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Constitutional Law--Grigsby v. Mabry: Are Death-Qualified Juries No Longer Qualified to Assess Guilt

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NOTES

Constitutional Law— *Grigsby v. Mabry*: Are Death-Qualified Juries No Longer Qualified to Assess Guilt?

Until 1968 a state could "death-qualify" a jury sitting on a capital case by challenging for cause any juror who objected to capital punishment.[1] In *Witherspoon v. Illinois*[2] the United States Supreme Court substantially curtailed a state's ability to remove a juror who morally opposed infliction of the death penalty. The Court found that exclusion of all jurors with scruples against capital punishment destroyed the jury's impartiality on the question of sentencing, "produc[ing] a jury uncommonly willing to condemn a man to die."[3] Such a hanging-jury violated due process, requiring that the resulting death sentence be set aside. The Court in *Witherspoon* mandated that mildly scrupled jurors—those opposed to capital punishment but nonetheless able to put aside their personal beliefs and vote for the death sentence in the appropriate case—could not be excluded for cause from any phase of the trial.[4] The decision did not require that those more highly scrupled jurors who, although able to impartially assess guilt, would never vote to impose capital punishment be allowed to serve during either the guilt or sentence determination phases of the trial.[5] Nor was the Court willing to find that a "death-qualified" jury was impermissibly partial on the issue of guilt.[6] In a partial concurrence Justice Douglas voiced a strong objection to these later aspects of the holding,[7] an

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1. *See* Logan v. United States, 144 U.S. 263 (1892).
2. 391 U.S. 510 (1968).
3. *Id.* at 521.
4. *Id.* at 521-23.
5. *Id.* at 522-23, n.21. The Court stressed that the decision did not bear

> upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id. Although this can be read as a statement by the Court that it was not deciding the constitutionality of challenging highly scrupled jurors, a more recent pronouncement by the Court indicates that jurors may be challenged if they are "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." Adams v. Texas, 100 S. Ct. 2521, 2529 (1980).

It has also been suggested that, as a practical matter, the two groups excluded under *Witherspoon*, those who would automatically vote against the death penalty and those biased against the prosecution on the issue of guilt, are the same people. Supplemental Brief Amicus Curiae of the North Carolina Civil Liberties Union at 10-11, Crawford v. Bounds, 395 F.2d 297 (4th Cir.), *vacated*, 393 U.S. 76 (1968). If this is true then Grigsby's claim concerning the representative nature of a death-qualified jury (*see* text accompanying notes 14-15 *infra*) is purely academic.

6. 391 U.S. at 518. This aspect of the holding was based on the Court's skepticism about the reliability of several studies which Witherspoon had offered as proof of the partiality of death-qualified juries on the issue of guilt. The Court left open the possibility that future studies would change this result. *Id.* at 520, n.18.

7. *Id.* at 523 (Douglas, J., concurring).

attack that recently has been renewed by the United States District Court for the Eastern District of Arkansas. In *Grigsby v. Mabry*[8] that court argued that eliminating those highly scrupled jurors who are able to assess guilt fairly from the guilt determination phase of the trial violates defendant's sixth amendment right to be tried by an impartial jury drawn from a cross-section of the community.[9] Nonetheless, the court felt constrained by stare decisis to reject defendant's claim that his right to a jury drawn from a cross-section of the community had been violated[10] but remanded for further hearings on defendant's claim that a death-qualified jury is per se partial on the issue of guilt.[11] Chief Judge Eisele's analysis of the cross-section claim has thrown considerable doubt on the continued validity of this aspect of *Witherspoon* in light of subsequent Supreme Court pronouncements. *Grigsby* reflects the growing concern over the soundness of *Witherspoon*,[12] a concern which must eventually be answered by the Supreme Court.

In *Grigsby* the state charged defendant James Grigsby with committing felony murder, a crime punishable by death or life imprisonment. Under Arkansas practice the jury that makes the determination of guilt must also determine the appropriate sentence in a separate phase of the trial.[13] Prior to trial Grigsby requested that two panels be used and that those highly scrupled ju-

8. 483 F. Supp. 1372 (E.D. Ark. 1980).

9. *Id.* at 1376-84. The sixth amendment provides that 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." U.S. CONST. amend. VI.

The requirement that a jury be chosen from a cross-section of the community has its origins in the fourteenth amendment's equal protection clause. In Strauder v. West Virginia, 100 U.S. 303 (1879), the Court held that a jury selection process that excluded blacks violated a black defendant's right to equal protection. In a later application of this principle the Court stated that it is "part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Smith v. Texas, 311 U.S. 128, 130 (1940). In reviewing a federal conviction the Court stated in dictum that the cross-section requirement was part of the "traditional requirements of jury trial" embodied in the sixth amendment. Glasser v. United States, 315 U.S. 60, 86 (1942). To bring a jury challenge under the cross-section requirement a defendant did not need to demonstrate that any prejudice had resulted from the exclusion of an identifiable group in the community. However, until the Court held in Duncan v. Louisiana, 391 U.S. 145 (1968), that the sixth amendment was applicable to the states, it insisted that the defendant in a state court proceeding be a member of the excluded group, and in cases of exclusion of non-racial groups, that the defendant demonstrate prejudice. Fay v. New York, 332 U.S. 261, 287 (1947). Justice Murphy dissented in *Fay*, arguing that "[w]e can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof." *Id.* at 300 (Murphy, J., dissenting). Justice Marshall gave this argument authority by using it to find that the exclusion of black jurors from a white defendant's trial violated due process. Peters v. Kiff, 407 U.S. 493, 503 (1972).

10. 483 F. Supp. at 1385.

11. *Id.* at 1389.

12. *See, e.g.*, Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

13. 483 F. Supp. at 1375, n.2. The court noted that if

> Arkansas followed the federal practice in which the judge fixes the sentence after a jury verdict of guilt, or, if Arkansas required a separate "sentencing" jury, the problem would not arise because it would obviously be improper to excuse a juror *for cause* (in the guilt-determination-trial) solely upon the basis of his irrevocable opposition to the death penalty. *But see* Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) which suggests to the contrary.

Id. See the discussion of *Spinkellink* in text accompanying notes 54-61 *infra*.

rors who believed that they could be impartial on the question of guilt not be removed for cause from that phase of the trial. Grigsby also requested a continuance to present evidence in support of his claim that a death-qualified jury, even under the *Witherspoon* limitation, is conviction prone in that it is more likely to convict than a jury that has not been rid of scrupled jurors. Both requests were denied. Over Grigsby's objection three of the veniremen were excused because they were irrevocably opposed to the death penalty, and the jury chosen from among the remaining veniremen found Grigsby guilty. Grigsby received a sentence of life imprisonment after the prosecution waived the death penalty. He unsuccessfully appealed to the Arkansas Supreme Court[14] and then petitioned the district court for a writ of habeas corpus. The court rejected defendant's claim that his jury was not drawn from a cross-section of the community but remanded the case for an evidentiary hearing on his claim that the jury was conviction prone and therefore violated his right to an impartial jury.

Grigsby's claim that highly scrupled jurors should be allowed to sit during the guilt determination phase of trial was based on two requirements of the sixth amendment: that a jury be drawn from a cross-section of the community and that it be impartial.[15] In *Taylor v. Louisiana*[16] the Court held that the "selection of a petit jury from a representative cross-section of the community is an essential component of the sixth amendment right to a jury trial."[17] Further, the *Taylor* Court implied that a defendant was not required to show that any specific prejudice had resulted from the lack of representativeness because unrepresentativeness in and of itself "deprived him of the kind of factfinder to which he was constitutionally entitled."[18] In *Duren v. Missouri*[19] the Supreme Court specified the elements necessary to establish a prima facie case of violation of the cross-section requirement:

> The defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not

14. Grigsby v. State, 260 Ark. 499, 542 S.W.2d. 275 (1976).

15. *See* note 9 *supra*.

16. 419 U.S. 522 (1975).

17. *Id.* at 528.

18. *Id.* at 526. This was the interpretation given to the *Taylor* decision by the court in *Grigsby*. 483 F. Supp. at 1377. The *Taylor* decision made it clear that the issue was the substantial underrepresentation of a cognizable group in the community; there is no requirement that juries "must mirror the community and reflect the various distinct groups in the population." 419 U.S. at 538. In *Taylor* the excluded group was women, a group formed to be cognizable in a previous case decided on statutory grounds. *See* Ballard v. United States, 329 U.S. 187 (1946). In finding cognizability the *Ballard* Court reasoned that the

> truth is that the two sexes are not fungible . . . the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either is excluded.

Id. at 193-94 (footnote omitted). The Court also advanced another rationale for not requiring a demonstration of actual prejudice in stating that "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Id.* at 195.

19. 439 U.S. 357 (1979).

> fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[20]

In *Grigsby* defendant claimed that removal for cause of jurors absolutely opposed to the death penalty violated the principles established in *Taylor* and *Duren*. Because the Supreme Court had not yet formulated these principles when it decided *Witherspoon*, the *Grigsby* court was confronted with the question of whether a post-*Taylor* Supreme Court would have decided *Witherspoon* differently. While the Supreme Court was aware when deciding *Witherspoon* that the exclusion of mildly scrupled jurors would produce a jury that did not reflect the makeup of the community,[21] the majority chose to ignore the issue of whether this exclusion violated the cross-section requirement. Rather, it merely stated that "we 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."[22] This statement, as the court in *Grigsby* noted, demonstrates "the conflict in analysis that permeates *Witherspoon*."[23] Did the Court mean that it was unwilling to recognize scrupled jurors as an identifiable group in the community, or did it hold that there was insufficient evidence to support the claim that a death-qualified jury was conviction-prone, and thereby lacking impartiality?[24] Or was the decision based on rejecting both claims? The *Grigsby* court was troubled by the lack of analysis in *Witherspoon* of the implications of exclusion of scrupled jurors under the cross-section requirement and decided to re-examine the issue in light of *Taylor* and *Duren*.

The *Grigsby* court examined whether defendant had established a prima facie case of violation of the cross-section requirement according to the test set forth in *Duren*. The first element defendant had to establish was that highly

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20. *Id.* at 364.

21. In light of Douglas' concurring opinion it is impossible to conclude that the majority was unaware of the cross-section argument. Douglas thought that the majority had disregarded the principles of the cross-section requirement in allowing highly scrupled jurors to be excluded. Douglas could

> see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or are neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

391 U.S. at 528 (Douglas, J., concurring). The majority in *Witherspoon* refused to go this far, but never articulated a response to Douglas' argument.

22. *Id.* at 517-18.

23. 483 F. Supp. at 1379.

24. By rejecting the claim that the jury was conviction-prone and the claim that it was unrepresentative in the same breath, the Court seemed to be treating two distinct constitutional requirements as one. There is no need to demonstrate prejudice to sustain a challenge under the cross-section requirement. *See* note 9 *supra*. The implication of the *Taylor* decision was not a novel one, but it had never been applied to a challenge of a state selection system, except on racial grounds. A proper analysis of the factors to be considered in deciding a challenge under the cross-section requirement—cognizability of the excluded group, degree of underrepresentation, the cause of the underrepresentation, and the state's interests—was not done by the *Witherspoon* Court, so *Witherspoon* serves as ambiguous precedent on the cross-section claim in *Grigsby*.

scrupled jurors are a distinctive group in the community.[25] The court was aware that the recognition given to scrupled jurors as a distinctive class by the Supreme Court in *Witherspoon* was not dispositive of the question because not *all* scrupled jurors had been excluded from Grigsby's trial, as they had been in *Witherspoon*, but only those who would never vote for capital punishment.[26] The *Witherspoon* decision only recognized mildly scrupled jurors as being a necessary component of an impartial jury on the sentencing phase of the trial, so it is possible that the cognizability of scrupled jurors under the cross-section requirement was never decided in *Witherspoon*.[27] To determine if the subgroup of highly scrupled jurors constituted an identifiable group as required by *Duren* the court adopted the test enunciated in *United States v. Olson*.[28] Under *Olson* the excluded group will be considered cognizable only if, in their absence, no other group on the jury will represent their views.[29]

Applying the *Olson* test the court found that it "cannot be doubted that by that standard those excluded for cause pursuant to *Witherspoon* constitute an identifiable group. No one else will represent their strong viewpoint on the jury in their absence."[30] However, the ambiguity of the Supreme Court's treatment of the question in *Witherspoon* prevented the court from assuming that the Supreme Court would reach the same result if confronted with the question today. While the decision in *Witherspoon* differentiated between mildly and highly scrupled jurors, it is not clear how this distinction was to be viewed. The *Grigsby* court considered the possibility that "the Supreme Court was saying there is an important difference in the two groups when it comes to sentencing but not in relation to *guilt determination*."[31] In other words,

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25. 439 U.S. at 364.

26. 483 F. Supp. at 1380.

27. Justice Douglas was prepared to hold that both mildly and highly scrupled jurors were cognizable during all stages of the trial. *See* note 21 *supra*.

28. 473 F.2d 686 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973). The language quoted by the court in *Grigsby*, 483 F. Supp. at 1382, arguably does not set out a complete test of cognizability, but examines only one factor. A more comprehensive test of cognizability was presented in United States v. Guzman, 337 F. Supp. 140 (S.D.N.Y. 1972). Under *Guzman* a group

> must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that the exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved.

Id. at 143-44. This test identifies one factor not explored in *Grigsby*, the ability to define the group. *Grigsby* may not have dealt with this because highly scrupled jurors are self-defining, in fact "the United States Supreme Court itself has drawn the line to create the two, assumedly *different* groups: those with mild scruples who may not be excused for cause and those who will never impose the death penalty. . . ." 483 F. Supp. at 1382. Because of this, only the second factor, the possibility that the views of the group will go unrepresented, is important. The third factor identified by *Guzman*, the possibility of bias, is clearly unimportant under *Taylor*. *See* note 18 *supra*.

29. 483 F. Supp. at 1382.

30. *Id.*

31. *Id.*

Witherspoon could be interpreted as holding that highly scrupled jurors are a cognizable group during the sentencing phase but not during the guilt determination phase of the trial. An alternative interpretation of the holding in *Witherspoon* is that it stood only for the proposition that a death-qualified jury was not *impartial* on the issue of sentencing and did not address the issue or cognizability under the cross-section requirement at all. This position was not adopted by the court in *Grigsby*, which instead rejected the possibility that *Witherspoon* had held that highly scrupled jurors are not a cognizable group during the guilt determination phase of the trial on the basis of the number of highly scrupled jurors in the population. The court noted that the excluded jurors constituted 16% of the population, "which is larger than another identifiable group which the Court has stated may not be excluded."[32] Although the court's finding of cognizability may be correct its reasoning is unsound.[33]

The *Grigsby* court identified another basis for finding that a death-qualified jury violates the cross-section requirement even if highly scrupled jurors are not recognized as a cognizable group. The exclusion of highly scrupled jurors results in the disproportionate exclusion of other groups already recognized as cognizable: the poor, women, blacks, ethnic and religious groups, Democrats, and laborers.[34] It is settled that if the effect of an otherwise valid exclusion is to exclude a cognizable group, then the cross-section requirement is violated.[35]

The *Grigsby* court readily found that the remaining two elements of the *Duren* test were satisfied by defendant's claim. The second prong of the

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32. *Id.* at 1383. The "other group" referred to is the black population, which constitutes 10% of the general population. Another possible reading of this portion of *Grigsby* is that the court was not using the size of the group to refute the *Witherspoon* argument, but was leaving the question of cognizability open. Under either reading, the court could have provided a stronger analysis.

33. While the *Taylor* decision identified size as one factor in determining cognizability, 419 U.S. at 531, it is not a factor that is related to the distinctiveness of a group's views. The size of a group does not preclude a finding that its views are adequately represented on the jury by another group.

It was unnecessary for the *Grigsby* court to base its analysis of *Witherspoon* on such a weak argument. Since the court ostensibly was re-examining *Witherspoon* in light of *Taylor*, it should have adopted the reasoning used by the Court in *Taylor* when it determined that women represented a cognizable group. In *Taylor* there was no showing of concrete differences between the sexes, nor was there any need to assume that women would act as a class. 419 U.S. at 531. Rather, the Court was satisfied that a "subtle interplay of influence", *id.*, existed with women in the jury room, though it was among the "imponderables." *Id.* at 531-32. Reliance on intangible differences would seem particularly persuasive in the case of highly scrupled jurors, since they are defined by their beliefs in an important aspect of the criminal justice system—that is, their beliefs about sentencing.

Justice Douglas did advance this argument in *Witherspoon*, stating:

> We can as easily assume that the absence of those opposed to capital punishment would rob the jury of certain peculiar qualities of human nature as would the exclusion of women from juries . . . we must proceed on the assumption that in many, if not most, cases of class exclusion on the basis of beliefs or attitudes some prejudice does result. . . .

391 U.S. at 531 (Douglas, J., concurring).

34. 483 F. Supp. at 1384. See the studies cited by the court and an additional study indicating that death-qualified juries are disproportionately white and male. H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 12 (1968).

35. Labat v. Bennet, 365 F.2d 698 (5th Cir. 1966).

Duren test requires that representation of the excluded group in venires is "not fair and reasonable in relation to the number of such persons in the community."[36] The court held that the consistent and total exclusion of a group constituting 16% of the population is clearly neither fair nor reasonable.[37] The final element of a prima facie case of a cross-section violation requires that the exclusion be "systematic," meaning that the cause of the exclusion is "inherent in the particular jury-selection process."[38] Several prior decisions had argued that a defendant's right to representation of a cross-section of the community ended with the selection of the jury pool, so that any skewing of the representative nature of the jury that occurred during voir dire was immaterial.[39] The *Grigsby* court apparently rejected this argument and found that the exclusion of highly scrupled jurors presented the required systematic exclusion.[40]

After thus presenting a persuasive argument that highly scrupled jurors previously excluded under *Witherspoon* should be recognized as an identifiable group in the community, the *Grigsby* court retreated from this position. Although sympathetic to defendant's claim the court apparently agreed with Judge Learned Hand's comment that it is not "desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant."[41] Accordingly the court bowed to the precedent of *Witherspoon* and the possible argument that mildly scrupled jurors and highly scrupled jurors are not distinct when it comes to guilt determination.[42] While the court was aware that *Witherspoon* was ambiguous precedent at best and that the Supreme Court might decide the question differently in light of *Taylor* and *Duren*,[43] it was nonetheless unwilling to extend the protection offered defendant by *Witherspoon*. By denying relief on the cross-section claim the court avoided facing what will become a major issue if and when highly scrupled jurors are recognized as cognizable, which is

36. 439 U.S. at 364.

37. 483 F. Supp. at 1383. It is at this point that the comparison with the exclusion of blacks is useful, and it is possible that was all that *Grigsby* intended. The court seems to be reading a balancing test of the state's interest into this element when it states that on "the basis of a qualification relevant only to *sentence* determination a group . . . is totally excluded from *guilt* determination. It is difficult to see how such lack of representation could be considered fair or reasonable." *Id.* A proper application of the *Duren* test does not consider the state's interests until the degree of underrepresentation has been shown to be unfair. 439 U.S. at 365-66.

38. 439 U.S. at 366.

39. Pope v. United States, 372 F.2d 710 (8th Cir. 1967). The court, citing Tuberville v. United States, 303 F.2d 411 (D.C. Cir. 1962) and United States v. Puff, 211 F.2d 171 (2d Cir. 1954), states that "[i]t is well pointed out, in either or both of those opinions, that 'the point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn.'" 372 F.2d at 725. *But see* Crawford v. Bounds, 395 F.2d 297 (4th Cir.), *vacated*, 393 U.S. 76 (1968). "Where inevitably such jurors will be excused from petit jury service, it is no answer to say that petitioner's rights were not violated because they were members of the array from which the jury to try him was chosen." *Id.* at 307 n.12.

40. 483 F. Supp. at 1383.

41. Spector Motor Service, Inc. v. Walsh, 139 F.2d 809, 823 (2d Cir. 1944) (Hand, J., dissenting).

42. 483 F. Supp. at 1384-85.

43. *Id.* at 1385.

whether the state's interest in excluding highly scrupled jurors is sufficient to outweigh defendant's right to a representative jury.

Because the court in *Grigsby* did not find that the exclusion of jurors under *Witherspoon* violated the cross-section requirement, it dealt only briefly with the interests of the state that are advanced by excluding highly scrupled jurors from the guilt determination phase of the trial. It recognized that the state has a significant interest in excluding these jurors from the sentencing phase of a trial, but it was convinced that this interest does not extend to the guilt determination phase if the prospective juror swears to decide the guilt issue on the basis of the law and the evidence presented at trial.[44] The implication of this is that the state must find an alternative to single jury determination of both guilt and punishment in capital cases. Whether this threat will ever become a reality will depend on the relative weight given to the interests of defendant and the state. The Supreme Court has insisted that the "right to a proper jury cannot be overcome on merely rational grounds."[45] The state must advance a "significant state interest" to justify the exclusion of a cognizable group.[46]

The state's interest in excluding scrupled jurors is based on the state's right to try a case before an impartial jury.[47] The state's argument is that scrupled jurors should be excluded because "a juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."[48] At the time that this state interest was accepted as valid, however, it was common for a state to inflict the death penalty automatically whenever a defendant was convicted of a capital crime. Allowing scrupled jurors to sit during the guilt phase of the trial resulted in juries acquitting guilty men to avoid the harshness of the gallows.[49] The jury's role has been altered drastically since then. Jurors are now permitted to exercise their discretion in determining if death is the proper penalty.[50] While several states recognize that this extra flexibility lessens the interest of the state in excluding jurors with scruples against the death penalty,[51] the pre-

44. *Id. See also* State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980) (Exum, J., dissenting), and the discussion of *Avery* in Comment, *Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A* Witherspoon *Qualification*, this issue.

45. Taylor v. Louisiana, 419 U.S. at 534.

46. Duren v. Missouri, 439 U.S. at 367.

47. Hayes v. Missouri, 120 U.S. 68, 70 (1887).

48. Logan v. United States, 144 U.S. 263, 298 (1892). In *Logan* the state was allowed to challenge for cause jurors with "conscientious scruples in regard to the infliction of the death penalty for crime." *Id.* In this aspect *Logan* was overruled by *Witherspoon*. Scrupled jurors are not limited to capital cases. Persons biased against polygamy laws were properly excluded from sitting on the trial of a polygamist. Reynolds v. United States, 98 U.S. 145 (1879).

49. H. ZEISEL, *supra* note 34, at 2.

50. Witherspoon v. Illinois, 391 U.S. at 519.

51. *See, e.g.*, State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894). In finding that the state was not entitled to challenge for cause scrupled jurors the court noted that "it cannot be said that the state is entitled to have the punishment of death inflicted in every case. The statute authorizes that punishment, in the discretion of the jury . . . but the state has no right to a trial by jurors who have no objection against inflicting the death penalty." *Id.* at 502-03, 60 N.W. at 121. Accord-

vailing view is still that those jurors absolutely opposed to capital punishment cannot be impartial on the issue of guilt.[52]

In *Spinkellink v. Wainwright*[53] the Fifth Circuit Court of Appeals maintained that a highly scrupled juror will hang the jury on the issue of guilt rather than allow another jury to hang the defendant during the sentencing phase of the trial.[54] Thus, the court argued, even a bifurcated system providing separate juries on the issues of guilt and sentencing will not remove the bias brought to the jury by highly scrupled jurors. The Fifth Circuit found that the interest in preventing hung juries constituted the "weightier reason" required to overcome a defendant's right to a jury drawn from a cross-section of the community.[55] The *Grigsby* court did not consider this argument, but apparently viewed a dual jury system as a viable solution to the problem.[56]

The decision in *Spinkellink* has been criticized for misconstruing the requirements of a constitutionally "neutral" jury.[57] *Spinkellink* framed the issue as whether "persons who are not opposed to capital punishment are psychologically inclined against criminals and [whether] therefore a jury composed of such persons is not an impartial jury."[58] The California Supreme Court in *Hovey v. Superior Court*[59] rejected this, noting that the Supreme Court in *Witherspoon* had not been concerned with actual bias on the part of any of Witherspoon's jurors.[60] *Hovey* regarded the real issue as being whether a death-qualified jury met the constitutional need for "diffused impartiality." Under *Hovey* a "neutral" jury "is one drawn from a pool which reasonably

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ingly the prosecution had to rely on peremptory challenges to exclude scrupled jurors. The same result was reached in South Dakota in State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898).

52. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); United States v. Puff, 211 F.2d 171 (2d Cir. 1954); People v. Sand, 81 Cal. App. 3d 448, 146 Cal. Rptr. 448 (1978); Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1902).

53. 578 F.2d 582 (5th Cir. 1978).

54. *Id.* at 595-96. *See also* People v. Sand, 81 Cal. App. 3d 448, 450, 146 Cal. Rptr. 448, 450 (1978).

55. 578 F.2d at 597. The court was willing to assume *arguendo* that the excluded jurors constituted a cognizable group. Not all commentators have agreed with *Spinkellink*. The petitioner in *Witherspoon* had urged that "no irreconcilable conflict exists between the rights of the petitioner and the interests of the state. The dilemma created by the double-issue procedure can be obviated either by placing the penalty fixing power in the hands of the judge . . . or by adopting a system of bifurcated trials." Brief for Petitioner at 12, Witherspoon v. Illinois, 391 U.S. 510 (1968). This, of course, does not answer the argument advanced in *Spinkellink* but simply denies the major premise of that reasoning, that highly scrupled jurors will acquit to avoid someone else imposing the death penalty. *See also* Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

56. 483 F. Supp. at 1384. The court implied that the defendant's interest in impartial guilt determination should outweigh the state's interest in impartial sentencing, stating that "if the same jury decides *both* guilt and punishment, that jury could not be qualified on *Witherspoon* grounds at all, lest the jury for the initial, guilt determination phase be defectively representative in violation of the constitutional guarantee." *Id.*

57. In Hovey v. Superior Court, 28 Cal. 3d —, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980), the court stated that the "Fifth Circuit stumbled and missed the real issue in *Spinkellink v. Wainwright*." *Id.* at —, 616 P.2d at 1309, 168 Cal. Rptr. at 136 n.41.

58. 578 F.2d at 595.

59. Hovey v. Superior Court, 28 Cal. 3d —, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

60. *Id.* at —, 616 P.2d at 130, 168 Cal. Rptr. at 137. The court reasoned that if this had been the real concern in *Witherspoon* these jurors would be properly excludable in future cases involving capital crimes on the basis of actual prejudice against the defendant. *Id.*

mirrors the diversity of experience and relevant viewpoints of those persons in the community who can fairly and impartially try the case."[61] This "diffused impartiality" test obviously incorporates the cross-section requirement as a factor in determining impartiality.

This debate serves to highlight the confusion surrounding the issue of "impartiality." Regardless of which approach is taken it is clear that a state may challenge for cause any juror who is actually biased against conviction. However, if the pool of potential jurors is made up of individuals who claim to be able to try the case fairly and impartially, the state should bear the burden of proving that a given class of these jurors is nonetheless partial towards the defense. This is especially true when granting the requested exclusions will deprive a defendant of his right to be tried by a representative jury.[62]

The court in *Grigsby* did not have the benefit of the analysis presented in *Hovey* and viewed defendant's contentions under what it termed a "functional equivalency" test.[63] Under this standard "the necessary showing is that the difference in the makeup of such a jury, as compared to a jury selected without regard to attitudes towards capital punishment for the determination of guilt, results in the functional difference in the operation of that jury."[64] Defendant's contention before the trial court followed this test. Grigsby claimed that death-qualification produces a jury which is "conviction-prone," meaning that such a jury is more likely to convict than a non-death-qualified jury in a given case.

Although the Supreme Court had held in *Witherspoon* that the evidence on the partiality of death-qualified juries was insufficient to prove that they were conviction-prone,[65] defendant insisted that information made available since 1968 did demonstrate that death-qualified juries were partial on the issue

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61. *Id.*

62. 483 F. Supp. at 1388 n.23. The opinion in *Hovey* presents a strong argument for the proposition that a "neutral" jury will serve as a more accurate fact finder.

> Diversity enhances the accuracy of a jury's decision making by improving its ability to recognize and appropriately evaluate evidence. Testimony from the hearing below, as well as studies in social psychology, help to explain why this is so. Human perception is selective, influenced by the very beliefs and attitudes which venirepersons bring into the courtroom. New data which tend to contradict one's beliefs may be quickly "forgotten" or may not even be perceived in the first place. The members of a homogeneously composed jury are more likely to perceive evidence in a similar fashion. Also, they are more likely to filter out any evidence inconsistent with their shared attitudes and values. Insofar as a jury is composed of members whose attitudes, preconceptions, and experiences are diverse, the jury is more likely to perceive and remember all the important evidence and arguments presented at trial.

28 Cal. 3d at —, 616 P.2d at 1312-13, 168 Cal. Rptr. at 139-40. The perceived partiality of death-qualified juries on the issue of guilt is reflected by the practice of some prosecutors of waiving the death penalty after a conviction has been obtained. By death-qualifying a jury when there is no real intention of seeking the death penalty the prosecution hopes to "get a 'better' jury for its purpose—one that will be more responsive to the prosecution's case on the guilt-innocence issue." Oberer, *Jury Selection, the Death Penalty and Fair Trial*, 71 CASE & COM. 3, 5 (Jul.-Aug. 1966).

63. 483 F. Supp. at 1388 n.23.

64. *Id.*

65. 391 U.S. at 518. The Court left open the possibility that a defendant in the future might establish that the jury was not impartial. *Id.* at 520 n.18.

of guilt, and that they consistently favored the prosecution.[66]

Grigsby desired to present the results of several studies made after *Witherspoon* and the testimony of several expert witnesses that supported the conclusion that there is a "positive and consistent relationship between the degree to which one favors capital punishment and one's readiness to assess guilt."[67] The explanation offered for this phenomenon is that "authoritarian personalities are more prone to find guilt, and those who are *not* against the death penalty are more authoritarian, generally, than those who oppose it."[68] After examining the evidence, the court in *Grigsby* held that the showing made by defendant was strong enough to support a finding that death-qualified juries are conviction-prone, and that the trial court's refusal to allow defendant a continuance to present the evidence amounted to an abuse of discretion.[69]

By granting Grigsby a chance to prove that the jury was conviction-prone the court implicitly accepted the assumption that guilt-proneness can be equated with partiality. However, because a jury convicts more often than other juries deciding similar cases does not necessarily prove that it is biased. In fact, the guilt-prone jury may be closer to the truth in its assessment of the facts than its more lenient counterparts. Not all courts have been willing to find that a conviction-prone jury is partial, stating that what the defendant "is really asserting is the right to have on the jury some who may be prejudiced in his favor."[70]

There may be in fact no juries that are neutral about sending a man to his death, with the possible exception of a jury composed solely of members of the community who have no feelings at all.[71] However, the evidence presented to the court seems to establish that the reason a death-qualified jury may be conviction-prone is not the ability of nonscrupled jurors to see the truth better than scrupled jurors, but rather juror personality types and the demographic spread of those jurors opposed to capital punishment. The person who favors the death penalty or is neutral concerning its infliction, it is argued, will tend to view the presumption of innocence accorded to the defendant and the stan-

66. 483 F. Supp. at 1386.

67. *Id.* at 1388. The court considered the following studies: HAMILTON, INDIVIDUAL DIFFERENCES IN ASCRIPTION OF RESPONSIBILITY, GUILT AND APPROPRIATE PUNISHMENT (1975); 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; Girsch, *The Witherspoon Question: The Social Science and the Evidence*, 35 NLADA BRIEFCASE 99 (1978); Jurow, *supra* note 55; Mitchell & Byrne, *The Defendant's Dilemma: Effects of Juror's Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOCIAL PSYCH. 123 (1971).

68. 483 F. Supp. at 1387. "Authoritarian" personality traits include:

> conservatism, rigidity, punitiveness (in the sense of being "in complete agreement with the administration of harsh punishment"), moralism and inability to understand or tolerate deviant behaviour, and hostility toward low status persons (persons considered socially inferior, uneducated, etc.). The Authoritarian juror identifies with the prosecution's effort to punish a deviant, and often lower-class or minority group, defendant.

Jurow, *supra* note 55, at 570-71 (footnotes omitted).

69. 483 F. Supp. at 1388.

70. Tuberville v. United States, 303 F.2d 411, 419 (D.C. Cir. 1962).

71. Jurow, *supra* note 55, at 588-89.

dard of proof demanded of the state less seriously than will his scrupled counterpart.[72] Jurors with scruples against the death penalty are also more likely to accept a plea of insanity.[73] These results do not stem from neutrality but from the "political conservatism, dogmatism, authoritarianism, lack of self-doubt, and legal attitudes favoring punishment and constituted authority" which nonscrupled jurors are likely to exhibit.[74]

If there is no method for selecting a jury truly neutral on the issue of capital punishment, then the selection system should aim for a broad base in the community, so that a defendant's right to be tried by a representative jury will not be sacrificed in pursuit of an unattainable goal. There are a number of alternatives to the conventional single jury system that can accomodate both the state's interests and those of the defendant which are discussed elsewhere in this issue.[75]

Regardless of how a state elects to serve the interests of the defendant, the court in *Grigsby* clearly indicated that the current system of excluding highly scrupled jurors from the guilt determination phase of the trial is inconsistent with the right to trial by an impartial jury drawn from a cross-section of the community. The court's refusal to grant complete relief should not be read as a determination that these interests are already adequately protected; rather, it is indicative of the deference the court paid to the Supreme Court's treatment of the issue. Eventually the Supreme Court will have to clarify its holding in *Witherspoon*, and *Grigsby v. Mabry* should provide a persuasive argument that the protection now accorded a defendant facing a capital trial does not meet fundamental constitutional standards.

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72. *Id.* at 595-96.

73. Goldberg, *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, 60-61 (1970).

74. Girsch, *supra* note 7, at 128. *See also* Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: A Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 31 (1970).

75. *See* Comment, *Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A* Witherspoon *Qualification*, this issue.