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go against the tortfeasor.²⁵ But in this case the insurer's subrogation rights were not destroyed, making it doubtful that such a reimbursement possibility is open. Moreover, the insurer has not chosen to proceed for reimbursement but has brought an action against the defendant. The question then becomes whether, if reimbursement is possible, the defendant can have the insured joined as a party. While there are some possible analogous decisions,²⁶ they are not really very closely related and the prospect seems doubtful.

Unless it was fairly evident that damages were going to run to a significantly larger figure, the defendant, who paid for a settlement with the insured and still faces a subrogation action by the insurer, has made a rather bad bargain. The danger of such a bargain could be avoided, and just settlement encouraged, if procedural devices were available to require that all parties needed for final and complete settlement could be joined in the suit.

ROBERT L. THOMPSON

Jury—Allowing Challenge for Cause to a Prospective Juror Opposed to Capital Punishment

In *State v. Childs*¹ defendant was found guilty of rape and burglary in the first degree and sentenced to death. Appeal was made on the ground *inter alia* that the trial judge erred in granting the State's challenges for cause to prospective jurors on the ground that they had conscientious scruples against the infliction of the

²⁵ See cases collected in 29A AM. JUR. INSURANCE § 1736 (1960).

²⁶ One sued by subrogated insurer for having destroyed the property may require all other insurance companies participating in paying the loss to be made parties to the action. *Powell & Powell v. Wake Water Co.*, 171 N.C. 290, 88 S.E. 426 (1916). While a fire insurance company, which pays a loss, is proportionately subrogated to the insurer's right of action against the tortfeasor, the insurer must work out his remedy through the insured, so, where several insurance companies each paid part of a loss, it was proper, where separate actions by the several insurance companies were consolidated, to make the insured a party. *Lumberman's Mut. Ins. Co. v. Southern R.R.*, 179 N.C. 255, 102 S.E. 417 (1920). See *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949) where the Court held that where an insurer has become partially subrogated to the rights of an insured under the Federal Tort Claims Act, both are "necessary parties" but not "indispensable parties" and either party may sue, although in such case the United States upon timely motion may compel their joinder.

¹ 269 N.C. 307, 152 S.E.2d 453 (1967).

death penalty. The North Carolina Supreme Court found no error. It said:

It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty.²

The practice of excusing, on a challenge for cause, any prospective juror who is opposed to capital punishment is followed in the federal courts³ and in the majority of state courts by either statute⁴ or judicial decision.⁵ This practice originated at a time when conviction of a capital crime meant a compulsory death sentence,⁶ and the theory behind the practice is obvious. In a case where a finding of guilty would automatically mean the death penalty, a juror opposed to capital punishment would never vote in favor of the defendant's guilt, thus prejudicing the prosecution.

Today most states, including North Carolina, have abolished the mandatory death penalty.⁷ Statutes in those states now give the jury discretion as to the punishment to be imposed.⁸ Under such statutes the jury first decides whether the defendant is guilty or innocent of

² *Id.* at 317-18, 152 S.E.2d at 461.

³ *Turberville v. United States*, 303 F.2d 411 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962).

⁴ *E.g.*, CAL. PEN. CODE § 1074: "A challenge for implied bias may be taken for all or any of the following causes and no other . . . 8. If the offense charged by punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty; in which case he must neither be permitted nor compelled to serve as a juror."

⁵ *State v. Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967). See Annot., 48 A.L.R.2d 560 (1956).

⁶ *E.g.*, *State v. Vann*, 162 N.C. 534, 77 S.E. 295 (1913).

⁷ See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

⁸ In North Carolina the death penalty may be imposed for murder in the first degree, N.C. GEN. STAT. § 14-17 (1953); rape, N.C. GEN. STAT. § 14-21 (1953); burglary in the first degree, N.C. GEN. STAT. § 14-52 (1953); and arson, N.C. GEN. STAT. § 14-58 (1953). In each of these statutes is the following provision: "Provided, if at the time of rendering its verdict [of guilty of a capital crime] in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." This provision gives the jury "an unbridled discretionary right" to recommend that punishment for the crime shall be imprisonment for life in lieu of death in all cases where a verdict of guilty of a capital crime has been reached. *State v. McMillan*, 233 N.C. 630, 633, 65 S.E.2d 212, 213 (1951).

the crime charged. If guilty, the jury then decides what the punishment shall be—the death penalty or life imprisonment. Since the death penalty is no longer automatically imposed by the jury upon a finding of guilty, can it still be said that a juror opposed to capital punishment may be prevented by that opposition from joining a verdict of guilty? The courts of two states have said not.

In *State v. Lee*⁹ the Iowa Supreme Court held it error to allow a challenge for cause to a prospective juror who was opposed to capital punishment. The court said:

It cannot be said that the state is entitled to have the punishment by death inflicted in any 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, except as it can secure them by challenging peremptorially those who have such objections.¹⁰

In *State v. Garrington*¹¹ the South Dakota Supreme Court, in upholding the trial judge's refusal to allow challenge for cause on these grounds, agreed that under a statute mandatorily imposing the death penalty upon a finding of guilty, a juror opposed to capital punishment would not find the defendant guilty. But where the jury has discretion as to punishment "the entertaining of such opinions does not have that effect, and is not a cause for challenge."¹²

There is a further challenging theory supporting the proposition that persons opposed to capital punishment should not be excluded from juries in capital cases. Basically it is that a jury from which such persons have been excluded "will necessarily have been culled of the most humane of its prospective members"¹³ and will contain members who, consciously or unconsciously, will be more prone to convict, and tend to find a particular defendant guilty on less evidence than would a jury from which persons opposed to capital punishment were not excluded.¹⁴ Professor Walter E. Oberer¹⁵ proposes the argument thusly:

⁹ 91 Iowa 499, 60 N.W. 119 (1894).

¹⁰ *Id.* at 502, 60 N.W. at 121.

¹¹ 11 S.D. 178, 76 N.W. 326 (1898).

¹² *Id.* at 184, 76 N.W. at 327.

¹³ Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial On Issue of Guilt?*, 39 TEXAS L. REV. 545, 549 (1961). [Hereinafter cited as Oberer]

¹⁴ This theory is pointedly supported in ADORNO, FRENKEL-BRUNSWIK, LEVINSON, & SANFORD, *THE AUTHORITARIAN PERSONALITY* (1950). [Here-

(1) Under modern statutes the guilt issue has been separated from the punishment issue. (2) The necessity which justified death-qualification under the old mandatory, one-issue statutes no longer obtains. (3) A jury qualified to the prosecution's satisfaction on the punishment issue is correspondingly disqualified from the defendant's standpoint on the guilt issue. (4) The logical consequence is that when the same jury decides both issues, the defendant is denied due process of law through having forced upon him a partial jury on the most critical issue in the case—that of guilt or innocence.¹⁶

Persons opposed to capital punishment form a sizeable and definite class in our society, and those in favor of capital punishment are actually in a minority.¹⁷ Of the people in favor of capital punishment, many do not like the idea of having anything to do with it themselves.¹⁸ Can it be said then that a jury composed of such a class of persons, who are in a minority in our society and who may tend to more quickly find a criminal defendant guilty on less evi-

inafter cited as ADORNO]. This book, a study on prejudice, includes data indicating that there are persons possessing certain personality traits in varying degrees. Among these traits are certain attitudes toward people. On one end of the scale are persons with attitudes such as moralistic condemnation of other people, the tendency to blame other people rather than oneself, general suspiciousness and distrust of others, orientation towards persons in positions of power and authority, and an exploitive-manipulative-opportunistic attitude. The persons on this end of the scale will externalize and project their hostile feelings by conceiving of others as threatening and dangerous. On the other end of the scale are persons who feel permissive toward other people, who tend to refrain from blaming others, who feel trustingness and openness and see people as essentially "good" until proved otherwise, who conceive of the environment as congenial rather than dangerous, and who tend persistently to strive for realization of productive social values. Between these two extremes lie the greater percentage of people possessing these traits in different degrees. *Id.* at 405-15.

See also WEIHOFEN, *THE URGE TO PUNISH* (1956).

In *Turberville v. United States*, 303 F.2d 411, 420 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962), the court noted that there was a "thesis in this area of the law . . . that persons who are not opposed to capital punishment are psychologically inclined against criminals and therefore a jury composed of such persons is not an impartial jury." This thesis was rejected by the court without extensive consideration.

¹⁶ See note 13 *supra*.

¹⁷ Oberer 555.

¹⁸ A recent poll indicated that forty-three percent of the people in the United States are opposed to capital punishment for persons convicted of murder; this figure rose from twenty-five per cent in 1953. Twelve per cent of the people have no opinion. This left forty-five per cent in favor of capital punishment for persons convicted of murder. Press release by the Gallup Institute dated February 5, 1965 on file in Wilson Library at University of North Carolina at Chapel Hill.

¹⁸ WEIHOFEN, *THE URGE TO PUNISH*, 168 (1956).

dence, does not deprive that defendant of due process of law? In two recent cases attention has been focused on the constitutional aspects of the problems of exclusion from juries of members of definite and sizeable classes in society.

In *Labat v. Bennett*¹⁹ the Court of Appeals for the Fifth Circuit held *inter alia* that systematic total exclusion of daily wage earners as a class violated the criminal defendant's due process and equal protection rights to an impartial jury representing a cross-section of the community.²⁰

In a different context is *Schowgurow v. State*.²¹ There the Maryland Court of Appeals held that the provisions "of the Maryland Constitution requiring demonstrations of belief in God as a qualification for service as a grand or petit juror are in violation of the Fourteenth Amendment, and that any requirement of an oath as to such belief, or inquiry of prospective jurors, oral or written, as to whether they believe in a Supreme Being is unconstitutional."²²

These cases indicate that when a state systematically and totally excludes from the jury a sizeable and clearly defined class of persons, such as those opposed to capital punishment, a criminal defendant is denied a jury drawn from a cross-section of society and his constitutional rights have thus been invaded.

¹⁹ 365 F.2d 698 (5th Cir. 1966), *petition for cert. denied*, 35 U.S.L. WEEK 3272 (U.S. Jan. 10, 1967) (No. 956).

²⁰ In *Labat* the court relied upon the words of the United States Supreme Court in *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946); *Glasser v. United States*, 315 U.S. 60 (1942); and *Smith v. Texas*, 311 U.S. 128 (1940). The court in *Smith* said, "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." 311 U.S. at 130. In *Glasser* it was pointed out that "the proper functioning of the jury system, and, indeed our democracy itself, requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class." 315 U.S. at 86.

In *Fay v. New York*, 332 U.S. 261 (1947), the Court rejected a constitutional challenge to purported exclusion from juries, by the state of New York, of working class people in order to form a "blue-ribbon" jury. However, it should be noted that the Court accepted the proposition that a jury should represent a cross-section of the community, and based its opinion heavily upon the lack of evidence that any "person was excluded because of his occupation or economic status." *Id.* at 291. Further, in *Thiel* the Court stated that exclusion of daily wage earners "cannot be justified by federal or state law," although it rested its decision that daily wage earners cannot be excluded from federal juries upon its supervisory powers. 328 U.S. at 222.

²¹ 240 Md. 121, 213 A.2d 475 (1965).

²² *Id.* at 131, 213 A.2d at 482.

A questionable point in the argument against excluding those opposed to capital punishment is that if the jurisdiction requires that the jury be unanimous in its decision on punishment, whether it be death or life imprisonment, as well as guilt, then one juror opposed to capital punishment could prevent a unanimous vote for the death penalty. Among the states that have considered the particular question, there is a split of authority.²³ Some states require unanimity on both guilt and punishment.²⁴ Others hold that if the verdict is guilty of the capital crime and the jury does not vote unanimously to recommend life imprisonment, the death penalty will automatically be imposed; so there does not have to be a unanimous vote in order to impose the death penalty.²⁵

No case has been found in which the North Carolina Supreme Court has been faced with this question. The North Carolina statutes provide that certain crimes "shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life. . . ."²⁶ From this wording it would appear that if the jury did not unanimously so recommend, the death penalty would be imposed. If this interpretation were placed upon the statute by the court, then some jury members opposed to capital punishment could not prevent imposition of the death penalty. If the position taken was that the jury must be unanimous as to which penalty is to be imposed, then one juror *could* prevent the death penalty from being imposed. However, it is suggested that in this situation it should be possible to have a bifurcated trial. In the first stage, a jury from which no one opposed to capital punishment was excluded would consider the defendant's guilt or innocence. If the defendant is found guilty, the trial would move into the second stage with a jury from which everyone opposed to capital punishment was excluded. This jury would consider the punishment to be imposed. Admittedly, this process would require more time and be more expensive to the state. However in this way the defendant's interest in

²³ Annot., 1 A.L.R.3d 1461 (1965); Annot., 92 L. Ed. 2d 1072 (1948); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099, 1125 (1953).

²⁴ *E.g.*, State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963), *cert. denied*, 377 U.S. 1000 (1964).

²⁵ *E.g.*, Commonwealth v. McNeil, 328 Mass. 436, 104 N.E.2d 153 (1952).

²⁶ N.C. GEN. STAT. §§ 14-17, 21, 52, 58 (1953).

an impartial jury on the question of his guilt, as well as the prosecution's interest in an impartial jury on the question of punishment, would be protected. Certainly the desire to see that a criminal defendant, who may lose his life, gets a decision as to his guilt by a fair and impartial jury outweighs considerations of the time and cost of this procedure.²⁷

The courts and legislatures must face the realization that exclusion from the jury of persons opposed to capital punishment continues as a vestige of an ancient rule of law that had its origin under the now non-existent mandatory death penalty statutes. They should be made aware of the psychological data indicating that a jury from which this large segment of society has been excluded may result in prejudice to the defendant on the question of his guilt. Decisions must be made on whether the present practice is to continue, and, if so, what interest society has in its continuation. Hopefully, the constitutional implications of this practice will lead to judicial decisions or legislation to the effect that these persons should no longer be excluded from the jury in capital cases. If the present

²⁷ The necessity of bifurcated trials has been recognized by other courts. In *Holmes v. United States*, 363 F.2d 281 (D.C. Cir. 1966) the court noted the prejudicial effect of pleading the defense of insanity and the defense of not guilty before the same jury and stated that the trial judge could impanel a second jury to hear evidence on the insanity issue, after the first jury had considered the issue of guilt, "if this appears necessary to eliminate prejudice." *Id.* at 283.

Another example is the situation in which the jury determines the voluntariness of a criminal defendant's confession, and then, upon a finding that it was involuntary and excludable, proceeds to determine the defendant's guilt. The United States Supreme Court in *Jackson v. Denno*, 378 U.S. 368 (1964) found this practice unconstitutional and held that the same jury should not decide both issues.

Examples of statutory provisions for bifurcated trials can be seen in California, CAL. PEN. CODE § 190.1, and in New York, N.Y. PEN. LAW § 1045-a. Under these statutes the trial court may for good cause discharge the jury that decided the guilt question in a capital case, and impanel a new one to decide the question of punishment; otherwise the same jury will decide both issues. It should be noted that the Supreme Court of California recently rejected, with little discussion, the contention of a criminal defendant that since the trial court could discharge the jury deciding the guilt issue in a capital case, there was no reason for the judge to sustain challenges for cause to prospective jurors who indicated that they could not vote for the death penalty. The court read into the statute a "legislative directive" that "whenever possible the same jury shall serve at both phases of the trial by reasons of continuity and economy of effort." *People v. Smith*, 63 C.2d 779, —, 48 Cal. Rptr. 382, 389, 409 P.2d 222, 229 (1966).

For a discussion of the right to a bifurcated trial in general, see 45 N.C.L. REV. 541 (1967).

practice continues the bifurcated trial process could be utilized to avoid the unfairness of the present situation.

PENDER R. McELROY

Labor Law—Breach of the Duty of Fair Representation as an Unfair Labor Practice

Since 1962 the National Labor Relations Board has held that the failure of a union to represent its members fairly is an unfair labor practice.¹ The NLRB has used Sections 8(b)(A),² 8(b)2³ and 8(b)3⁴ of the National Labor Relations Act to reach this result.

¹ *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). See *e.g.*, *Local 12, United Rubber Workers*, 150 N.L.R.B. 312 (1964); *Automobile Workers Union*, 149 N.L.R.B. 482 (1964); *Local 1367, Int'l Longshoremen's Ass'n*, 148 N.L.R.B. 897 (1964); *Independent Metal Workers Union*, 147 N.L.R.B. 1573 (1964).

² Section 8(b)1 provides in part that it shall be an unfair labor practice for a union or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ." Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(1) (1964).

Section 7 provides "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

³ Section 8(b)2 provides in part that it shall be an unfair labor practice for a union or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

Section 8(a)3 provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 61 Stat. 140 (1957), 29 U.S.C. § 158(a)(3) (1964).

⁴ Section 8(b)3 provides that it shall be an unfair labor practice for a union or its agents "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions ship in any labor organization. . . ." 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(3) (1964).

Section 8(d) provides in part "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the em-