematic political and demographic characteristics, so that juries purged of these persons no longer reflect a cross section of the community; and that proponents assess more severe penalties than opponents.[11]

Oberer's work has focused the attention of scores of social scientists and legal writers on the effects of the death-qualification process.[12] Their studies,

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Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), *death penalty vacated*, 428 U.S. 904 (1976); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, *cert. denied*, 409 U.S. 1043 (1972); State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), *death penalty vacated*, 408 U.S. 939 (1972); State v. Dickens, 278 N.C. 537, 180 S.E.2d 844 (1971); State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), *death penalty vacated*, 403 U.S. 948 (1971).

9. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545 (1961).

10. 391 U.S. at 516 n.9.

11. Girsch, *The* Witherspoon *Question: The Social Science and the Evidence*, 35 NLADA Briefcase 99, 100 (1978) (Girsch and Goldberg in note 12 *infra* are the same person).

12. The works considered by the Court in *Witherspoon* included Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Cases (unpublished manuscript, Morehouse College, undated), later published as *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L.L. REV. 53 (1970) (finding that attitudes about the death penalty are embedded in a context of related views); Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, Univ. of Texas, 1964) (finding that those favoring the death penalty are more likely to find guilt, be more confident of their verdict, assess more severe penalties, be biased in favor of the prosecution, and be biased against a defendant's insanity defense); and H. Zeisel, Some Insights into the Operation of Criminal Juries (confidential first draft, Univ. of Chicago, 1957), later published as SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT (Univ. of Chicago Center for Studies on Criminal Justice, 1968) (finding that death-qualification removes more blacks than whites, women than men, college-educated than less-well-educated men, liberals than conservatives; and finding proneness to convict in death-qualified juries).

For post-*Witherspoon* materials, *see, e.g.*, Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734 (relating authoritarianism as a personality factor to pro-capital punishment feelings and proneness to convict); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970) (finding conviction-proneness among death penalty proponents; finding those demographic groups generally favoring the death penalty to be composed more often of whites, Protestants, skilled and white-collar workers, executives, professionals, moderately educated persons, those with incomes in excess of $5000 per year, older persons, Republicans and Independents); Buckhout, Baker, Perlman and Spiegel, *Jury Attitudes and the Death Penalty*, 3 SOC. ACTION & LAW no. 6 and vol. 4 no. 1 (1978) (finding a link between attitudes favoring death penalty and proneness to convict) [hereinafter cited as Buckhout]; Comment, Witherspoon: *Will the Due Process Clause Further Regulate the Imposition of the Death Penalty?*, 7 DUQ. L. REV. 414 (1969) (finding no linear relationship between attitudes favoring the death penalty and dogmatism); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) (finding that those who favor the death penalty are likely to be more conservative, more authoritarian, more apt to have conviction-prone attitudes and inclined to assign more severe penalties than opponents of the death penalty); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCH. 123 (1973) (concluding that trial by a jury of attitudinally similar peers versus trial by jury of attitudinally dissimilar non-peers could well result in quite different verdicts); Osser and Bernstein, *Death-Oriented Jury Shall Live*, 1 SAN FERN. V. L. REV. 253 (1968) (finding that the rate of conviction declined as the seriousness of the charge increased, claimed to

based on differing population groups in widely varying parts of the country, utilize different measures, but most of them confirm at least one of Oberer's original hypotheses.[13] First, a considerable number of these studies point to the conclusion that death-qualification results in a jury more prone to convict than a jury that is not death-qualified.[14] Second, many show that attitudes toward the death penalty are "embedded in a context of political conservatism, dogmatism, authoritarianism, lack of self-doubt, and legal attitudes favoring punishment and constituted authority."[15] Third, there is considerable evidence to suggest that death-qualified jurors differ demographically from death-opposed jurors. Thus, compared to a non-capital jury, a death-qualified jury usually has fewer minorities, women, persons with little formal education, persons with higher-than-average formal education, Catholics and other non-Protestants, young persons, housewives, and unskilled workers.[16] Despite these findings, no court has ruled unconstitutional a conviction rendered by a death-qualified jury.[17]

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be due to death-qualification); Rokeach & McClellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQ. L. REV. 125 (1970) (reinterpreting Comment, *supra*, finding that persons always in favor of death penalty were more dogmatic than others polled) [hereinafter referred to as Rokeach]; Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974) (finding those favoring capital punishment more likely to feel threatened by rising crime rates and to hold attitudes favoring general social and political conservatism) [hereinafter cited as Vidmar]; and White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Jurors*, 58 CORNELL L. REV. 1176 (1973) (finding people who could vote for death penalty more likely to convict than those who could never vote for the death penalty) [hereinafter cited as White, *Constitutional Invalidity*]. *See also* studies mentioned in Hovey v. Superior Court, 28 Cal. 3d 1, 26-69, 74-77, 616 P.2d 1031, 1314-46, 1350-53, 168 Cal. Rptr. 128, 141-74, 178-81 (1980).

13. *See* text accompanying note 11 *supra*.

14. *See, e.g.*, Bronson; Buckhout; Jurow; White, *Constitutional Invalidity*; Wilson; and Zeisel, all note 12 *supra*. Whether proneness to convict is to be measured relative to a non-capital jury or some other standard has not been settled by writers and courts. Professor White points out, "Although the Court speaks of an 'unrepresentative jury on the issue of guilt,' it does not define a 'representative jury on the issue of guilt.' Therefore, it fails to establish a benchmark against which a jury's propensity to convict can be measured." White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 373-74 (1980) (quoting *Witherspoon*, 391 U.S. 510, 517).

Some courts, including the Fifth Circuit Court of Appeals, have utilized the non-death-qualified *capital* jury as a "bench mark" for comparison. *See* Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), discussed in the text accompanying notes 62-72 *infra*. White disagrees:

> *Witherspoon*'s logic suggests that the bench mark against which the death-qualified jury should be measured is the non-death-qualified jury utilized in *non-capital* cases. This jury is a logical bench mark because it is used in the vast majority of criminal cases, and it is "representative" of the community in the sense that it is surrounded by procedures designed to insure that it will be selected from a fair cross-section of the community.

41 U. PITT. L. REV. at 375 (emphasis added). See also White's criticism of *Spinkellink*, *id.* at 374-75.

15. Girsch, note 11 *supra*, at 100. For similar comments, see, *e.g.*, Boehm; Bronson; Buckhout; Jurow; Wilson; and Zeisel, all note 12 *supra*.

16. Girsch, note 11 *supra*, at 100. *See, e.g.*, Bronson; Goldberg; Jurow; Rokeach; Vidmar; and Zeisel, all note 12 *supra*.

17. White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 359 (1980) [hereinafter cited as White, *Reexamined*].

II. THE RESPONSE OF LOWER COURTS TO THE SOCIAL SCIENCE DATA

In the years since *Witherspoon*, indeed until very recently, courts have rejected defendants' challenges to death-qualified juries in different ways. Some courts, including the United States Court of Appeals for the Seventh Circuit,[18] have borrowed from *Witherspoon* the conclusion that data and arguments are still "too tentative and fragmentary"[19] to support a finding of sixth amendment violation in the determination of a defendant's guilt.[20] That position ignores recent studies.[21]

A second judicial means of spurning jury challenges[22] has been to quote or cite selected portions of the *Witherspoon* opinion,[23] creating the impression that the Supreme Court rejected outright, and permanently, the possibility that a defendant could show a sixth amendment violation in the composition of the jury determining guilt. A more honest reading of the language of *Witherspoon* shows that the Court had concluded only that the data before it at the time were simply "too tentative and fragmentary" to show that defendant Witherspoon had been denied due process.[24] The clear implication, both from the context and from the warning in Justice Stewart's footnote, is that the Court reserved the question until sufficient data and analysis were accumulated. Hence, rather than treating the matter as closed, a court should at least scan the available evidence to determine whether the question can be resolved.

Third, some courts have developed a basis for rejecting jury challenges apparently by concluding that any juror who could not vote to impose the death penalty automatically would not follow his oath or jury instructions with regard to the verdict of guilt or innocence.[25] Rather than allowing these

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18. *See, e.g.*, United States *ex rel.* Clark v. Fike, 538 F.2d 750 (7th Cir. 1976) *and* United States *ex rel.* Townsend v. Twomey, 452 F.2d 350, 363 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972).

19. 391 U.S. at 517.

20. *See, e.g.*, Craig v. Wyse, 373 F. Supp. 1008, 1011 (D. Colo. 1974), where the court noted that, after *Witherspoon*, lower courts had rejected new studies tending to show that death-qualified juries are conviction-prone, citing United States *ex rel.* Townsend v. Twomey, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972) and People v. Murphy, 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1972), *cert. denied*, 414 U.S. 833 (1973). *See also* People v. Rhinehart, 9 Cal. 3d 139, 507 P.2d 642, 107 Cal. Rptr. 34 (1973); *In re* Anderson, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), *cert. denied*, 406 U.S. 971 (1972); People v. Sand, 81 Cal. App. 3d 448, 146 Cal. Rptr. 448 (1978), *cert. denied*, 439 U.S. 1117 (1979); Hooks v. State, 416 A.2d 189 (Del. 1980); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), *cert. denied*, 436 U.S. 950 (1978); Commonwealth v. McAlister, 365 Mass. 454, 313 N.E.2d 113 (1974), *cert. denied*, 419 U.S. 1115 (1975).

21. *See* post-*Witherspoon* studies listed in note 12 *supra*. *See generally* Girsch, *supra* note 11.

22. As in, *e.g.*, State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); State v. Cherry, 298 N.C. 86, 106, 257 S.E.2d 551, 564 (1979), *cert. denied*, 446 U.S. 941 (1980); State v. Madden, 292 N.C. 114, 123, 232 S.E.2d 656, 662 (1977); State v. Williams, 275 N.C. 77, 86, 165 S.E.2d 481, 487 (1969); Commonwealth v. Martin, 465 Pa. 134, 160-62, 348 A.2d 391, 405-06 (1975).

23. Frequently courts quote this sentence: "We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." 391 U.S. at 517-18. *See also* note 4 *supra*.

24. 391 U.S. at 517.

25. *See, e.g.*, State v. Wilson, 57 N.J. 39, 269 A.2d 153 (1970); State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), *rev'd*, 403 U.S. 946 (1971); State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), *modified*, 428 U.S. 904 (1976); State v. Elliot, 25 Ohio St. 2d 249, 54 Ohio Op. 2d 371, 267 N.E.2d 806 (1971), *modified*, 408 U.S. 939 (1972); Rowbothan v. State, 542 P.2d 610 (Okla. Crim. App.

persons to sit only at one phase of the trial, judges have stricken them altogether. Consequently, many jurors who have expressed *both* opposition to the death penalty *and* a commitment to determine guilt or innocence impartially have been excluded from serving in capital cases. This consequence ignores Justice Stewart's observation that

> [i]t is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.[26]

This third approach by lower courts contradicts the analytical pattern of *Witherspoon*. It is true that the Court in *Witherspoon* did acknowledge that, in purging all veniremen who admitted prior to trial that they could not even consider returning a verdict of death, a state might argue successfully that the resulting jury was neutral on the penalty question.[27] Even so, Justice Stewart reasoned, a defendant still might be able to show that such a jury "was less than neutral with respect to *guilt*."[28] If such a showing were made, the Justice continued, then the state's interests in selecting a jury capable of imposing the death penalty in a "proper" case and the defendant's interest in having a fair and impartial determination of guilt or innocence would have to be weighed in light of the availability of a bifurcated jury scheme.[29]

III. POST-*Witherspoon* RESPONSE BY THE SUPREME COURT: MIXED SIGNALS

Many courts have refused to take the analysis as far as Justice Stewart suggested, however, apparently because they have not been willing to accept the concept of ordering the sort of bifurcation suggested in *Witherspoon*, that

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1975), *modified*, 428 U.S. 907 (1976); Commonwealth v. Rightnour, 435 Pa. 104, 253 A.2d 644 (1969), *overruled*, 360 A.2d 917 (1976); Thomas v. Leeke, 257 S.C. 491, 186 S.E.2d 516 (1970).

Some courts have relied on the following statement by the United States Supreme Court in Lockett v. Ohio: "We specifically noted, however, that nothing in our opinion prevented the execution of a death sentence when the veniremen excluded for cause make it 'unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.'" 438 U.S. 586, 596 (1978) (emphasis in original) (quoting *Witherspoon*, 391 U.S. at 522-23 n.21). *See, e.g.*, Hooks v. State, 416 A.2d 189, 194 (Del. 1980); Bowen v. State, 244 Ga. 495, 497-98, 260 S.E.2d 855 (1979), *cert. denied*, 446 U.S. 970 (1980); Harris v. Hopper, 243 Ga. 244, 245, 253 S.E.2d 707, 708 (1979); State v. Avery, 299 N.C. 126, 138, 261 S.E.2d 803, 810 (1980).

26. 391 U.S. at 514-15 n.7.

27. *Id.* at 520.

28. *Id.* at 520 n.18 (emphasis in original).

29. *Id.* Justice Stewart's notion of a bifurcated trial is "using one jury to decide guilt and another to fix punishment." *Id.* More recently the term has been used to indicate the separation of the trial into distinct phases: first, determination of the guilt or innocence of the defendant; second, imposition of punishment. The more recent concept presumes use of the same jury at both phases. *See, e.g.*, N.C. GEN. STAT. § 15A-2000 (Cum. Supp. 1979), *quoted herein* at note 83 *infra*.

For an examination of judicial responses to defendants' cross-section arguments, see Note, *supra* note 2.

is, "using one jury to decide guilt and another to fix punishment."[30] Moreover, the pattern of responses by courts to *Witherspoon*-inspired sixth amendment challenges is hardly surprising when one considers the mixed signals from the Supreme Court since 1968. In *Duncan v. Louisiana*,[31] decided contemporaneously with *Witherspoon*, the Court held the sixth amendment applicable to the states via the fourteenth amendment. The years following *Witherspoon* were highlighted by a series of successful challenges to jury composition, including *Peters v. Kiff*,[32] in which a white defendant was held entitled to federal habeas corpus relief upon proof that blacks had been systematically excluded from state juries that indicted and convicted him, even though he could not show specific harm in such exclusion; *Taylor v. Louisiana*,[33] in which the Court held that exclusion of a sizable, identifiable venire class—in this case, women—was a violation of the sixth and fourteenth amendments; *Davis v. Georgia*,[34] in which the Court ruled that exclusion of even one prospective juror in violation of *Witherspoon* standards was reversible error without requiring defendants to show specific harm; *Ballew v. Geor-*

30. 391 U.S. at 520 n.18. Another explanation for the failure of courts to agree with defendants' jury composition challenges has been offered in White, *Reexamined*, *supra* note 17: the Court in *Witherspoon* gave little guidance as to how a defendant could establish the non-neutrality of a death-qualified jury, and it failed to explain how a successful claim should then be weighed against the state's interest in preserving neutrality at the penalty phase of the trial.

White reviews many of the studies related to the issue of prosecution-proneness which have appeared since 1968, concluding that post-*Witherspoon* studies have strengthened the prosecution-proneness hypothesis. *Id.* at 361-70. Nonetheless, apart from evaluating data, "there is the question of defining the applicable legal standard [—*i.e.*,] what must the empirical evidence show to establish that the death-qualified jury is 'non-neutral' with respect to the determination of guilt?" *Id.* at 371. White argues that the Court's attitude toward the use of scientific data in sixth amendment cases was established in Ballew v. Georgia, 435 U.S. 223 (1978). *Id.* at 376. The Court's approach is (1) to examine the total body of published data bearing on the issue to learn whether or not a substantial threat to individual interests exists; (2) then, to the extent that a substantial threat is shown, to balance interests. *See* Ballew v. Georgia, 435 U.S. at 232-45.

With regard to the prosecution-proneness argument, White asserts that the court should scrutinize the effects of death-qualification on the jury's three main functions (*i.e.*, to deliberate effectively, to represent a cross section of the community, and to return accurate and consistent verdicts). White, *Reexamined*, *supra* note 17, at 377. Then, if a substantial threat to these functions were found, the court would consider the state's interests and institutional concerns, such as stare decisis, which might bear upon the issue. *Id.* at 381-85.

Applying these criteria to the evidence and arguments on prosecution-proneness, White concludes that death-qualification (1) reduces the counterbalancing of views unfavorable to the defense; (2) destroys the representativeness of the cross section which remains; and (3) produces changes in verdict that, even if rare, are always to the detriment of the defense. *Id.* at 385-95. State interests—administrative convenience and neutral penalty determination—can be accommodated without sacrificing the interests of the defendant, he claims. By arranging a proper method of bifurcation, the state could allow death-opposed jurors to serve at the guilt phase only; furthermore, there would be little inconvenience or cost difference in postponing the death-qualification process until the penalty phase of the trial and in using videotapes of appropriate segments of the guilt phase for evidentiary purposes at the penalty phase. *Id.* at 397-401. With regard to institutional interests, particularly a state's reliance upon stare decisis, White notes that such reliance is not so important as the "evolving recognition of the increased protection which must be afforded to capital defendants." *Id.* at 404.

31. 391 U.S. 145 (1968).

32. 407 U.S. 493 (1972).

33. 419 U.S. 522 (1975). *See* discussion in Note, *supra* note 2.

34. 429 U.S. 122 (1976) (per curiam). The Court rejected Georgia's argument that improper exclusion of a single juror did not violate the *Witherspoon* rationale if others having general objections to the death penalty were not excused for cause. *Id.* at 122-23.

gia,[35] in which the Court held unconstitutional a criminal conviction rendered by a jury of fewer than six persons; and *Duren v. Missouri*,[36] in which the Court established criteria for showing a sixth amendment "fair cross section violation" and held that such violations could be allowed only if outweighed by compelling state interests. Yet, during the same period, the Court steadfastly refused to take up the question of conviction-proneness that it raised in *Witherspoon*.[37]

In *McGautha v. California*,[38] three years after *Witherspoon*, the Court refused to order a bifurcated trial for a defendant who complained that he had been denied a fair trial when he was forced to choose between his fifth amendment protection against self-incrimination and the opportunity to testify for the purpose of mitigating a possible penalty.[39] The defendant had argued that bifurcation of the trial into guilt and penalty phases would avoid forcing him to speak to the issue of mitigating circumstances prior to a determination of guilt. Relying on a pre-*Witherspoon* precedent[40] declining to order bifurcation, the majority concluded that the fact that the case involved capital sentencing did not require bifurcation. While acknowledging that the birfucated trial might well be a "superior means of dealing with capital cases,"[41] Justice Harlan's majority opinion indicated that the United States Constitution does not guarantee trials that are the "best of all worlds"; rather, Harlan observed that all the Constitution requires is that "trials be fairly conducted and that guaranteed rights of defendants [be] scrupulously respected."[42] He rejected the suggestion that the Court should dictate some sort of bifurcation scheme:

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35. 435 U.S. 223 (1978).

36. 439 U.S. 357 (1979). *See* discussion in Note, *supra* note 2.

37. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); United States *ex rel.* Townsend v. Twomey, 452 F.2d 350 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972); People v. Sand, 81 Cal. App. 3d 448, 146 Cal. Rptr. 448 (1978), *cert. denied*, 439 U.S. 1117 (1979); Davis v. State, 241 Ga. 376, 247 S.E.2d 45, *cert. denied*, 439 U.S. 947 (1978); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980).

In Bumper v. North Carolina, 391 U.S. 543 (1968), decided on the same day as *Witherspoon*, the Court declined to decide the prosecution-proneness issue, noting that the petitioner had offered only one additional study—R. Crosson. An Investigation into Certain Personality Variables Among Capital Trial Jurors (Jan. 1966) (unpublished dissertation, Case W. Res. Univ.)—to those that the Court considered in *Witherspoon*. *Id.* at 545-46 n.6.

38. 402 U.S. 183 (1971). The Court combined *McGautha*, a California case, with Crampton v. Ohio in its single opinion.

39. *Id.* at 213.

40. Spencer v. Texas, 385 U.S. 554 (1966). Justice Harlan there had observed:

> To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might well agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem [full disclosure to jury of defendant's past criminal conviction before jury has considered question of quilt] is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.

Id. at 567-68 (footnotes omitted).

41. 402 U.S. at 221.

42. *Id.*

> Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases.
>
> . . . From a constitutional standpoint we cannot conclude that it is impermissible for a state to consider that the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.[43]

Two years later, the Court again expressed a reluctance to order significant changes in states' jury procedures, stressing in *Chaffin v. Stynchcombe*[44] that juries could determine penalties without violating fourteenth amendment due process and that states historically have enjoyed wide discretion in separating the duties of judge and jury.[45]

Consequently, by 1973 any initial post-*Witherspoon* anticipation of the adoption of bifurcated capital trials might easily have been dampened by the Court's own language. Nevertheless, there were other signals from the Court that prompted legislators and lower court judges to consider the utility of the bifurcated trial. In the wake of the Court's invalidation of many state death penalty statutes[46] in 1972 following *Furman v. Georgia*,[47] state lawmakers eager to find a constitutional capital punishment scheme began to explore alternatives. Subsequently, several states[48] revised their statutes, adding schemes that separated the guilt-determination and sentencing phases of the trial. By 1976, when the Court validated the death penalty statutes of Georgia,[49] Florida,[50] and Texas,[51] the bifurcated trial, which merely five years earlier Justice Harlan had pronounced as beyond the power of the Court to mandate, had suddenly become an integral part of valid capital punishment schemes. While it would be overreaching to conclude that by 1976 the Court had abandoned its earlier predisposition against ordering bifurcated trials, the approval of the bifurcation arrangements of Georgia, Florida, and Texas, along with the Court's heightened interest in capital jury selection and procedures, renewed legislative and judicial interest in bifurcation.[52] While the Court's approval of bifurcated trials came not in response to sixth amendment issues but instead to eighth amendment problems discussed in *Furman*—namely arbitrary and ca-

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43. *Id.* at 195, 221.

44. 412 U.S. 17 (1973).

45. *Id.* at 22.

46. *See* vacated death sentences and remanded cases listed at 408 U.S. 933, 933-940 (1972); Stewart v. Massachusetts, 408 U.S. 845 (1972).

47. 408 U.S. 238 (1972).

48. *See, e.g.*, FLA. STAT. ANN. § 921.141 (West 1974); GA. CODE ANN. § 27-2503 (Supp. 1975); TEX. STAT. ANN. § 37.071 (Supp. 1975-76). (Some statutes have since been changed.)

49. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

50. *See* Proffitt v. Florida, 428 U.S. 242 (1976).

51. *See* Jurek v. Texas, 428 U.S. 262 (1976).

52. Indeed, at least one commentator has concluded that capital defendants now are guaranteed the "right to be tried pursuant to a bifurcated proceeding in which the issues of guilt and punishment are separately considered." White, *Reexamined*, *supra* note 17, at 353. Moreover, all states with capital punishment statutes now provide for bifurcated proceedings. *Id.* at 353 n.2.

pricious infliction of the death penalty—nevertheless it is fair to conclude that the Court was beginning to view bifurcation as helpful in meeting constitutional requirements.[53] Moreover, bifurcation was not a feature of the death penalty statutes of North Carolina[54] and Louisiana,[55] both of which the Court rejected[56] while it simultaneously upheld those of Georgia, Florida, and Texas. Legislators interested in drafting constitutionally valid capital punishment statutes since 1976 have been advised to use bifurcation.[57] As a result, an overwhelming majority of states have adopted bifurcation schemes since 1976.[58]

IV. Recent Cases Involving *Witherspoon* Challenges to Jury Composition

Until its wholesale adoption in response to eighth amendment concerns, the bifurcated trial had seen an erratic history after 1968. In contrast, the development of social science data and legal arguments on the issue of the proneness of death-qualified jurors to convict have been continuous. Many articles and studies[59] have appeared since *Witherspoon*. Yet, despite the fact that these studies "all basically agree,"[60] and despite their apparent compelling force and their continuous mention in jury challenges,[61] only in a few recent cases have judges zealously been willing to consider their impact.

Perhaps the most conspicuous of these recent cases has been *Spinkellink v.*

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53. Consider the comments of Justice Stewart in Gregg v. Georgia:

> Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure—one in which the question of sentence is not considered until the determination of guilt has been made—is the best answer. . . . When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman* . . . .
>
> . . . As a general proposition these concerns [*i.e.*, arbitrary and capricious manner of imposing death penalty] are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

428 U.S. at 190, 192, 195 (plurality opinion) (footnotes omitted).

54. *See* N.C. Gen. Stat. §§ 14-17, -21 (Cum. Supp. 1975) (later modified).

55. *See* La. Code Crim. Pro. Ann. Art. 817 (West Supp. 1975) (later modified).

56. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976). In these states, the death penalty was mandatory for certain crimes.

57. "[I]t is recommended that the guilt phase be separated and bifurcated from the penalty phase when the jury determines penalty." H. Schwab, Legislating the Death Penalty 1 (1977). This publication was prepared for the Council of State Governments.

58. *See, e.g.*, La. Code Crim. Pro. Ann. Arts. 905 *et seq.* (West Cum. Supp. 1980); Miss. Code Ann. § 99-19-101 (Cum. Supp. 1980); Mo. Ann. Stat. §§ 565.006 *et seq.* (Vernon 1979); Mont. Rev. Codes Ann. § 46-18-301 (1979); Nev. Rev. Stat. § 175. 552 (1977); N.M. Stat. Ann. §§ 31-20A-1 *et seq.* (Supp. 1979); Okla. Stat. Ann. tit. 21 §§ 701.10 *et seq.* (West Cum. Supp. 1980); S.C. Code § 16-3-20 (Cum. Supp. 1979); Tenn. Code Ann. § 39-2404 (Cum. Supp. 1980); Va. Code §§ 19.2-264.3 *et seq.* (Cum. Supp. 1980).

59. *See, e.g.*, the list in note 12 *supra*.

60. Girsch, *supra* note 11, at 125.

61. *See, e.g.*, many of the cases listed in note 6 *supra*.

Wainwright.[62] In *Spinkellink*, the Fifth Circuit Court of Appeals noted that a review of the data indicated that it was "far from conclusive"[63] that a death-qualified jury would be prone to convict; but at the same time the court suggested, without alluding to any social science findings,[64] that a jury inclusive of death-opposed jurors would be prone to acquit. Indeed, the court apparently concluded that death-opposed veniremen could not fairly decide a defendant's guilt[65] but failed to demand the same scientific data it would insist upon from a defendant who argued that a death-qualified jury favored the prosecution.

The *Spinkellink* court considered but then rejected the defendant's request that scrupled jurors be allowed to vote only on the issue of guilt. The court reasoned that during the first phase of a capital trial these jurors "still would know that a vote to convict could eventually mean the death penalty, a result to which [they] would have contributed, if only indirectly."[66] The court concluded that the death-opposed jurors would find their decision about a defendant's guilt or innocence "troublesome."[67] Consequently, the court deferred to Florida's determination that the rights of the defendant and the interests of the state were simply "too fundamental to risk a defendant-prone jury"[68] that might result from the inclusion of scrupled jurors at the guilt phase, even though such jurors stated that they could decide impartially the issue of guilt.

Spinkellink's response to *Witherspoon* issues is inadequate. First, the rejection of a proposition supported by a vast array of data contradicts the Supreme Court's increasing respect for such data.[69] Second, the court may have misperceived the issue of neutrality with respect to guilt. According to one recent interpretation, *Witherspoon* does not stand for the notion that jurors passing the death-qualification process themselves are necessarily so partial toward the prosecution and so biased against the defendant that they should be excused for cause.[70] Rather, it suggests that the death-qualification process eliminates from the pool of fair and impartial veniremen "that portion of the spectrum of viewpoints or experience which is most likely to be

62. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

63. *Id.* at 594. *Cf.* text accompanying notes 18-20 *supra* (calling data "too tentative and fragmentary").

64. *Id.* The court reasoned that showing that a "death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant." *Id.* Compare this passage with comments in note 14 *supra*.

65. *Id.* at 595. The excluded veniremen had stated (1) that they could not vote to impose the death penalty under any circumstances, but nevertheless (2) that they would fairly judge the petitioner's guilt or innocence. The trial judge struck them for cause. *Id.*

66. *Id.* at 596.

67. *Id.*

68. *Id.* at 597.

69. *See* White, *Reexamined*, *supra* note 17, at 376 for an analysis of the Supreme Court's approach to social science data in sixth amendment challenges.

70. Hovey v. Superior Court, 28 Cal. 3d 1, 19 n.41, 616 P.2d 1301, 1309 n.41, 168 Cal. Rptr. 128, 136 n.41 (1980). *See also* the criticism of *Spinkellink* in White, *Reexamined*, *supra* note 17, at 374-75.

favorable to [the defendant] at the trial on guilt or innocence."[71] Third, rather than engaging in a balancing of interests of the defendant and the state given the availability of a bifurcation scheme, the court apparently deferred to the state's own determination of such a balancing process.[72]

Contemporaneously with *Spinkellink*, in *People v. Sand*[73] a California defendant contended that it was error to exclude death-opposed jurors from either phase of the bifurcated capital trial. Relying on state precedent, the majority of the appeals court rejected the defendant's contention that he was denied due process by the exclusion of death-opposed jurors who claimed that their views would not or might not prevent them from rendering an impartial decision on the question of guilt, and by the exclusion of death-opposed jurors who were not asked whether they could render an impartial verdict.[74]

In a vigorous dissent, Judge Jefferson pointed out that *Witherspoon* had left open the question of proneness toward conviction among death-qualified jurors.[75] He implied that so long as the juror did not have to decide punishment, he could remain unalterably opposed to imposing the death penalty and yet be impartial on the question of guilt. The dissent concluded that the defendant's evidence failed to establish a convincing case on the issue of proneness to convict. Nevertheless, Judge Jefferson argued that the procedures used to purge scrupled jurors unconstitutionally excluded a large and identifiable segment of the community, and that the state had failed to establish any legitimate purpose for excluding such a class.[76]

In 1980 the *Witherspoon* question was raised several times. In *State v. Avery*,[77] a divided North Carolina Supreme Court rejected the defendant's argument that sufficient social science data and legal analysis now exist to allow the conclusion that death-qualified juries are unconstitutionally composed at the guilt phase.[78] In his dissenting opinion,[79] Judge Exum considered the defendant's array of legal arguments and social science data and concluded that, even if proneness to convict were not conclusively shown, the defendant nevertheless had shown that death-opposed jurors constituted a cognizable group for purposes of challenging the composition of capital juries.[80] He concluded that the state had failed to show that veniremen excluded for complete

71. Hovey v. Superior Ct., 28 Cal. 3d at 19 n.41, 616 P.2d at 1309 n.41, 168 Cal. Rptr. at 136 n.41.

72. The court observed:

> Florida has reached the reasoned determination that the parties' right under the sixth and fourteenth amendments to an impartial trial and the state's interest in the just and evenhanded application of its laws, including Florida's death penalty statute, are too fundamental to risk a defendant-prone jury from the inclusion of such veniremen.

578 F.2d at 597.

73. 81 Cal. App. 3d 448, 146 Cal. Rptr. 448 (1978), *cert. denied*, 439 U.S. 1117 (1979).

74. *Id.* at 451, 146 Cal. Rptr. at 450.

75. *Id.* at 456, 146 Cal. Rptr. at 453 (Jefferson, J., dissenting).

76. *Id.* at 459-61, 146 Cal. Rptr. at 455-56 (Jefferson, J., dissenting).

77. 299 N.C. 126, 261 S.E.2d 803 (1980).

78. *Id.* at 138, 261 S.E.2d at 810.

79. *Id.* at 139, 261 S.E.2d at 811 (Exum, J., dissenting).

80. *Id.* at 139-48, 261 S.E.2d at 811-16 (Exum, J., dissenting).

opposition to the death penalty could not obey the law and be impartial at the guilt phase of the trial.[81] He then argued that, unless the state could show a significant policy—apparently more than mere convenience—for having precisely the same persons determine both guilt and punishment, then a sixth amendment violation had occurred because of the systematic exclusion of all scrupled jurors from the first phase of the trial.[82] Finally, Judge Exum argued that North Carolina's capital punishment statute could be read broadly to mitigate problems of cross section violation and proneness to convict raised by the elimination of death-opposed jurors, by allowing such jurors to sit at the guilt phase, to be replaced by alternates at the punishment phase.[83]

In Arkansas, the decision of federal district Judge Eisele in *Grigsby v. Mabry*[84] represents a small breakthrough for defendants raising objections to the guilt-phase jury created by *Witherspoon* challenges for cause. While rejecting petitioner's cross-section argument, nevertheless, for the first time, a court has concluded that the evidence no longer appears so "fragmentary and tentative"[85] as it did in 1968 when *Witherspoon* was decided. Judge Eisele argued that the trial court's refusal to grant defendant the opportunity to demonstrate the conviction-proneness hypothesis denied him the right to an impartial jury and constituted an abuse of judicial discretion;[86] he remanded the case for an evidentiary hearing. The court asserted that it would be improper to excuse a juror for cause at the guilt phase solely on the basis of his or her irrevocable opposition to the death penalty, and it acknowledged that the state's interest—ensuring a jury capable of imposing the death penalty in a proper case—was not involved if the scrupled juror swore to decide the question of guilt on the basis of law and evidence.[87] The court suggested that if the state insisted on excluding jurors on *Witherspoon* grounds, then different juries would be required to determine guilt and punishment. Otherwise, Judge Eisele concluded, a jury could not be qualified on *Witherspoon* grounds and simultaneously be able to determine both guilt and punishment, since at the

81. *Id.* at 149, 261 S.E.2d at 817 (Exum, J., dissenting).

82. *Id.* at 149-50, 261 S.E.2d at 817-18 (Exum, J., dissenting).

83. *Id.* at 150, 261 S.E.2d at 817-18 (Exum, J., dissenting). N.C. GEN. STAT. § 15A-2000 (Cum. Supp. 1979) provides as follows:

> The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

84. 483 F. Supp. 1372 (E.D. Ark. 1980). For a detailed examination of *Grigsby*, see Note, *supra* note 2.

85. *Id.* at 1388 (quoting *Witherspoon*, 391 U.S. at 517).

86. *Id.*

87. *Id.* at 1384.

guilt phase the jury would be impermissibly unrepresentative.[88] Nevertheless, the court held out the possibility that a state might be able to show an overriding interest in having one jury decide both guilt and punishment, in which case exclusion of death-scrupled jurors for cause would be justified.[89]

The *Grigsby* court's interpretation of *Witherspoon* differs markedly from those of the Fifth Circuit court in *Spinkellink* and the hesitant Seventh Circuit court in *United States ex rel. Clark v. Fike*.[90] Unlike *Spinkellink*, *Grigsby* interprets *Witherspoon* to limit the state's power to challenge for cause. This view comports with one recently expressed by the Supreme Court in *Adams v. Texas*:[91]

> *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limit on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out.[92]

It appears that the Court of Appeals for the Fifth Circuit in *Spinkellink* used a "broader basis" than was permissible in excluding death-opposed jurors from the guilt phase of the trial. Since the vast majority of such jurors would be able to decide the facts impartially and apply the law on the issue of guilt,[93] they should not have been excluded from the first phase of the capital

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88. *Id.*

89. *Id.* at 1385. Placing on the state the burden of showing a compelling state interest in order to tip the balance toward the state would seem appropriate in light of *Witherspoon*, 391 U.S. at 520 n.18, and Duren v. Missouri, 439 U.S. 357 (1979).

90. 538 F.2d 750 (7th Cir. 1976). *See* text accompanying note 18 *supra*.

91. 448 U.S. 38 (1980). The Court explained that generally

> a juror may not be challenged for cause based on his 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. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45. The Court then specifically concluded that this rule applied to "the bifurcated procedure employed by Texas in capital cases." *Id.*

92. *Id.* at 47-48. The Supreme Court struck down the Texas statute, which required exclusion of any venireman "unless he state[d] under oath that the mandatory penalty of death or imprisonment [would] not affect his deliberation on any issue of fact." *Id.* at 42 (quoting TEXAS PENAL CODE ANN. § 12.31 (b) (1974)).

The Court concluded that the Texas scheme was flawed because it expanded the *Witherspoon* limit to include considerations of whether the mandatory death penalty, which would accompany affirmative answers to three statutory questions, "would have any effect at all on the jurors' performance of their duties." *Id.* at 49. The Court observed:

> Such a test could, and did, exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be "affected." But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments.

Id. at 49-50 (footnotes omitted).

93. *See* Bronson, *supra* note 12, at 12-13: "With less than 10% of those most opposed to

trial. This was precisely the conclusion reached in *Grigsby*, which also implied that the time has arrived for the highest Court to reexamine the inclinations of death-qualified juries toward conviction. Absent clear Supreme Court guidance, however, Judge Eisele observed that "it should be open to defendants in capital cases to prove that, *in fact*, death-qualified juries are more prone to convict as they were invited to do in *Witherspoon*."[94]

The Delaware Supreme Court has taken a different approach to the death-opposed juror. In *Hooks v. State*,[95] the court sanctioned the seating of death-opposed jurors who feel able to render an impartial verdict. The court rejected a defendant's claim that the death-qualification process yields a jury prone to convict. The court noted that jurors who had been removed were those who stated that "they could not return a guilty verdict in any case if they knew the penalty would be death."[96] The court further observed that Delaware law allowed a death-penalty opponent to sit as a juror if he or she felt able to render an impartial verdict.[97] Responding to studies on the proneness of death-qualified juries to convict, the court summarily noted that studies published since *Witherspoon* were based on individual questioning rather than on group experiences in actual trial settings.[98] The court observed that other jurisdictions[99] had found the studies inconclusive, and it refused to depart from those precedents.[100] It distinguished *Grigsby* as presenting a more compelling situation, since the defendant in that case had been denied an evidentiary hearing at trial.[101]

The most thorough state-court examination to date of the issue of proneness to convict has been presented in *Hovey v. Superior Court of Alameda County*,[102] in which the California Supreme Court, by a four-to-three margin, ruled that a prospective juror who could be fair and impartial with respect to the guilt phase of a capital trial may nevertheless be removed for cause if he or she is unequivocally opposed to imposition of the death penalty. Reviewing the evidentiary hearing below, which had consumed seventeen court days and 1200 pages of transcript, Chief Justice Bird in his majority opinion drew a distinction between a "*Witherspoon*-qualified jury" and a "California death-qualified jury."[103] According to the court, the former consists of a panel from which those unalterably opposed to the death penalty have been excluded. The California-qualified jury consists of those qualified by *Witherspoon* stan-

capital punishment evincing a strong willingness to let their distaste for the punishment override their judgment on guilt, it would seem untenable to exclude the whole group."

94. 483 F. Supp. at 1389 (emphasis in original).

95. 416 A.2d 189 (Del. 1980).

96. *Id.* at 194-95.

97. *Id.* at 194 (citing DEL. CODE ANN. tit. 11 § 3301 (1979), as interpreted in Steigler v. State, 277 A.2d 662 (1971) and Parson v. State, 275 A.2d 777 (1971)).

98. 416 A.2d at 195.

99. Citing Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); United States *ex rel.* Clark v. Fike, 538 F.2d 750 (7th Cir. 1976); and Craig v. Wyse, 373 F. Supp. 1008 (D. Colo. 1974).

100. 416 A.2d at 195.

101. *Id.* at 195 n.3.

102. 28 Cal. 2d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

103. *Id.* at 16 n.34, 63-64, 616 P.2d at 1307-08 n.34, 1343, 168 Cal. Rptr. at 134-35 n.34, 170-71.

dards and also excludes those who would vote automatically to impose the death penalty.[104] Consequently, despite a comprehensive review of the evidence presented by the defendant,[105] the majority concluded that his evidence related only to *Witherspoon*-qualified juries, and, despite the strong implication that the data were sufficient to prove that the process of death-qualification results in juries biased toward conviction, the court held that such evidence could not be transposed to California-qualified juries.[106] The result is equivalent to finding the evidence as yet "too tentative and fragmentary" to allow firm conclusions about California-qualified juries.

Notwithstanding the court's rejection of the defendant's data on the issue of conviction-proneness, the majority concluded—ironically, on the basis of a single study[107]—that the procedure for death-qualification, and not the exclusion of scrupled jurors, predisposes the remaining jurors to believe that the defendant is guilty.[108] The court determined that the time and energy expended in the death-qualification process, and the repetition of the death-qualification voir dire questions, create a jury no longer neutral with respect to guilt.[109] Consequently, the court ordered individual voir dire and sequestration of veniremen for the death-qualification process.[110]

Hovey is significant in several respects. Certainly, the court's careful evaluation of the data on the conviction-proneness hypothesis and its sequestration rule for the death-qualification process should heighten interest in these issues. The court's negative implication was that a *Witherspoon*-qualified jury that included jurors predisposed to vote for the death penalty would not be neutral.[111]

Moreover, the decision recognized three constitutional approaches which defendants may use in developing *Witherspoon*-based challenges to the death-qualification process. First, on the *Witherspoon* neutrality issue, a defendant could establish that removal of jurors who state that they can impartially determine guilt results in a jury less than neutral with respect to guilt determination, violating due process and sixth amendment impartial jury guarantees.[112] Second, invoking an approach adopted in *Ballew v. Georgia*,[113] a defendant could show, by raising a substantial doubt, that the proper purpose and function of the jury, which are protected by the sixth amendment, are significantly

104. *Id.* at 63-64, 616 P.2d at 1343, 168 Cal. Rptr. at 170.

105. *Id.* at 26-69, 616 P.2d 1314-46, 168 Cal. Rptr. at 141-68.

106. *Id.* at 63-64, 616 P.2d at 1343, 168 Cal. Rptr. at 170.

107. Haney, The Biasing Effects of the Death Qualification Process (1979 prepublication draft), *cited in* 28 Cal. 3d at 75 n.125, 616 P.2d at 1351 n.125, 168 Cal. Rptr. at 178 n.125.

108. 28 Cal. 3d at 73, 616 P.2d at 1348, 168 Cal. Rptr. at 175.

109. *Id.* at 69-80, 616 P.2d at 1347-54, 168 Cal. Rptr. at 174-81.

110. *Id.* at 80-81, 616 P.2d at 1354, 168 Cal. Rptr. at 181-82.

111. *Id.* at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173: "All he [the defendant] has shown is that if a state used all four '*Witherspoon* qualified' groups [*i.e.*, those indifferent to, opposed to, and favoring the death penalty, plus those who would vote automatically to impose it] in a capital trial, the jury would not be neutral."

112. *Id.* at 17, 616 P.2d at 1308, 168 Cal. Rptr. at 135. *See* note 2 *supra*.

113. 435 U.S. 223 (1978). *See* text accompanying note 35 *supra*. *See also* discussion of *Ballew* at note 30 *supra*.

inhibited by the exclusion of death-scrupled jurors who could vote impartially on guilt or innocence.[114] Third, a defendant could show that jurors excluded because of their scruples against capital punishment constitute a cognizable class such that their removal results in a jury which does not reflect a fair cross section of the community.[115]

The *Hovey* distinction between *Witherspoon*- and California-qualified juries will spark considerable debate. Whether *Witherspoon* presupposed that jurors who would automatically vote to impose the death penalty would be excluded on *separate*—perhaps eighth amendment—grounds is an open question.[116] The United States Supreme Court in *Witherspoon* did take note[117] that in *Crawford v. Bounds*,[118] the Fourth Circuit Court of Appeals had invalidated a death penalty rendered by a jury which included a juror who claimed that it was his duty to sentence to death every convicted murderer, while those who had indicated general scruples against the death penalty had been summarily dismissed from jury service. Moreover, in *Boulden v. Holman*,[119] *Davis v. Georgia*,[120] *Lockett v. Ohio*,[121] and *Adams v. Texas*,[122] the Court empha-

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114. 28 Cal. 3d at 18, 616 P.2d at 1309, 168 Cal. Rptr. at 136.

115. *Id.* at 17-18 n.38, 616 P.2d at 1308-09 n.38, 168 Cal. Rptr. at 135-36 n.38. *See* Note, *supra* note 2. Also, the defendant argued that the voir dire procedure for death-qualification in California influenced the attitudes of those persons who eventually were chosen as jurors and thus rendered the jury "less than neutral" with respect to both guilt and punishment. *Id.* at 18, 616 P.2d at 1309, 168 Cal. Rptr. at 136. The court concluded that such a jury would indeed be "prone to convict." *Id.* at 73, 616 P.2d at 1349, 168 Cal. Rptr. at 176. This argument is also constitutional in nature, but since it deals with the questioning *procedure* rather than the *process* of excluding death-scrupled jurors, it is not classified as an approach to challenging the *process*.

116. Judge Bird noted that while *Witherspoon* "did not directly address whether the Constitution requires the exclusion of those who would automatically vote for the death penalty in every case," defendant's evidence presupposed that those who would vote automatically to impose the death penalty were *Witherspoon*-qualified. 28 Cal. 3d at 63-64 n.110, 616 P.2d at 1343 n.110, 168 Cal. Rptr. at 170 n.110. Support for the court's view can be found in Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 LAW & CONTEMP. PROB. 137, 148 (Autumn 1980). Mullin notes that "the Supreme Court has yet to hold that persons who would automatically vote for the death penalty in the second trial when they found the accused guilty of first degree murder in the first trial may also be excluded." *Id.*

On the other hand, the *Witherspoon* opinion itself noted that a state could not utilize a jury "'organized to convict,'" 391 U.S. at 521 (quoting Fay v. New York, 332 U.S. 261, 294 (1947)).

Some misunderstanding has resulted from the Supreme Court's failure to state unequivocally that states must exclude veniremen who would vote automatically to impose the death penalty regardless of the circumstances of a particular case. The Court may have exacerbated the confusion by its comments in Adams v. Texas, 448 U.S. at 49. *See* note 122 *infra*.

117. 391 U.S. at 521-22 n.20.

118. 395 F.2d 297, 303-04 (4th Cir. 1968), *cert. denied*, 397 U.S. 936 (1970) (alternate holding).

119. 394 U.S. 478, (1969). The Court observed:

> [I]t is entirely possible that a person who has a "fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of the trial judge and to consider fairly the imposition of the death sentence in a particular case.

Id. at 483-84.

120. 429 U.S. 122 (1976) (per curiam).

121. 438 U.S. 586, 595-96 (1978).

122. 448 U.S. 38 (1980), *quoted at* note 91 *supra*.

In *Adams*, the Texas Attorney General argued that the State's procedure for questioning veniremen, *see* note 92 *supra*, was "neutral," since a defendant theoretically could use the scheme to challenge those jurors "who state that their views in favor of the death penalty will affect their deliberations on fact issues." *Id.* at 49. The Supreme Court found this argument unpersuasive,

sized the ability of a juror conscientiously to follow the trial court's instructions. By implication, a juror predisposed to vote for the death penalty regardless of the facts of a particular case *ipso facto* could not follow the instructions of the trial judge at the penalty phase of the trial. Notwithstanding that fact, there are probably many jurors who are unalterably in favor of the death penalty who could nevertheless be impartial in determining the issue of guilt.

The court in *Hovey* assumed that *Witherspoon*-qualified jurors include those who would vote automatically to impose the death penalty regardless of the facts in a particular case. Significantly, the court failed to consider the distinct possibility that, upon reexamination of *Witherspoon*, the present Supreme Court might expand, *or clarify*, the exclusion standard in capital cases (1) to require disqualification at the guilt phase of the trial of those death-penalty proponents whose views would interfere with their ability to find the facts and follow the court's instructions; and (2) to require at the guilt phase the inclusion of those death-penalty proponents who could be fair and impartial in determining guilt or innocence.

Furthermore, the *Hovey* majority assumed that California's practice of excluding from both stages of the capital trial those jurors who would automatically vote to impose the death penalty regardless of mitigating factors is constitutionally sound. It may be argued, particularly in light of the United States Supreme Court's warning that jurors may be excluded on no broader basis than their "inability to follow the law or abide by their oaths,"[123] that California's practice of excluding all who would impose the death penalty automatically is overly broad, since it eliminates at the guilt phase those death-

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noting that although such "eye for an eye" jurors exist—at least hypothetically—"it is undeniable . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment. The appearance of neutrality created by the theoretical availability of § 12.31 (b) as a defense challenge is not sufficiently substantial to take the statute out of the ambit of *Witherspoon*." *Id.*

In lightly dismissing the Texas neutrality argument the Court was not tacitly countenancing the seating of all jurors who would vote automatically to impose the death penalty regardless of the circumstances of the particular case. Indeed, elsewhere in its opinion the Court noted that "a juror would no doubt violate his oath if he were not impartial on the question of guilt." *Id.* at 44. Elsewhere the Court repeated "that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths." *Id.* at 50.

The California court in *Hovey* was troubled by the Supreme Court's approach, since "Texas' contention was unmeritorious on its face, regardless of the relative sizes of those groups [i.e., jurors who unquestioningly favor the death penalty and jurors who always oppose it]." 28 Cal. 3d at 66 n.113, 616 P.2d at 1345 n.113, 168 Cal. Rptr. at 172 n.113.

The court continued:

> *Witherspoon* established that a constitutionally neutral jury is one drawn from a pool which includes (in appropriate proportion) *all* segments of the community of fair and impartial adults. . . . A jury from which a segment of that community has been excluded (or is underrepresented) does not become constitutionally neutral merely because an opposing segment is also excluded. The concept of constitutional diversity contemplates jury *diversity*, and the reasons for jury diversity include more than simply counterbalancing opposing view points. . . . Thus, there appears to have been no reason for the *Adams* court to resort to speculation as to the relative sizes of the "eye for an eye" and "scrupled" groups. Texas' argument was unsound on a more fundamental level.

Id. (emphasis in original).

123. *Id.* at 48 (quoting *Witherspoon*, 391 U.S. at 522 n.21).

penalty proponents who could be impartial. Hence, while the *Hovey* court struggled to distinguish the *Witherspoon* data, it merely postponed an inevitable result: the creation of a single constitutional standard for a capital jury. The *properly constituted capital jury* should exclude (a) at the guilt phase, only those who would (1) allow their feelings favoring the death penalty to interfere with an impartial determination of guilt or innocence; or (2) allow their feelings opposing the death penalty to interfere with an impartial determination of guilt or innocence; and (b) at the penalty phase, those additional jurors who would (3) vote automatically to impose the death penalty regardless of mitigating circumstances; or (4) vote automatically against imposing the death penalty regardless of the circumstances.

Finally, the *Hovey* court utilized a study[124] based on *Witherspoon*-qualified "jurors" to reach its conclusion that the death-qualification procedures predisposed the jury to convict the defendant.[125] The court failed to explain why it found this study so persuasive without insisting that it be based on a California-qualified "jury," an inconsistency mentioned in the partial dissent.[126]

Whether the United States Supreme Court takes up the unresolved *Witherspoon* questions soon, recent case developments portend that more lower courts will reach the same conclusions as the court in *Grigsby* and the dissenting opinions in *Sand* and *Avery*. The unique *Hovey* rulings indicate that courts may be inching toward the conclusion that new approaches to death-qualification must be devised. Consequently, attention should be focused on procedures that will balance the interests of the defendant in receiving an unquestionably neutral and representative jury, against the state's interest in maintaining an efficient trial mechanism.

V. Some Proposals to Accommodate Interests of the Defendant and State in Capital Juries

A. Peremptory Challenges

Many solutions to the problems of composing a fair and impartial capital jury have been proposed, some of them even before *Witherspoon* was announced.[127] One proposal would allow states to strike scrupled veniremen by the use of peremptory challenges.[128] The occasional use of the peremptory challenge to exclude such jurors would probably go unquestioned. However, there are significant problems with this approach. First, if utilized often enough, it would result in the wholesale exclusion of scrupled veniremen.

124. Haney, The Biasing Effects of the Death Qualification Process (1979 prepublication draft) (*cited in Hovey*, 28 Cal. 3d at 75 n.125, 616 P.2d at 1351 n.125, 168 Cal. Rptr. at 178 n.125).

125. 28 Cal. 3d at 79, 616 P.2d at 1351, 168 Cal. Rptr. at 179. The study's "jurors" were persons in simulated jury settings.

126. *Id.* at 84-85, 616 P.2d at 1356, 168 Cal. Rptr. at 184 (Richardson, J., partially dissenting).

127. *See, e.g.*, Oberer, *supra* note 9; Note, *Jury—Allowing Challenge for Cause to a Prospective Juror Opposed to Capital Punishment*, 45 N.C.L. Rev. 1070, 1075-76 (1967).

128. Such an approach, with regard to death-penalty opponents, was considered by Oberer, *supra* note 9, at 566.

Such a practice would be open to the charge that it resulted in systematic, "invidious discrimination for which the peremptory system is insufficient justification."[129] Hence this approach is of dubious constitutionality.

Second, if the number of scrupled veniremen in a particular pool exceeded the maximum number of peremptories allowed by statute, this approach would not resolve the issue of death-qualification, since in some trials the state would not be able to prevent some scrupled jurors from being seated at both the guilt and penalty phases of the trial. As a result, *Witherspoon* would be violated in that scrupled jurors would sit at the penalty phase, presumably determining, before the first evidence was heard, either (a) that the state's interest would not be protected; that is, in states where the jury determines punishment, the jury could not return a death sentence if the situation called for it; or (b) that the defendant's interest would not be protected; that is, in states where the jury determines punishment, the jury would contain certain individuals predisposed to impose the death penalty.

B. Challenges for Cause

A second, superior approach would allow the prosecution to challenge for cause only those veniremen who cannot separate their strong feelings for *or* against the death penalty from their sworn duty to consider objectively the facts and the law in determining guilt.[130] This approach would seem to fit the contours of *Lockett v. Ohio*[131] and *Adams v. Texas*,[132] by limiting the basis for the state's power to exclude to a juror's inability to obey the law or his oath. Furthermore, the resulting guilt-phase jury would fit the proposed definition of a properly constituted capital jury suggested above in the discussion of *Hovey v. Superior Court of Alameda County*.[133] If the second approach is adopted, the practical problem is to develop a bifurcation scheme to include scrupled jurors at the guilt phase and to prevent them from denigrating either the state's or defendant's interests at the penalty phase.

1. States in Which Juries Determine Punishment

In states which allow the jury to determine punishment, several options are available. First, scrupled jurors allowed to vote on the issue of guilt could be replaced by alternates at the penalty phase.[134] This approach is suitable and efficient where the number of scrupled jurors is small. The alternate juror(s) could be seated adjacent to, or perhaps mingled with, the guilt-phase jury. If there were a large number of alternate jurors, however, mere physical accommodation in the courtroom would present problems in many jurisdic-

129. Swain v. Alabama, 380 U.S. 202, 223 (1965).

130. This may be the approach of the court in Hooks v. State, 416 A.2d 189 (Del. 1980). *See* text accompanying notes 95-97 *supra*.

131. 438 U.S. 586 (1978).

132. 448 U.S. 38 (1980).

133. *See* text following note 122 *supra*.

134. Such an approach was suggested (with respect to death-scrupled jurors) in State v. Avery, 299 N.C. 126, 150, 261 S.E.2d 803, 817 (1980) (Exum, J., dissenting).

tions. Some courtrooms would have to be renovated. Moreover, attorneys might also find a large number of jurors and alternates to be distracting, lessening the intimacy that is sought from the usual jury of twelve (or fewer). The psychological nuances that many attorneys use in dealing with juries could become harder to develop or manipulate.

There are some variations of the first option that mitigate some of its potential problems while creating others. Two completely different juries could be used to determine guilt and punishment.[135] Such a proposition is expensive when compared to other options. Much time and manpower would be expended in the repetitious presentation of evidence. If both juries were seated in the courtroom simultaneously, attorneys could become torn between the two juries in the presentation of evidence. Jurisdictions with current, serious case backlogs might view the double-jury arrangement as merely exacerbating delays in the delivery of justice. Alternatives to *de novo* presentations of evidence, such as video-tape replays of original presentations, present problems of expense, possibilities for misrepresentation, and technical difficulties.

A second option in states where the jury determines punishment would allow scrupled jurors to drop off at the penalty phase, using only the remaining jurors to determine punishment. This approach has been requested at least once—and summarily rejected.[136] There are obvious problems with this approach: (a) Whenever more than a few jurors were scrupled, the group determining punishment might be so small that the presumed advantages of group decision-making would be lost; (b) While the Supreme Court has not directly addressed the reduced-size capital jury, an analogy to *Ballew v. Georgia*,[137] in which the Supreme Court invalidated a conviction rendered by a jury of fewer than six persons, suggests that any group smaller than six to determine punishment would likewise be unconstitutional. Hence this option would apply at best only to a portion of the problem cases,[138] and a supplementary scheme would have to be devised to handle the remaining cases.

A third option in states where the jury determines penalty would allow scrupled jurors to sit at both stages, permitting the group to determine punishment by majority vote. While the Supreme Court has countenanced majority votes of at least nine-to-three in certain non-capital cases,[139] it has never extended its approval of the concept to death penalty situations. Given the rather demanding strictures the Court has imposed on states wishing to utilize the death penalty,[140] such a flexible approach as majority vote on penalty would seem a flagrant contradiction. Furthermore, it seems at least strange to

135. This idea—with respect to death-opposed jurors—appears in Oberer, *supra* note 9, at 567 n.93; in *Witherspoon*, 391 U.S. at 520 n.18; and in State v. Avery, 299 N.C. at 150, 261 S.E.2d at 817 (Exum, J., dissenting).

136. *See* Porter v. State, 237 Ga. 580, 229 S.E.2d 384 (1976).

137. 435 U.S. 223 (1978).

138. *I.e.*, those with a penalty-phase jury of at least six members.

139. *See* Johnson v. Louisiana, 406 U.S. 356 (1972).

140. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976), Proffitt v. Florida, 428 U.S. 242 (1976); and Jurek v. Texas, 428 U.S. 262 (1976).

require a unanimous vote to convict in a capital case, while demanding only a majority vote to choose a penalty.[141] Moreover, in those cases where a majority of jurors were death-scrupled or biased toward an automatic death penalty, the state's interest in procuring a death sentence—or the defendant's right to be sentenced fairly—presumably would be blocked.

For states that allow juries to dictate punishment, accommodating the interests of both defendant and prosecution through bifurcated proceedings will require some additional expense and inconvenience. The first option, alternate jurors, appears to be the most promising change constitutionally and the least disruptive practically.

2. *States in Which Juries Do Not Recommend Punishment*

For states in which the jury does not control punishment determination, there are also multiple options. In states that permit no jury input at the penalty phase,[142] the only visible change would be to permit scrupled jurors to sit at the guilt phase unless they make clear their inability to be impartial. Whether the state provides that one judge[143] or a panel of judges[144] determines the punishment, such an approach places responsibility on those who are most familiar with the sentencing process. Indeed, several Justices of the Supreme Court have expressed a preference for judicial sentencing.[145] On the other hand, judicial sentencing usurps the jury's role of representing the conscience of the community.

3. *States in Which Juries Make Nonbinding Penalty Recommendations*

In states that permit juries to recommend, but not to dictate, the penalty in capital cases, the options are very similar to those available to states which allow juries to dictate punishment.[146] There are two major options. The first would force scrupled jurors to drop off after the guilt phase, permitting the remaining jurors, either alone or with alternates, to recommend a penalty. Since the recommendation would not be binding, it is arguable that eliminating scrupled jurors at the penalty phase would serve little purpose.

The better option would be to allow scrupled jurors to sit at both phases and permit the jury to make the non-binding recommendation of punishment by majority vote. Presumably this arrangement would eliminate the motiva-

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141. State are free, of course, to insist on unanimous verdicts in jury penalty determinations. *See, e.g.*, N.C. GEN. STAT. § 15A-2000(b) (1978).

142. *See, e.g.*, MONT. CODE ANN. § 46-18-301 (1979).

143. *Id. See* also OHIO REV. CODE ANN. §§ 2929.03-.04 (Page 1975).

144. *See, e.g.*, NEV. REV. STAT. § 175.522 (1977).

145. Justice Powell, speaking for Justices Stewart and Stevens, has commented:

> [I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.

Proffitt v. Florida, 428 U.S. 242, 252 (1976) (concurring opinion).

146. *See* text accompanying notes 134-141 *supra*.

tion of a death-opposed juror to hang the jury on the guilt question, since the juror would have a less drastic means to prevent imposition of the death penalty, namely persuasion at the penalty phase. The constitutionality of this majority-vote system of sentence recommendation was examined and approved by the Supreme Court in *Proffitt v. Florida*,[147] although there no death-scrupled jurors were involved. This alternative has the added benefit of requiring no extra expenditures for implementation.

VI. CONCLUSION

Courts, legislatures, and students of the law should give careful scrutiny to these alternatives and to others which are generated in the future. The whole process of death-qualification, including the voir dire scheme, deserves close examination. Certainly when, as here, social scientists speak with near-unanimity, neither the courts nor the legislatures should ignore them for very long.[148] Surely the Supreme Court eventually will have to pursue the questions it posed and left unanswered in *Witherspoon*. Prudent lawmakers can insulate their jurisdictions from adverse consequences by utilizing one or more of the suggested alternatives that balance the interests of the state and its capital defendants. At the very least, a state that steadfastly insists on preserving the death penalty should afford its capital defendants correspondingly steadfast safeguards for their interests and rights.

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147. 428 U.S. 242 (1976). *But cf.* Witt v. State, 342 So. 2d 497 (Fla.), *cert. denied*, 434 U.S. 935 (1977) (not error to exclude jurors who said they could not return an advisory verdict of death sentence upon weighing extenuating or mitigating circumstances, or could not judge guilt or innocence according to the facts); *see also* Fleming v. State, 374 So. 2d 954 (Fla. 1979) (not error to excuse for cause two jurors who expressed opposition to the death penalty where both exhibited an irrevocable commitment to vote against the death penalty regardless of the facts presented or instructions given).

148. As Judge Eisele observed in Grigsby v. Mabry, "[As] science advances our understanding and insight and as our society itself changes, so may the specific institutional methods of assuring that the impartiality which is guaranteed by the Sixth Amendment be, indeed, delivered." 483 F. Supp. 1372, 1389 (E.D. Ark. 1980).