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LOCKHART V. MCCREE: THE "BIASED BUT UNBIASED JUROR," WHAT ARE THE STATES' LEGITIMATE INTERESTS?

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INTRODUCTION

One of the issues that has lingered in capital cases is the confusing problem of determining when the state may remove, for cause, a venire member who opposes the death penalty. In 1968, the Supreme Court in *Witherspoon v. Illinois*[1] held that a state could not challenge for cause a potential juror who expressed opposition to the death penalty, as long as the juror did not absolutely exclude assessing it. The Court reasoned that the jury was the conscience of the community and that the defendant was entitled to have a pool of potential jurors that included individuals who had reservations about the appropriateness of the death penalty in general, as did a substantial portion of the American population at the time.[2] The Court recognized that the state could challenge, for cause, those jurors whose opposition to capital punishment would prevent them from impartially determining guilt or innocence. The state could also exclude jurors who would automatically reject death as a possible punishment from the sentencing trial.[3]

Witherspoon left open, however, the question whether the state could constitutionally remove this latter category of jurors from the guilt-innocence trial if they claimed they were capable of judging guilt or innocence fairly. The Court determined that the record in *Witherspoon* did not support holding such an exclusion unconstitutional. In a footnote, the Court expressly reserved the question in the event of a case with more compelling evidence of a constitutional violation.[4]

The Court's holding prompted numerous attacks upon capital trial procedures that did not permit this category of *Witherspoon* excludables to serve on guilt-innocence juries.[5] The challengers reasoned that these

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

2. *Id.* at 520. According to the Court in *Witherspoon*, public opinion surveys showed that in 1960, 51% of the American people supported capital punishment, whereas in 1966, only 42% supported it. During this same time period, opposition to capital punishment increased from 36% of the American population to 47%. *Id.* at 520 n.16. More recent public opinion surveys conducted in 1982, however, determined that approximately 70% of all Americans supported capital punishment, indicating a reversal of the trend noted in *Witherspoon*. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, 1982 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1983).

3. *Witherspoon*, 391 U.S. at 522-23 n.21.

4. *Id.* at 517-18, 520 n.18.

5. *E.g.*, Tison v. Arizona, 459 U.S. 882 (1982); Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), *cert. denied sub nom.*, 106 S. Ct. 2258 (1986); Smith v. Balkcom, 660 F.2d 573

venire members would be nullifiers only at the sentencing trial, and, if they claimed an ability to decide fairly in the guilt-innocence trial, their exclusion at that stage would deprive the defendant of a constitutionally composed jury.[6] Such a juror would literally be both biased and unbiased. Opposition to capital punishment would be so substantial as to exclude even the possibility of its imposition, yet such a juror would be able to set that opposition aside so completely that it would not influence the decision of guilt or innocence. If this reasoning were accepted, every conviction and sentence resulting after the exclusion of such a juror from the guilt-innocence stage of a capital case would be unconstitutional.

Since no state required the seating of these "biased but unbiased" jurors in capital cases, this argument could have had dramatic results. It might have reversed the results of hundreds of capital trials,[7] as well as abolishing the unitary jury system in future death penalty cases. In more concrete terms, it could have emptied death rows in most states across the nation and vacated the convictions in society's most heinous murder cases adjudicated over most of the preceding generation.

Every appellate court but one, however, rejected the argument.[8]

(5th Cir. 1981), *modified on other grounds*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); United States *ex rel* Clark v. Fike, 538 F.2d 750 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977).

6. *See Keeten*, 742 F.2d at 131-32; *Smith*, 660 F.2d at 575; *see also* Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 57 (1982).

7. This holding might have reversed convictions, not merely sentences, if applied retroactively. For a discussion of this consideration, see Woodard v. Sargent, 753 F.2d 694 (8th Cir. 1985). There were 37 states that provided for capital punishment at the time *Lockhart v. McCree*, 106 S.Ct. 1759 (1986) was decided. Of those 37 states, 33 allowed for sentencing by juries alone or permitted juries to act in an advisory role. *See* ALA. CODE § 13A-5-47 (Supp. 1984); ARK. STAT. ANN. § 41-1301 (1977); CAL. PENAL CODE § 190.3 (West Supp. 1985); COLO. REV. STAT. § 16-11-103 (Supp. 1984); CONN. GEN. STAT. § 53a-46a (1985); DEL. CODE ANN. tit. 11, § 4209 (Supp. 1984); FLA. STAT. § 921.141 (1985); GA. CODE ANN. § 17-10-31 (1982); IND. CODE § 35-50-2-9 (1985); KY. REV. STAT. ANN. § 532.025 (1983); LA. CODE CRIM. PROC. ANN. art. 905.6 (West 1984); MD. CRIM. LAW CODE ANN. § 413 (1982); MISS. CODE ANN. § 99-19-101 (Supp. 1985); MO. REV. STAT. § 565.030 (Supp. 1985); NEV. REV. STAT. § 175.552 (1981); N.H. REV. STAT. ANN. § 630:5 (Supp. 1983); N.J. STAT. ANN. § 2C:11-3 (West 1982); N.M. STAT. ANN. § 31-20A-3 (1981); N.C. GEN. STAT. § 15A-2002 (1983); OHIO REV. CODE ANN. § 2929.03 (Anderson 1983); OKLA. STAT. tit. 21, § 701.10 (1983); 1985 OR. LAWS ch. 3; 42 PA. CONS. STAT. § 9711 (1982); S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1979) TENN. CODE ANN. § 39-2-203 (1982); TEX. CRIM. PROC. CODE ANN. art. 37.071 (Vernon 1981 & Supp. 1985); UTAH CODE ANN. § 76-3-207 (Supp. 1985); VT. STAT. ANN. tit. 13 § 2303(c) (Supp. 1985); VA. CODE ANN. § 19.2-264.4 (1983); WASH. REV. CODE § 10-95.080 (Supp. 1986); WYO. STAT. § 6-4-102 (1977 and Supp. 1982). As of October 1, 1985, these thirty-three states had custody of 1395 of the 1590 persons on death row. *See, Death Row U.S.A. NAACP Legal Defense and Education Fund* (Oct. 1, 1985). It is difficult to determine with any precision how many of these convictions would have been reversed if the Eighth Circuit's opinion in *Woodard* were adopted by the Court. The Supreme Court, however, has held that exclusion of only one prospective juror in violation of *Witherspoon* is sufficient to require retrial of the defendant in a capital case, so the number of potential reversals was likely to be significant. *See* Davis v. Georgia, 429 U.S. 122 (1976).

8. *See* cases cited *supra* note 5.

The exception was the Eighth Circuit, in *Grigsby v. Mabry*.[9] Relying upon sociological studies that purported to show conviction-proneness in capital juries, the *Grisby* court disappointed prosecutors, who feared the retroactive results of the decision as much as its future implications. The decision simultaneously gave systematic effect to the arguments of death penalty opponents who claimed that capital punishment was unjustly imposed.

The Supreme Court granted certiorari in *Grigsby* to resolve the issue of the "biased but unbiased" juror. It ultimately reversed the Eighth Circuit's decision in *Lockhart v. McCree*.[10] Almost two decades after the famous footnote that had left the question open,[11] the Court squarely held that the *Witherspoon* reasoning could not be extended to prohibit a state from excluding from the guilt-innocence trial, as well as from the sentencing trial, those venire members who could not consider the sentence of death.

This article examines *Lockhart v.McCree* in light of the controlling constitutional and policy issues, some of which were presented to the Court but not incorporated into its reasoning. The article begins by exploring the line of cases which set general standards for the exclusion of venire members opposed to capital punishment.[12] Then, in Part II, the article discusses the Eighth Circuit's opinion in *McCree* as well as the Supreme Court's reasons for reversal.[13] Next, in Part III the article examines the issues underlying the Supreme Court's holding.[14] This Part first considers the disadvantages to both the state and the accused which would have resulted from the Eighth Circuit's abolition of the unitary jury, but which that court did not credit.[15] It further evaluates the extent to which "biased but unbiased" venire members can be identified reliably.[16] Part III also considers whether the sixth and fourteenth amendments can be read to prohibit unitary juries in capital cases, and it examines the Eighth Circuit's use of sociological evidence, which the Supreme Court rejected as a basis for deciding the constitutional questions.[17] Finally, Part IV states the author's conclusions, which are that *McCree* was properly decided and that the Supreme Court is moving toward a more workable, balanced approach to constitutional issues in

9. 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). McCree's case had been consolidated by stipulation with two other habeas corpus petitions by James Grigsby and DeWayne Hulsey. Grigsby's case became moot in 1983, after he died in prison. The district court determined that Hulsey's case was procedurally barred because he had failed to preserve his allegations of error by objection under the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977). *See* Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983).

10. 106 S. Ct. 1758 (1986).

11. Witherspoon v. Illinois, 391 U.S. 510 (1968); *see also* Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980).

12. *See infra* notes 19-53 and accompanying text.

13. *See infra* notes 54-90 and accompanying text.

14. *See infra* notes 91-211 and accompanying text.

15. *See infra* notes 93-116 and accompanying text.

16. *See infra* notes 116-47 and accompanying text.

17. *See infra* notes 147-211 and accompanying text.

capital cases.[18]

The author was counsel of record in the Supreme Court for sixteen states in *Lockhart v. McCree*, and argued to the Court that the states could properly exclude the potential jurors at issue. Consequently, this article is not an attempt to analyze the issues from a position of impartiality, if indeed that claim can ever be made in an article on this volatile subject. However, the article does present arguments that were not fully developed in the Supreme Court's opinion, and for this reason, it may contribute to an understanding of the states' position and perhaps some of the Court's reasoning.

I. CAPITAL JURY QUALIFICATION UNDER *WITHERSPOON, ABRAMS* AND *WITT*

Prior to 1968, the Supreme Court routinely refused to impose restrictions on the states' power to enact discretionary death penalty statutes.[19] *Witherspoon v. Illinois*[20] marked the beginning of the Court's efforts to establish "unique safeguards" for capital defendants by imposing a more stringent standard of due process in such cases.[21] In *Witherspoon*, the Court held unconstitutional an Illinois statute permitting the prosecution to exclude jurors who had "conscientious scruples against capital punishment, or . . . [who were] opposed to [the] same."[22]

At Witherspoon's trial, the prosecution was able to use this statute to challenge nearly half of the venire for cause on the basis that they had general hesitation about returning the death penalty. The state made these challenges without inquiring whether the potential jurors could impartially determine guilt or consider death as a possible punish-

18. *See infra* note 212 and accompanying text.

19. By 1962, all American jurisdictions adopting capital punishment statutes permitted the fact-finder unfettered discretion in determining whether to assess death, life, or a number of years in prison, once the defendant was convicted of first-degree murder. MODEL PENAL CODE § 210 commentary at 120-132 (1980). Discretionary statutes of this nature were not seriously challenged on constitutional grounds until after 1950. S. KADISH, S. SCHULHOFER, M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 518 (4th ed. 1983). These court challenges were based upon alleged violations of three different constitutional theories, that of equal protection, procedural due process, and cruel and unusual punishment. *Id.* The equal protection argument focused upon the disproportionate number of blacks sentenced to die for committing crimes against white victims. This argument was initially rejected by the Court in Maxwell v. Bishop, 398 U.S. 262 (1970). It was reconsidered by the Court in McCleskey v. Kemp, 107 S.Ct. 1756 (1987).

The procedural due process argument, which is based upon the contention that unfettered jury discretion in sentencing violates the 14th amendment, was rejected in McGautha v. California, 402 U.S. 183, 207 (1971). The same basic argument was recast as an eighth amendment argument in Furman v. Georgia, 408 U.S. 238 (1972) and was one of the bases for the Court's reversal. *Id.* at 222 (Brennan, J. and Marshall, J., concurring).

20. 391 U.S. 510 (1968).

21. It has been argued that the death penalty is qualitatively different from other criminal penalties because it is irrevocable. For this reason, state and federal courts have imposed procedural safeguards that apply only in capital cases to ensure that the correct decision is being made. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (Stewart, J., plurality opinion); *see also* W. WHITE, LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES (1984).

22. *Witherspoon*, 391 U.S. at 512 (ruling ILL. REV. STAT., ch. 38, § 743 (1959) unconstitutional).

ment.[23] The Court, impressed by the large number of jurors excluded by the statute and the substantial number of Americans in the general population echoing the concerns of the excluded venire members,[24] concluded that the Illinois procedure produced a "jury uncommonly willing to condemn a man to die."[25] The remaining jurors could not hope to speak for the community: "Culled of all who harbor doubts about the wisdom of capital punishment — of all who would be reluctant to pronounce the extreme penalty — such a jury can speak only for a distinct and dwindling minority."[26] The Court reasoned that the discretion given to Illinois jurors in deciding whether to assess life or death made it of particular importance that the decision be reached by a jury selected from a fair cross-section of the community, including not only those who believed strongly that death was an appropriate sentence, but also those who had substantial reservations about capital punishment. By indiscriminately excluding the latter category of potential jurors, the state had violated the sixth and fourteenth amendments.[27]

Witherspoon recognized that the state could constitutionally enforce qualifications for a capital jury. The state could only sustain a challenge for cause, however, in two instances: first, against venire members who could never return a verdict of death in any case, and second, against those who could not impartially view the evidence in determining guilt in a capital case.[28] The Court rejected as premature the contention that a "biased but unbiased" juror, that is, one who would automatically vote against capital punishment but who claimed to be impartial in determining guilt or innocence in a capital case, should be allowed as a constitutional matter to judge guilt alone. Witherspoon contended that preventing such jurors from determining guilt or innocence resulted in a jury more likely to convict. The Court declined to adopt this argument because the petitioner presented only three sociological studies supporting this conclusion, which the Court considered too "fragmentary"

23. Forty-seven venire members were challenged by the prosecution in *Witherspoon* in "rapid succession," according to the Court, on the basis that they voiced general opposition to the death penalty. Thirty-nine of those members were excused without any inquiry into whether they could consider assessing capital punishment in an appropriate case. *Id.* at 514-15.

24. *But see supra* note 2.

25. *Witherspoon*, 391 U.S. at 521. The Court supports this conclusion by observing that an amici in the case, the American Friends Service Committee, et al., had argued that the number of death row inmates was rising but the number of actual executions was declining. These observations led the amici to conclude that there was a widening divergence between capital juries, as they were constituted at the time, and society in general, making it imperative to reconstitute capital juries to reflect society's views. *Id.* at 521 n.19. While this might be a reasonable deduction, it is also possible that an increase in the number of court challenges beginning in the 1960's could account for this phenomenon as individual cases tediously worked their way through the habeas corpus process. *See supra* note 13.

26. *Witherspoon*, 391 U.S. at 520.

27. *Id.* at 518.

28. The Court indicated that in order to be disqualified, the prospective juror must make his views on these two issues "unmistakenly clear." *Id.* at 522 n.21. *But see* Adams v. Texas, 448 U.S. 38, 45 (1980) (a juror cannot be excluded under *Witherspoon* unless his views "would prevent or substantially impair the performance of his duties").

and "tentative" as evidence.[29] It hinted, however, that if future petitioners could provide more convincing evidence supporting the claim of conviction-proneness, it might be willing to extend its *Witherspoon* logic to require that jurors excluded on sentence, but unbiased on guilt, be eligible to sit during the guilt phase of a capital trial. The Court suggested that such a holding might require states using sentencing juries to provide two differently composed juries in every capital case, "using one jury to decide guilt and another to fix punishment."[30]

Subsequent to *Witherspoon*, the Court decided another related but distinct issue involving capital jury sentencing which was to have a subtle effect on the interpretation of *Witherspoon* standards. In *Furman v. Georgia*, the Court concluded that existing death penalty schemes, which permitted juries to use unstructured discretion in sentencing, violated the Constitution.[31] *Furman* did not suggest how a constitutional death penalty statute could be constructed. *Furman* itself contained nine separate opinions giving nine different analyses of the constitutional issues.[32] In attempting to comply with the Court's confusing messages about jury discretion, some states, such as North Carolina, enacted mandatory schemes where death was automatic once a defendant was found guilty of a capital offense.[33] The North Carolina statute was eventually held unconstitutional because it failed to permit a jury to consider mitigating circumstances.[34] Other states enacted "aggravating-mitigating" patterns, where juries or judges were instructed to focus on whether certain specifically defined facts had been established by the evidence before assessing punishment.[35]

The case of *Adams v. Texas*[36] arose from one of these new statutes. The Texas legislature, in an attempt to address the concerns of the Court in *Furman*, provided for a bifurcated trial with separate hearings

29. *Witherspoon*, 391 U.S. at 517 n.10. These studies were again before the Court in Lockhart v. McCree, 106 S. Ct. 1758, 1763 (1986).

30. *Witherspoon*, 391 U.S. at 520 n.18.

31. 408 U.S 238 (1972).

32. *Id.* The Court's holding was stated in a brief per curiam opinion and contained no central analysis.

33. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

34. Woodson v. North Carolina, 428 U.S. 280 (1976). *Accord* Roberts v. Louisiana, 431 U.S. 633 (1976).

35. In Florida, for example, the post-*Furman* capital punishment statute required the judge to instruct the jury to determine a capital defendant's sentence by balancing eight specifically enumerated aggravating factors and seven specifically enumerated mitigating factors. Examples of aggravating factors included the defendant committing more than one murder at the same time or committing the murder while in the course of committing certain felonies. Examples of mitigating factors included the defendant having no prior criminal history or committing the crime while under the influence of an extreme emotional or mental disturbance. FLA. STAT. ANN. § 921-141 (West 1985). In Proffitt v. Florida, 428 U.S. 242 (1976), the Court determined that this aggravating-mitigating approach properly focused the jury's inquiry so as to avoid unconstitutional jury discretion in sentencing. In a companion case, Gregg v. Georgia, 428 U.S. 153 (1976), the Court flatly rejected the argument that a state was prohibited from enacting any capital punishment statute no matter how carefully drawn.

36. 448 U.S. 38 (1980).

by the same jury as to guilt-innocence and punishment.[37] In the sentencing hearing, the jury decided three fact questions.[38] Only positive, unanimous answers to all three would result in the judge pronouncing a sentence of death.[39] Texas also had a provision in its Penal Code that stated: "A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."[40] The Supreme Court held this statute unconstitutional in *Adams* on the ground that it violated the limits on jury exclusion set forth in *Witherspoon*.

To reach this conclusion, the *Adams* Court first rejected Texas' contention that *Witherspoon* concerns did not apply, noting that the new Texas death penalty statutes imposed limits on jury discretion in sentencing by focusing on three key sentencing factors, unlike the Illinois statute at issue in *Witherspoon*.[41] The Court reasoned that even if Texas jurors were not directly deciding the defendant's punishment, they were told in advance the effect of their answers to the three sentencing questions at trial. The Court determined that the Texas provision at issue violated the constitutional requirements of *Witherspoon* because it not only excluded potential jurors who refused to follow the law, but it also excluded those who might have been able to follow the law but would have weighed their duties as jurors more seriously.[42]

In *Adams*, however, the Court appeared to retreat from the absolute standard of exclusion set forth in *Witherspoon*. Rather than require a state to demonstrate conclusively that a prospective juror could never assess death or sit impartially to decide guilt, the Court indicated in dictum that a state could exclude venire members whose "views would prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath."[43] By hinting at a "substantial impairment" test, the Court was tentatively moving in a new direction permitting states to exclude for cause jurors who were less than adamant about their opposition to capital punishment but whose capacity to be fair was impaired by their beliefs.[44] Whether this redefini-

37. TEX. CRIM. PROC. CODE ANN. art. 37.071(a) (Vernon Supp. 1979).

38. The three questions posed to a Texas capital jury on sentencing were:

(1)whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2)whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3)if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at art. 37.071(b).

39. *Id.*

40. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974).

41. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968).

42. *Adams*, 488 U.S. at 49-50.

43. *Id.* at 45.

44. Prior to *Adams*, one of the first signals that indicated the Court was moving away from applying the stringent standards of *Witherspoon* came in Lockett v. Ohio, 438 U.S. 586

tion was inadvertent, as dictum sometimes tends to be, or an intentional nod toward the concerns of the dissent,[45] was difficult to determine from the opinion. Furthermore, the Court did not address the more practical problem of how courts or attorneys were to make this distinction from the long and often confused ramblings of prospective jurors.[46]

The *Adams* "substantial impairment" dictum, however, resurfaced in *Wainwright v. Witt*[47] as the definitive test for *Witherspoon* exclusions. The issue in *Witt* was whether a prospective juror, who stated during voir dire questioning in a capital case that her beliefs against capital punishment would "interfere" with her judging the guilt or innocence of the defendant, could be challenged for cause consistently with *Witherspoon*.[48] Witt argued that such a statement fell short of the *Witherspoon* requirement that potential jurors unmistakably demonstrate that they would automatically vote against the death penalty in all circumstances before the state could remove them for cause. In rejecting this argument, the Court recognized that the *Witherspoon* test for excluding jurors had been simplified in *Adams*.[49] After *Furman*, states had enacted death penalty statutes that limited jury discretion in sentencing, and the Court reasoned that trials of death penalty cases were now similar to other criminal trials in which the jury's mission was to act as a fact-finder.[50] The liberalization of the *Witherspoon* test was appropriate, said the Court, because the state as well as the defense was entitled to a jury that was fair and impartial in making these factual decisions.[51] Additionally, the Court concluded that a requirement of "unmistakable clarity" in the showing that a *Witherspoon* excludable was properly challenged for cause was impractical given the nature of voir dire examinations in capital cases where many jurors equivocate, fail to articulate their true feelings,

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(1978) where the Court declined to apply the "automatic" language of *Witherspoon*. Instead the Court held that exclusion by the state of certain prospective capital jurors was proper because the jurors had made it unmistakably clear they could not follow the law in the case regardless of whether they would automatically vote against imposing death. *Id.* at 596. *See also* Wainwright v. Witt, 469 U.S. 412, 419 (1985). Thus, in retrospect, the "substantial impairment" language of *Adams* should not have been totally unexpected.

45. Justice Rehnquist's dissent in *Adams* argued that as a result of *Furman*, "the conditions that formed the predicate for Witherspoon no longer exist," and that "the Court should be reexamining the doctrinal underpinnings of Witherspoon . . . ." 448 U.S. at 52-53 (Rehnquist, J., dissenting).

46. *Id.*

47. 469 U.S. 412 (1985).

48. *Id.* at 415-16.

49. The test had been simplified in the sense that the "tests with respect to sentencing and guilt, originally in two prongs [in *Witherspoon*] have been merged. . . ." It had been liberalized in the sense that it had gone from requiring that a juror state he would automatically be opposed to the death penalty in *Witherspoon* to determining whether he was "substantially impaired" in the performance of his duties as a juror as a result of his views on capital punishment before he could be excused for cause. *Id.* at 421.

50. *Id.* at 422. *See supra* note 45 and accompanying text.

51. *Witt*, 469 U.S. at 423. The Court supported its conclusion by noting that the *Witherspoon* decision was based upon sixth amendment principles requiring a fair and impartial juror, not upon an eighth amendment cruel and unusual punishment analysis. Under the sixth amendment, the Court reasoned that no defendant in any criminal case, capital or otherwise, is entitled to seat jurors who are biased in his favor. *Id.*

or hide them.[52] Finally, the Court determined that trial judges' rulings on *Witherspoon* challenges of equivocating venire members should be treated as findings of fact and afforded a presumption of correctness, as are state court fact findings generally in habeas corpus review.[53]

Witt signaled that the Court was shifting its view of death penalty cases in general and of capital jury selection specifically. *Witherspoon's* emphasis was on a death penalty defendant's right to a jury that was more likely to acquit or sentence leniently because of residual doubts about the penalty to be imposed. *Witt's* emphasis was on the state's right, as well as the defendant's, to have jurors who could fairly and impartially apply the law. In all likelihood, this shift in attitude was due to the Court's belief that state death penalty statutes, subsequent to *Furman*, adequately channeled a jury's sentencing decision, thus reducing the need for stringent restrictions on state challenges for cause.

II. *LOCKHART V. MCCREE*: "THE BIASED BUT UNBIASED JUROR"

A. *The Eighth Circuit's Reliance on Statistics About Attitudes*

On February 14, 1978, Ardia McCree robbed and killed the owner of a gift shop and service station in Camden, Arkansas. His defense at trial was alibi. He claimed that a "tall, black stranger" hitched a ride with him, used his rifle to commit the crime, and later asked to be left off on a nearby dirt road. Two state eyewitnesses testified that McCree was alone immediately after the murder until the time the "stranger" was supposed to have left the car. Ballistic reports determined that McCree's rifle, which had been left by the side of the road, had fired the fatal shot. The jury disbelieved McCree's testimony, convicted him of capital murder, but assessed his punishment at life imprisonment without possibility of parole — a reaction that is not unusual in cases in which proof of guilt is beyond reasonable doubt but is short of ironclad.[54]

At trial, the judge had excluded for cause eight prospective jurors who stated they could not assess the death penalty under any circumstances. The jurors had not been asked nor had they volunteered whether they could put aside their strongly-held beliefs and follow the law in determining McCree's guilt.[55] Arkansas law required that a unitary jury both decide guilt and assess sentence.[56] Consequently, this

52. The Court observed that:

> This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'

Id. at 424-25.

53. *Id.* at 426.

54. Lockhart v. McCree, 106 S. Ct. 1758, 1761 (1986). *See infra* note 98 and accompanying text.

55. 106 S. Ct. at 1761.

56. ARK. STAT. ANN. § 41-1301(3) (1977); Rector v. State, 280 Ark. 385, 395, 659 S.W.2d 168, 173 (1983), *cert. denied*, 466 U.S. 988 (1984).

inquiry would have been immaterial.

McCree could not claim that the jury was biased against him in assessing punishment, since it chose the lesser of the two possible sentences. He argued, however, that by excluding from the guilt-innocence trial the eight venire members who could not consider capital punishment, without inquiring into whether they could fairly determine his guilt, the state had violated his sixth and fourteenth amendment rights to a fair and impartial jury in the trial on guilt or innocence.[57] This claim brought him squarely within the unanswered question posed by *Witherspoon*, concerning whether these jurors "biased on sentence, but unbiased on guilt" could constitutionally be excluded from determining guilt or innocence.

At a subsequent habeas corpus hearing, McCree presented conclusions from fifteen social science studies concerning the attitudes and beliefs of *Witherspoon* excludables.[58] These studies convinced the district court that preventing "biased but unbiased" *Witherspoon* excludables from sitting at the guilt portion of the trial resulted in a jury more prone to convict capital defendants. The district court vacated both McCree's conviction and his sentence, concluding that they were obtained in violation of the sixth and fourteenth amendments.[59]

On appeal, the Eighth Circuit affirmed the district court's decision

57. Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

58. The court categorized the following studies as "attitudinal and demographic" surveys: 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) [hereinafter Bronson I]; Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict: Some Evidence From California*, 3 WOODROW WILSON L. J. 11 (1980) [hereinafter Bronson II]; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984) [hereinafter Fitzgerald]; Louis Harris & Associates, Inc., Study No. 2016 (1971) [hereinafter Harris]; Precision Research, Inc., Survey No. 1286 (1981) [hereinafter Precision Survey].

The court categorized the following studies as "conviction-proneness" surveys: Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984) [hereinafter Cowan]; 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 (1970) [hereinafter Goldberg]; Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) [hereinafter Jurow]; Wilson, Belief in Capital Punishment and Jury Performance (unpublished) (1964) [hereinafter Wilson]; Zeisel, Some Data on Juror Attitudes Towards Capital Punishment (University of Chicago Monograph) (1968) [hereinafter Zeisel].

The court categorized the following studies as "other surveys": Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984) [hereinafter Haney]; Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness*, 8 LAW & HUM. BEHAV. 95 (1984) [hereinafter Thompson]; A. Young, Arkansas Archival Study (unpublished) (1981) [hereinafter Young]. *See* Grigsby v. Mabry, 758 F.2d 226, 232-35 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). In addition, McCree had presented several other surveys conducted by various national polling organizations, which tended to show that blacks and women disproportionately opposed the death penalty and were more likely to be excluded in a capital case because of their views: Harris & Associates, Inc., American Institute for Public Opinion (Gallup), National Opinion Research Center, and several national polls from 1953 through 1978. Brief for Respondent at 98, Lockhart v. McCree, 106 S. Ct. 1758 (1986).

59. Grigsby v. Mabry, 569 F. Supp. 1273, 1324 (E.D. Ark. 1983).

for several novel reasons. First, the court determined that the sixth amendment "fair cross-section" requirement applied to petit juries, the juries actually seated to hear the case, as well as the venire and the original jury list, and that the excluded "biased but unbiased" jurors constituted a cognizable group for sixth amendment purposes. These conclusions led it to accept McCree's argument that the exclusion of these jurors violated the sixth amendment.[60] The court also determined that the fifteen social science studies provided a valid and reasonable basis from which to conclude that such a group would tend to favor the prosecution in determining guilt or innocence. The court saw no inconsistency between its holdings and the decisions in *Adams* and *Witt*, which had moved away from the generally stricter standards announced in *Witherspoon* for reviewing challenges for cause of equivocating jurors.[61]

B. *Conflict Among the Circuits*

The Eighth Circuit's holding was unique. Although other appellate courts had considered the question, they had unanimously determined that venire members disqualified on sentence could properly be excluded from the guilt-innocence trial.[62] In *Smith v. Balkcom*,[63] for example, the Fifth Circuit rejected the argument that exclusion of "biased but unbiased" venire members was unconstitutional because the resulting jury was conviction-prone. To support this contention, the petitioner in *Smith* had presented thirteen studies similar to those presented in *McCree*.[64] The Fifth Circuit reasoned that even if it assumed that the results of the studies were accurate, the petitioner had no constitutional right to have *Witherspoon* excludable jurors determine his guilt. The court stated:

> [The fact that a] death-qualified jury is more likely to convict than a non-death-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a non-death-qualified jury might favor the defendant.[65]

Nor did the court believe that *Witherspoon* excludables who could claim to be impartial in determining guilt were a distinctive group whose exclusion by the state violated the "fair cross-section" requirement of the sixth amendment. Neither the state nor the petitioner was entitled to a juror whose interests and biases prevented him from considering the facts with an open mind. "A cross-section of the fair and impartial is more desirable," reasoned the court, "than a fair cross-section of the

60. *Grigsby*, 758 F.2d at 231-32 *rev'd sub. nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

61. *See supra* note 44 and accompanying text. *See also* Wainwright v. Witt, 469 U.S. 412, 415-16 (1985).

62. *See supra* note 5 and accompanying text.

63. 660 F.2d 573 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858, *cert. denied sub nom.* Tison v. Arizona, 459 U.S. 882 (1982).

64. *Compare Smith*, 660 F.2d at 577 n.8 (listing studies presented by petitioner) *with Grigsby*, 758 F.2d at 232-35 (listing studies presented by respondent, McCree).

65. *Smith*, 660 F.2d at 578 *quoting* Spinkellink v. Wainwright, 578 F.2d 582, 584 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

prejudiced and biased."[66]

The Fourth Circuit reached the same result by a slightly different analysis in *Keeten v. Garrison*.[67] In *Keeten*, the court questioned the persuasiveness of the statistical data submitted by the respondent because the state had presented strong statistical evidence showing that the studies were poorly designed, lacked random sampling, and were not monitored for internal consistency.[68] Even assuming the accuracy of such statistics, however, the Fourth Circuit found that a large portion of *Witherspoon* excludables were likely to be "nullifiers" when determining guilt or innocence, and, thus, they could be properly excluded under a sixth amendment analysis.[69] As to respondents' fourteenth amendment due process argument, the court determined that a capital defendant was entitled to a fair jury, not a jury biased in favor of a not-guilty verdict.[70] The Eighth Circuit in *McCree* was the only federal circuit court to disagree.

C. McCree *in the Supreme Court*

Speaking for a six-member majority in the Supreme Court, Justice Rehnquist reversed the Eighth Circuit in *McCree*. The majority first rejected the Eighth Circuit's holding that the fifteen social science studies supported the thesis that removal for cause of "biased but unbiased" jurors resulted in conviction-prone juries. The majority pointed out that only six of the studies in question dealt specifically with the potential effect of striking *Witherspoon* excludables from the guilt-innocence phase of the trial, three of which were considered and rejected as insufficient data in *Witherspoon* itself.[71] Only one of the three new studies attempted to quantify the effect "nullifiers" would have if permitted to serve on the guilt-innocence portion of a capital trial.[72] None of the studies predicted whether the presence of "biased but unbiased" jurors in determining guilt would have altered the result in an actual trial.[73]

The majority next rejected McCree's sixth amendment argument by reasoning that the right to a fair cross-section of the community did not extend beyond jury venires to actual petit juries. The task of providing

66. *Smith*, 660 F.2d at 583.

67. 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2259 (1986).

68. *Id.* at 132. Additionally, the state had presented studies of Dr. Steven Penrod, a psychologist who specializes in researching jurors and their attitudes. Dr. Penrod's studies concluded that there was little correlation between jurors' attitudes about the criminal justice system and their verdicts in the mock trials that he had conducted. Other expert witnesses for the state testified at trial that respondent Keeten's studies failed to show a strong correlation between jurors' attitudes and their possible verdicts in death penalty cases. The state contended that they did show, however, that "opposition to the death penalty strongly increases the likelihood of juror nullification." *Id.* Many of these same studies were again presented in Grigsby v. Mabry, 758 F.2d 226, 232-35 (8th Cir. 1985).

69. *Keeten*, 742 F.2d at 133. The court reasoned that a capital defendant does not have a constitutional right to be tried by jurors who cannot follow the law.

70. *Id.* at 134.

71. Lockhart v. McCree, 106 S. Ct. 1758, 1762-63 nn.4 & 8 (1986).

72. *Id.* at 1764 n.12.

73. *Id.*

each criminal defendant with a truly representative petit jury, as opposed to a venire, stated the Court, was a "practical impossibility."[74] Even if the sixth amendment were extended to petit juries, the majority would still reject the "death-qualified" challenge because shared attitude groups would not meet the requirement of a "distinct, cognizable group." The majority observed that the fair cross-section requirement had always been based upon the ability to recognize a distinct, cognizable group and to show that the group's wholesale exclusion from jury service was unrelated to individual members' ability to serve.[75] Qualification of jurors with respect to sentence was related to the legitimate state goal of obtaining a jury that would be fair and impartial.[76]

The majority also did not view respondent's fourteenth amendment argument with favor. Although the majority agreed that respondent was entitled to a fair and impartial jury under the fourteenth amendment, it refused to interpret this principle as a requirement that a capital jury be "balanced" at the guilt-innocence stage by the inclusion of *Witherspoon* excludables, who would allegedly view the state's evidence more critically and be less conviction-prone. The fourteenth amendment, reasoned the Court, does not require any particular mix of jurors on the panel.[77]

Lastly, the Court harmonized its holding with the *Witherspoon-Adams-Witt*[78] line of decisions. It rejected the argument that those decisions implied a constitutional violation whenever the state excludes a group that might favor the defense. Unlike the Illinois jury system of *Witherspoon*, the applicable Arkansas procedure served several important functions. These functions included maintenance of a unitary jury system, in which a capital defendant benefited at the sentencing stage from a jury's residual doubts about guilt, and which required that the evidence at trial be presented only once.[79] The Court also referred to the dissent in *Adams*, which had reasoned that a jury's role at guilt-innocence was primarily that of a fact-finder with limited discretion, unlike its role in sentencing.[80]

D. *Justice Marshall's Dissent*

Justice Marshall, joined by Justices Brennan and Stevens, dis-

74. *Id.* at 1765.

75. *Id.*

76. *Id.* at 1766.

77. *Id.* at 1767. The Court observed that if McCree's argument that the 14th amendment required a perfectly balanced jury were adopted, it would necessitate a "Sisyphean task of balancing juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on," as well as abandoning the practice of using peremptory challenges. *Id.*

78. Wainwright v. Witt, 469 U.S. 412 (1985); Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968).

79. *McCree*, 106 S. Ct. at 1768.

80. *Id.* at 1769-70 *citing* Adams v. Texas, 448 U.S. 38 (1980).

sented.[81] They argued that *Witherspoon* specifically stated that if a potential death penalty recipient made the proper statistical showing that exclusion of potential jurists, unbiased on guilt from the guilt-innocence determination, would result in a more conviction-prone jury, the Court would find a constitutional violation.[82] According to the dissent, McCree had made such a showing. Additionally, the dissent claimed that "there [were] no studies which contradict the studies submitted by the respondent; in other words, all documented studies support the district court's findings."[83] Authorizing conviction-prone juries to judge guilt or innocence in a capital case was particularly unacceptable, reasoned the dissenters, since death penalty defendants should be protected by "unique safeguards" against erroneous convictions.

The dissent did not rely upon the sixth amendment or upon a fair cross-section analysis to support its position, except in passing.[84] Instead, Justice Marshall reasoned that the statistical studies supported a finding that McCree's jury was conviction-prone, in violation of the due process clause of the fourteenth amendment.[85] In reply to the Court's assertion that *Adams* viewed the jury as performing a different function at guilt-innocence than at sentencing, the dissent interpreted Justice Rehnquist's dissent in *Adams* to the contrary and argued that both stages of the trial required juries representative of the conscience of the community and who are properly "balanced."[86]

The dissent supported these arguments by referring to *Ballew v. Georgia*, in which the Court held Georgia's authorization of criminal juries of fewer than six members unconstitutional.[87] The Court in *Ballew* concluded that this reduction in the number of members made the jury less conducive to careful deliberation and accurate fact-finding.[88] The dissent reasoned that by keeping venire members disqualified on sentence from determining guilt or innocence, the majority in *McCree* had sanctioned juries that were, like the juries in *Ballew*, "likely to be deficient in the quality of their deliberations, the accuracy of their results,

81. *McCree*, 106 S. Ct. at 1770 (Marshall, J., dissenting).

82. *Id.* at 1771-72 (Marshall, J., dissenting).

83. *Id.* at 1773 (Marshall, J., dissenting) (quoting Grigsby v. Mabry, 758 F.2d 226, 238 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986)).

84. *Id.* at 1775 n.6 (Marshall, J., dissenting). In a footnote, the dissent argued that the wholesale exclusion of any "distinction group" from a jury panel has the same practical effect as excluding such a group from the venire. For this reason, the dissent agreed with McCree that exclusion at voir dire of "biased but unbiased" jurors from determining guilt or innocence in a capital case was a violation of the fair cross-section requirement of the sixth amendment. *Id.*

85. *Id.* at 1774 (Marshall, J., dissenting). These survey results made the Court's opinion even more troublesome to the dissent because *Witt* had broadened the definition of excludable jurors in capital cases, thus making the resulting jury more arguably conviction-prone than it would have been if the *Witherspoon* test had been applied. *Id.*

86. *Id.* at 1777 (Marshall, J., dissenting).

87. *Id.* (Marshall, J., dissenting) (citing *Ballew*, 435 U.S. 223 (1978)).

88. *Id.* at 1778-79 (Marshall, J., dissenting). This conclusion was supported in *Ballew* by reference to more than 31 studies, all of which concluded that decreasing the number of deliberating jurors also decreased the quality of their deliberation. *Ballew*, 435 U.S. at 231-39. The Court discounted the three studies relied upon by the state because of difficulties those studies presented in their methodology. *Id.* at 242-43.

the degree to which they favor the prosecution, and the extent to which they adequately represent minority groups in the community."[89]

The dissent also rejected the Court's conclusion that the state had a substantial interest in identifying and excluding "nullifiers" before the guilt stage of the trial. In the dissent's opinion, such an identification procedure could be easily accomplished by allowing the state to ask prospective jurors if they could be fair in judging the defendant's guilt or innocence, without delving into their views on capital punishment.[90] The dissenters were not persuaded that practical limitations on the accuracy of such an inquiry were so significant as to justify exclusion of *Witherspoon* excludables from the guilt-innocence trial.

III. Analysis of *McCree*

There are at least four kinds of analyses to which the Supreme Court's holding in *McCree* might productively be subjected. The first inquiry might be whether the unitary jury used by Arkansas has real advantages, as the majority concluded it did and, if so, whether they can easily be achieved by other means, as the dissent argued. A second concern might be whether meaningful numbers of venire members substantially biased on sentence, yet unbiased on guilt, can be reliably identified through voir dire examination, as the dissenters maintained, or, as several states argued as *amici curiae*, whether this inquiry would be too internally contradictory to produce meaningful results in courtroom examinations of the real lay members in a venire. Third, it may be useful to compare the "biased but unbiased" venire members at issue with the kinds of excluded groups of which the Court has taken cognizance for sixth amendment purposes. Finally, it might be productive to examine the Eighth Circuit's reliance on social scientific studies as the basis for its conclusion that McCree's jury was unconstitutionally conviction-prone, and the Supreme Court's rejection of that reasoning.

A. *The Value of the Unitary Jury*

The dissent in *McCree* was based upon the argument that the due process clause of the fourteenth amendment required a neutral jury selection process, rather than upon an argument invoking the sixth amendment prohibition of invidious discrimination against cognizable

89. *McCree*, 106 S. Ct. at 1778 (Marshall, J., dissenting). Although the dissent claimed that more blacks than whites would be stricken from jury panels under the Court's analysis, the dissent did not rely on this argument to find a violation of the sixth amendment fair cross-section requirement, but suggested that it might, however, be of constitutional significance under the 14th amendment. *Contra Ballew*, 435 U.S. at 239.

90. *McCree*, 106 S. Ct. at 1780 (Marshall, J., dissenting) The dissent stated: "It overlooks, however, the ease with which nullifiers could be identified before trial without any extended focus on how jurors would conduct themselves at a capital sentencing proceeding. Potential jurors could be asked, for example, 'if there be any reason why any of them could not fairly and impartially try the issue of defendant's guilt in accordance with the evidence presented at the trial and the court's instructions as to the law.' ") *Id.* (Marshall, J., dissenting) (quoting Grigsby v. Mabry, 569 F. Supp. 1273, 1310 (E.D. Ark. 1983)).

groups.[91] The dissenters believed that by excluding the "biased but unbiased" juror from determining a capital defendant's guilt or innocence, the state actually would produce a jury biased in favor of the prosecution.[92] In making this argument, the dissent appeared to be balancing the interests of the defendant against the state's interest in its unitary jury procedure, rejecting the notion that the state had rational reasons for preferring a unitary jury system.

In any fourteenth amendment analysis, courts have traditionally considered the constitutional right of a defendant to a fair trial in the context of the state's legitimate interests in the procedure. The weightier the state's legitimate interest in the procedure, the more likely the procedure will pass constitutional muster.[93] In this instance, the procedure at issue was the state's decision to have a single jury decide both guilt-innocence and sentence in a capital case. The only state interests the dissent found potentially applicable were its interest in efficiency and expense and the possibility that a single jury might be less likely to assess death if its members had residual doubts about guilt. The dissent deemed the first interest "unconvincing" and the second "offensive."[94]

1. Avoiding the Reduction of Shared Decisionmaking Responsibility: The Unitary Jury and the "Residual Doubt"

Contrary to the dissent's position, however, Arkansas did not argue or recognize efficiency and expense as a justification for its unitary jury procedure in capital cases.[95] If it had, the dissent would have been correct in rejecting the argument because time and cost has proved to be insufficient to reduce jury size.[96] Arkansas did argue, however, that the Supreme Court of Arkansas had specifically recognized the theory that separate juries might have the effect of reducing the individual jurors' responsibility for deciding a difficult and severe outcome.[97] There may be more merit to this argument than the dissent was willing to concede.

The responsibility of deciding guilt in a capital case weighs heavily on jurors. The analysis necessary to decide guilt, followed in sequence by the responsibility in the same individuals to determine sentence, prompts significant caution in most jurors at both the guilt-innocence and the sentencing stages of a capital trial. Conversely, the most effective argument the defense may have against the death penalty in many cases is that of residual doubt about guilt.[98] Even aside from that effect,

91. *Id.* at 1775-76 (Marshall, J., dissenting).
92. *Id.* at 1778-79 (Marshall, J., dissenting).
93. *Id.* at 1769, 1779. *See also* Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).
94. *McCree*, 106 S. Ct. at 1780-81 (Marshall, J., dissenting).
95. *See* Brief for Petitioner at 6-8, Lockhart v McCree, 106 S. Ct. 1758 (1986).
96. *See* Ballew v. Georgia, 435 U.S. 223, 243-44 (1978).
97. Brief for Petitioner at 14, McCree, 106 S. Ct. 1758 (citing Rector v. State, 280 Ark. 385, 395, 659 S.W.2d 168, 173 (1983), *cert. denied*, 104 S. Ct. 2370 (1984)).
98. This is a "particularly powerful" argument, according to a publication of the National College for Criminal Defense. The College urges defense attorneys to argue that death "is an absolute punishment and . . . is not appropriate for one who is not absolutely

jurors who have shared the moral responsibility for a community finding of guilt and who have deliberated over the existence of small remaining doubts are often induced to be more cautious later in considering the death penalty. Thus the unitary jury can serve as an important additional safeguard against erroneous use of capital punishment. Indeed, the Arkansas procedure is even a possible explanation for Ardia McCree's own life sentence and his avoidance of the death penalty.

This concern was articulated by the Fifth Circuit in *Smith v. Balkcom*.[99] The court, while assuming the case of a capital defendant who had been convicted of a capital crime and who faced the trial that would determine his sentence, stated:

> A new jury, including only those willing to impose the death penalty, would be selected. They would entertain no doubt that the defendant before them was, indeed, the guilty party. Presumably they would be instructed that the defendant was the guilty party. . . . Not even a flimsy alibi would disturb their deliberations; no suggestion of misidentification would be material. Some may conclude that the destruction of the whimsical doubt sought here would involve a more serious deprivation of the benefits of the constitutionally guaranteed jury trial than envisioned by Smith's advocates in this appeal.[100]

The dissenters in *McCree* found such an argument "offensive" and "cruel."[101] They maintained that if the state was sincere in its claim that it was acting in the defendant's best interests in maintaining a unitary jury scheme, it should at least permit the defendant to waive this benevolence in favor of having two juries, so that "biased but unbiased" jurors could determine guilt or innocence.[102]

Arkansas may have had substantial reasons, however, for avoiding the choice advocated by the dissenters. For example, it may have concluded that a sentence of death should not be made to depend, or appear to depend, upon a strategic choice of this kind. Granted that strategy does influence outcomes, and that offering the defendant a choice is sometimes appropriate, Arkansas may have concluded that it should not encourage what would amount to an all-or-nothing,

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guilty (if there are lingering doubts about the evidence)." Kammen, *Final Arguments in a Death Penalty Case, National College for Criminal Defense Death Penalty Defense* 13 (1983). *See also Texas District & County Attorneys Ass'n,* Capital Murder Seminar A-1 (1980) (evidence of guilt that is less than ironclad often leads a jury not to return the death penalty). Thus, in one particularly grisly case involving the rape-murders of two young women, defense counsel's final argument on punishment was less than 30 seconds long and included the following: "You've convicted the wrong man. You should have found him not guilty. And since you shouldn't have convicted him in the first place, I'm not going to plead for his life now." The jury returned a sentence of life imprisonment rather than death. Defense counsel attributed this verdict to the fact that "the jury had a doubt about [whether the defendant] did it." D. CRUMP & G. JACOBS, CAPITAL MURDER 121-24 (1977) [hereinafter D. Crump].

99. 660 F.2d 573 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858, *cert. denied sub nom.* Tison v. Arizona, 469 U.S. 882 (1982).

100. *Smith*, 660 F.2d. at 581.

101. *McCree*, 106 S. Ct. 1781-82 (Marshall, J., dissenting).

102. *Id.* at 106 S. Ct. at 1781 (Marshall, J., dissenting).

riverboat gamble on a matter of pure procedure if the defendant were given the choice. Moreover, Arkansas could sensibly have concluded that it would be unfair or impractical to force such a choice on a capital defendant before the guilt-innocence trial and then, in the event of conviction, to consider it as binding him in the sentencing trial. This choice is likely to benefit only a small number of defendants because most capital cases are not prosecuted unless there is strong proof of guilt due to the high costs to the state.[103] It would clearly work to the disadvantage of a substantial number of those who were found guilty and who had chosen a two-jury alternative if the dissenters' arguments are accepted. The strategic position of a person who has made a bad choice, and who earnestly asks for a second chance in the light of subsequent information, suggests that enforcement of the binding nature of the election would be difficult.

Even if the dissent's suggestion had merit, one need not conclude that it is required by the Constitution. Perhaps a legislature could rationally enact the dissenters' proposal allowing for the defendant's risky choice. Arguments are available, however, to be made against that model, and due to the state's legislative discretion, they support Arkansas's selection of a different model.

2. The Defendant's Counter-Proposals: The "Twenty-Four Member" Jury, Replacement Schemes, and Ad Hoc Size

McCree suggested, on the other hand, that the state's valid concerns could be addressed by other procedures that would retain *Witherspoon* excludables unbiased on guilt.[104] For example, he argued that the state could impanel two juries simultaneously. The first jury would include members who were "biased but unbiased." The second would not. Both juries would hear evidence of guilt, but only the first jury would decide that issue. The second jury's function would be to decide punishment if that issue were reached. In this manner, residual doubts about guilt still could be entertained by the punishment jury, and the trial would need to be held only once.[105]

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103. *See infra* note 169 and accompanying text.

104. McCree, in his response to the Petition for Certiorari, stated that Arkansas was "free to empanel additional jurors, to have two juries hear the case simultaneously, to move toward judge sentencing, to entrust the jury deliberations to whatever jurors are selected, or to employ any other procedural device that avoids systematic exclusion of *Witherspoon* excludable jurors." Memorandum of Respondent in Response to Petition for Certiorari, Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985) (en banc), *cert. granted sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

105. *See* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 616-17 (1982) [hereinafter Colussi]. The district court, taking McCree's suggestions into account, ordered Arkansas to empanel a second jury purged of "biased but unbiased" jurors as well as *Witherspoon* excludables, to decide the penalty issue once a defendant was found guilty of capital murder. Grigsby v. Mabry, 569 F. Supp. 1273, 1320 (E.D. Ark. 1983). The Eighth Circuit modified this requirement by leaving "the procedure to be followed to secure an impartial jury in the guilt-innocence trial . . . to the states." Grigsby v. Mabry, 758 F.2d 226, 242-43 (1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

The Arkansas legislature might sensibly have decided, however, that this two-jury procedure would not be fairer to capital defendants than the unitary jury; arguably, the Arkansas legislature could have concluded such a proposal would be worse for defendants. The presence of both juries would be a dramatic way of impressing all twenty-four jurors with their limited roles. Furthermore, the deliberate impaneling of a separate sentencing jury, before defendant's guilt was established, would carry an obvious and undesirable message to jurors deciding guilt or innocence. Perhaps most importantly, the sentencing jurors would not share the experience of grappling with large and small doubts during deliberations on guilt.[106] Arkansas could have sensibly concluded that the elimination of this experience would remove an important restraint that its system provided against the inappropriate imposition of capital punishment.

Similar deficiencies are innate in the suggestion, also made by McCree, of partially replacing jury members at the sentencing stage.[107] Arkansas could have reasonably concluded that the new jurors would be relieved of responsibility for deciding guilt. Those remaining from the guilt stage would be impressed with the finality of that decision by the departure of jurors with whom they had shared deliberations, but who were not fit to determine punishment because their views were too extreme. This system might also work to the disadvantage of capital defendants. McCree also suggested that sentencing juries could be composed by removing *Witherspoon* excludables without replacing them.[108] This procedure would leave death penalty decisions to be made by a jury of ad hoc size, with no clear remedy for the possibility that the number might be reduced below acceptable levels. It would also retain most of the disadvantages of the replacement proposal.

Furthermore, the Arkansas legislature might have concluded that the possible detriments of the two-jury proposal were not confined to the sentencing stage. It could have considered the possibility that if jurors knew that their verdict of guilt would lead to the acceptance of responsibility of another body of jurors for determining punishment, some individuals might also be less restrained in finding guilt precisely because they could pass on to another body the responsibility for deciding the ultimate disposition. The seriousness of the guilt decision thus would be reduced, at least in some individuals, by the division of responsibility. Although these are not necessary conclusions, and indeed their validity or significance may be the subjects of substantial disagreement, they do seem to be within the realm of considerations that legitimately can influence a legislature.

106. *See supra* note 98 and accompanying text. *See also Grigsby*, 758 F.2d at 247 (Gibson, J., dissenting).

107. *See supra* note 104 and accompanying text.

108. *Id.*

3. The Argument for Elimination of Jury Sentencing

In requiring two differently composed bodies to ensure that "biased but unbiased" jurors decide guilt or innocence, the dissent did not confront another potentially harmful effect of its proposal. If the dissent had prevailed, states might legitimately decide that the values of jury sentencing were outweighed by the probability of hidden nullifiers, the unfairness to some defendants, the likelihood of ambiguities in the selection process, the resulting increase in appellate reversals, and the diminished accuracy and increased complexity of voir dire examination. In short, some states might regard the two-jury requirement as so cumbersome that they would prefer to abolish jury sentencing and have capital punishment imposed exclusively by judges.[109]

Although the dissent did not discuss this possibility, McCree did. In his response to the petition for certiorari, McCree argued that Arkansas, to protect its legitimate interests, was "free . . . to move toward judge sentencing."[110] During oral argument, McCree's attorney candidly confirmed that the choice of abolishing juries for sentencing purposes was constitutionally available to the states.[111] However, McCree's attorney refused to admit that the practical effect might influence the state's interest in retaining a unitary jury.

Although sentencing by judges has been held constitutional[112] and has advantages, it is not desired by many capital defendants because of the result.[113] The record in *McCree* demonstrates the "conventional wisdom" that judges generally are more conviction-prone than juries.[114] This principle would seem to imply, under the reasoning of *McCree*, that

109. *Id.* Arguments attempting to make the law regarding jury sentencing so draconian that it cannot possibly function have also been generally rejected by the Court. *See* Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976) (rejecting an argument that an "automatic" set of procedures to determine a capital defendant's guilt and punishment should be instituted, with the observation that such a requirement would effectively prohibit capital punishment by imposing impossible conditions for its use).

110. *See supra* note 104 and accompanying text.

111. *See* 54 U.S.L.W. 3475 (U.S. Jan. 21, 1986) (No. 92-212).

112. Lockhart v. Ohio, 438 U.S. 586 (1978) (reversed on other grounds); Proffitt v. Florida, 428 U.S. 242 (1976).

113. Judge-sentencing has the arguable virtue of greater consistency which is an important value in death penalty cases. Furman v. Georgia, 408 U.S. 238 (1972)(Douglas, J., concurring). Juries, however, have advantages such as community restraint, greater representation, and absence of "professional bias." *See* Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

114. The district court record included the following testimony:

> The Witness: What I'm saying is it's true of any of us. As a parent, as a teacher, the first time a student comes to me and says, 'I missed the exam. I have been sick,' I believe it. And the second time I believe it. The third time. By the time I've heard it for 15 years university teaching, I must confess I have developed a certain degree of cynicism. And I'm simply saying a judge who has heard a possible but not probable alibi defense or anyone who has heard these things before —
>
> The Court: The conventional wisdom is you don't try your case to the judge unless your client is innocent.
>
> Ms. Fewell: So you are implying in that statement that judges are more conviction-prone?
>
> The Witness: Well, as I think his Honor was saying, only on the facts.

Record at 674, Lockhart v. McCree, 106 S. Ct. 1759 (1986)(testimony of witness Bronson);

judges might also sentence more harshly. Judges are less ethnically diverse than juries,[115] and they arguably are underinclusive of minorities who would be more hesitant in death sentencing. For this reason, it would be ironic if McCree's arguments resulted in the substitution of judges for juries. States may also view judge sentencing as less desirable because they prefer to have such serious matters decided by a group more likely to weigh and measure conflicting arguments and decide them according to community standards.[116] If one concludes that the use of jurors for capital sentencing should not be made so cumbersome as to force states to choose judge sentencing when they prefer to retain juries, the decision of the Court in *McCree* can be supported by the observation that it tended to retain jury sentencing as a viable alternative.

A. *The Feasibility of Identifying "Biased But Unbiased" Venire Members*

The dissent in *McCree* concluded that venire members biased on sentence, but unbiased on guilt or innocence, could be identified through practical procedures. Specifically, the dissenters suggested that there should be a two-step voir dire examination in capital cases. During the first stage, attorneys should be permitted to ask whether prospective jurors believed they could be fair, without delving into their views on the death penalty, although presumably not concealing that the case was a capital one. Jurors qualified by this questioning would determine the defendant's guilt or innocence. During the second stage, attorneys could qualify prospective jurors who would determine punishment, much in the same manner as is presently done under *Witherspoon* and *Witt*. The dissenters believed that this procedure would ensure that a death penalty defendant would receive a fair trial as to his guilt because his jury could contain members who were substantially opposed to capital punishment but who could fairly, if not more sympathetically, view the evidence in his favor. The dissenters concluded, indeed, that the state could accomplish the result easily by this procedure, and they explained that in their view such an analysis was invited by *Witherspoon*.[117]

The dissent rested upon the assumption that "biased, yet unbiased" venire members are sufficiently numerous to be significant and can be identified with reasonable accuracy through voir dire examination. Such a venire member must, by hypothesis, regard capital punishment as so repugnant that he cannot conform to the law governing its imposition. Yet, simultaneously, he must be capable of impartially deciding guilt or

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see also H. KALVEN & H. ZEISEL, THE AMERICAN JURY 55-65 (1966)(judges more likely to convict when judges and juries disagree).

115. A recent survey revealed that in 1985, the average number of minorities in state judicial positions was 5.4%. Of this figure, Blacks accounted for 3.8%, and Hispanics accounted for 1.2%. NAT'L LAW J., Dec. 30, 1985, at 1, col. 2 (citing The Success of Women and Minorities in Achieving Judicial Office, a study done by the Fund for Modern Courts in New York City in 1985).

116. *See supra* note 113 and accompanying text.

117. *McCree*, 106 S. Ct. at 1780-81.

innocence while knowing that his guilty verdict is a step toward the imposition of precisely the penalty he finds so abhorrent, completely free of that consideration. In the Supreme Court, several states as *amici curiae* quoted a hypothetical venire member's explanation of this "biased, yet unbiased" state of mind:[118]

> Yes, I do absolutely oppose capital punishment. No, I cannot imagine any case (no matter how aggravated and no matter how terrifying) in which I could even contemplate a death sentence. Yes, it is absolute. I am not merely opposed to capital punishment, I categorically exclude, as barbaric and immoral, even the possibility of it.
>
> However, I could act to find a person guilty of a capital crime, knowing that I will then participate in making him face the sentence of death because of my finding. Furthermore, when I do that, I can remain completely free from any consideration of my opinion that no civilized person would participate in findings that could lead to capital punishment.
>
> Yes, I could decide the issue of guilt impartially in a capital case. No, I would not be influenced in the slightest to vote against conviction because of my revulsion toward capital punishment. Even though I categorically reject even the possibility of my being a part of a body that imposes the death penalty, and even though I know that my decision on guilt would be an inexorable part of that process in that it would lead to a decision on precisely that immoral and barbaric penalty, I would decide guilt without being influenced at all by my convictions in this regard.

The existence of persons with this state of mind is possible; perhaps the dissenters were even justified in concluding that the existence of such persons was probable.[119] Most individuals, however, would find the two states of mind incompatible, and the hypothesized responses seem more likely to be the result of poor communication than of a potential juror's real attitudes. The difficulty in accepting the dissenter's argument, therefore, lies in the proposition that numerous individuals of this "biased but unbiased" state of mind can be identified easily and accurately.

In fact, application of the simpler *Witherspoon-Witt* distinction, to identify persons qualified as impartial on sentence and to separate them from those disqualified on sentence, already requires great effort in the lower court.[120] It is unusual that a venire member comes to the courtroom with an innately formulated position articulated in precise *Witherspoon-Witt* terms, even if disqualified. Frequently, the initial response of such a potential juror is "against" the death penalty. Such a response may or may not indicate disqualification, and further questioning may be

118. Brief for Amici Curiae Alabama, Connecticut, et al. at 13-14, Lockhart v. McCree, 106 S. Ct. 1758 (1986).

119. *McCree*, 106 S. Ct. at 1772 (Marshall, J., dissenting).

120. Wainwright v. Witt, 469 U.S. 412, 424-25 n.6 (1985). *See* Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977 (1984) [hereinafter Schnapper].

necessary to obtain more precise *Witherspoon-Witt* information.[121]

The result is often equivocation. The venire member is being asked whether he would violate the law if seated on a jury, and such an admission is not easily made. The process of adversary questioning increases this problem. Even if a prospective juror understands the inquiry completely and accurately, it is often difficult to express a clear answer when opposing counsel word questions and misconstrue answers strategically. Jurors frequently feel so pressed that they refuse to answer questions or are reduced to tears. The record in *McCree* reflects examples of this behavior,[122] as do the opinions of several appellate courts.[123]

For example, in *O'Bryan v. Estelle*,[124] questioning of some individual jurors occupied as much as forty pages of transcript. The three venire members who were the focus of the Fifth Circuit's review were each asked dozens of times in dozens of different ways about their views, in an effort to resolve the *Witherspoon-Witt* inquiry. Their answers were repeatedly evasive, contradictory and nonresponsive. One member of the jury described himself as a "borderline tinker on the subject."[125] When asked whether he could decide the facts impartially, notwithstanding his absolute opposition to the death penalty, this potential juror replied:[126]

> I believe I would, as you say as facts, I don't know. Like I say, I would have reservations really regardless of what we consider facts in myself. I mean as far as a personal belief. I wouldn't elaborate to a greater extent, but I would think other than the fact. . . [sic].

These garbled responses are typical of those that the *Witherspoon-Witt* inquiry sometimes produces, even in thoughtful and articulate lay persons.

Such responses indicate that if capital cases are to be decided with consistency, there is a need for keeping the inquiry as simple and clear as possible. The arguments of the *McCree* dissent,[127] however, would overlay the existing *Witherspoon-Witt* inquiry by the addition of a more finely graded sub-category of "biased yet unbiased" venire members, which would be defined by another set of legal concepts that courts and venire members presumably would have even greater difficulty in inter-

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121. D. Crump, *supra* note 98, at 541-42.

122. *See* Record at 643-45, *McCree*, 106 S. Ct. 1758 ("You can see a very measured physical response from most people, even the most conservative will have some response; you can tell the breathing, heaving of chest, some folks will tear, some folks won't make any eye contact. It's a very difficult situation for a person to be in.") (testimony of expert witness Piazza).

123. *E.g.*, Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981). The following exchange in *Granviel* came after a series of equivocal responses and adversary questioning: "The Court: 'Mrs. Wallace, I am sure you do feel very deeply about this. It's brought tears to your eyes; is that right?' Venirewoman Wallace: 'Yes.' " *Id.* at 687. *See also* Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc); Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980); D. Crump, *supra* note 98, at 61.

124. 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984).

125. Record at 877, *McCree*, 106 S. Ct. 1758.

126. *Id.*

127. *McCree*, 106 S. Ct. at 1770 (Marshall, J., dissenting).

preting. This more complex inquiry would further decrease the likelihood that venire members would be accurately categorized. It also would make it more difficult to obtain even-handed and consistent determinations of guilt or innocence in capital cases, a goal so fundamental in death penalty cases that it was the basis for wholesale invalidation of capital punishment statutes in *Furman v. Georgia*.[128]

Several appellate courts have raised a second concern about the *McCree* dissenters' proposal. These courts have perceived the possibility that persons absolutely opposed to capital punishment might consider it their duty to serve on the jury at the guilt stage and to nullify the possibility of a death sentence by voting for acquittal regardless of the evidence.[129] One judge referred to such an individual as the "lying" juror.[130] While deliberate falsification is possible, it seems more likely that a venire member would become a hidden nullifier merely because he has overestimated his or her capacity to decide impartially on the basis of the evidence, regardless of the consequences. The Fifth Circuit explained the dilemma facing such a juror as follows:

> A juror who has such deeply-seated conscientious scruples against the death penalty might find himself confronting a grisly choice. If, because of his scruples, he votes to acquit, he must risk hanging the jury. Similarly motivated votes by other jurors in subsequent trials and retrials could, in effect, result in near immunity from crimes for which the death penalty can be imposed, which would frustrate Florida's interest in the just and even handed application of its laws, including the death penalty statute.[131]

The *Spinkellink* court concluded that Florida's "fundamental" interest in avoiding this result justified its exclusion of such a venire member from deciding guilt or innocence, as well as sentence.[132]

It seems reasonable to conclude, as did the court in *Spinkellink*, that there are some states of mind that make impartiality so difficult that the law is justified in treating them as unattainable. For example, if a defendant's brother were a member of a venire, no court would prohibit a state from excluding him even if he claimed that he could decide guilt with impartiality. The moral and emotional effect of family membership is too likely to countermand the most honest commitment to impartiality in such a case. For similar reasons, the state may harbor justified skepticism about a *Witherspoon* excludable's ability to put aside a deeply held religious, moral or ethical belief against capital punishment and to con-

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128. 408 U.S. 238 (1972).

129. *See, e.g.*, Andres v. United States, 333 U.S. 740, 766 (1940) (Frankfurter, J., concurring) (possibility that such a juror "can hang the jury if he cannot have his way"); Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986); United States v. Puff, 211 F.2d 171 (2d Cir. 1954) (concern that such a jury would be "in reality a 'partisan jury' ").

130. O'Bryan v. Estelle, 714 F.2d 365, 406 (5th Cir. 1983) (Buchmeyer, J., dissenting), *cert. denied*, 465 U.S. 1013 (1984).

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

132. *Spinkellink*, 578 F.2d 596-98.

vict a defendant knowing that the sentence of death is the likely result. The probability is high that any predictions of this nature would be a product of poor communication during voir dire examination, confusion, or overestimation by the venire member of his capacity for making a coldly logical decision. If these conclusions are accepted, a state should be constitutionally permitted to conclude that *Witherspoon* excludables who convincingly predict impartiality in determining guilt or innocence would be so few, so difficult to identify, and so likely in any event to frustrate the evenhanded adjudication of capital cases, that they should be excluded from sitting in these cases in any capacity.

B. *"Biased but Unbiased" Jurors as a Cognizable Class*

Another significant holding of *McCree* was that jurors who were biased on sentence, but who could be unbiased in determining guilt or innocence, did not constitute a cognizable class for purposes of the sixth amendment.[133] The dissent in *McCree* found it unnecessary to analyze the issue because it had concluded that the respondent had been deprived of a fair trial under the sixth and fourteenth amendments.[134]

The sixth amendment has been interpreted to mean that a criminal defendant cannot be deprived of a jury selected from a "fair cross-section" of the community.[135] Perhaps more accurately, it has been characterized as prohibiting the systematic or invidious exclusion of any "cognizable group" from the venire.[136] This requirement has generally been applied only to venires, not petit juries.[137]

There are several reasons for this prohibition. First, venires composed of a "fair cross-section" of the community are thought to "guard against the exercise of arbitrary power" by the state. Second, if all sections of the community are allowed to participate on the venire, it is believed that the public's confidence in the criminal justice system will be preserved. Third, the requirement ensures that all portions of society will share "in the administration of justice" as a "phase of civil responsibility."[138]

Although federal courts have yet to define precisely what constitutes a "cognizable group" for sixth amendment purposes, they have generally recognized that the group must be identifiable in some objective and discernible way.[139] Another factor has been whether the larger community has exhibited prejudice against the group so that its exclusion is based upon reasons other than ability to serve.[140] Under these

133. *McCree*, 106 S. Ct. at 1765.
134. *Id.* at 1775 (Marshall, J., dissenting).
135. *See* Taylor v. Louisiana, 419 U.S. 522 (1975); Duncan v. Louisiana, 391 U.S. 145 (1968).
136. Duren v. Missouri, 439 U.S. 357, 364 (1979).
137. *Id.* at 363-64.
138. *Taylor*, 419 U.S. at 530-31.
139. Lockhart v. McCree, 106 S. Ct. 1758, 1765 (1986). *See also, Duren*, 439 U.S. 522 (1979); United States v. Potter, 552 F.2d 901, 904 (9th Cir. 1977).
140. *Potter*, 552 F.2d at 904-05.

criteria, courts have recognized cognizable groups that have included economic, social, religious, political, racial and geographical entities,[141] as well as groups based on gender.[142]

Applying these principles, the Court in *McCree* concluded that "biased but unbiased" jurors were not a cognizable group for sixth amendment purposes.[143] The Court observed that traditional sixth amendment groups were generally those who were denied jury service on a basis other than their abilities under circumstances that gave rise to an "appearance of unfairness" to them, as would be the case if blacks were excluded systematically from jury service solely because of their race. By this exclusion, these groups would be completely denied their rights as citizens to serve the community in criminal cases. The Court distinguished these exclusions from exclusion of the sub-group of *Witherspoon* excludables at issue, since the latter were disqualified not on the basis of some immutable trait but rather because of their inability to follow the law in a particular case. The Court also reasoned that all *Witherspoon* excludables, including the "biased yet unbiased" subclass at issue, can serve in other cases if they can follow the law. Thus, they suffer no deprivation of their basic rights of citizenship. In this sense, they are like any other group of persons who possess common attitudinal traits that make them unable to be fair in a particular criminal case.[144]

The Court's conclusion also could be justified by the recognition that there are substantial difficulties in making a common attitude the basis of membership in a cognizable group for sixth amendment purposes. An attitudinally defined group could be composed of persons from all economic, religious, racial, sexual and political categories. Its members would be much more difficult to classify, and the classifications, once made, would be less accurate. Furthermore, attitudes, unlike most of the characteristics that define cognizable groups under the sixth amendment, are subject to change. For example, the number of persons who are *Witherspoon* excludables in general has decreased significantly since 1968,[145] but no members of the population have changed race and few have changed gender. Further, classifications on the basis of attitudes can shift easily during voir dire examination itself. Jurors often change their attitudes or at least the expression of their attitudes during the course of a trial or in response to lengthy and intense questioning.[146] Thus, the sharing of an attitude is not a trait that is either fixed or readily identifiable.

Moreover, the Court observed that when a cognizable group has been recognized and its members' exclusion held unconstitutional, the

141. Alexander v. Louisiana, 405 U.S. 625 (1972); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).
142. *Duren*, 439 U.S. 357 (1979).
143. *McCree*, 106 S. Ct. at 1765-66.
144. *Id.* at 1764-66.
145. *See supra* note 2 and accompanying text.
146. *See* D. Crump, *supra* note 98.

characteristics that compose the group generally have had no relationship to the performance of a juror's responsibilities.[147] For example, a blanket prohibition against jury service by women or blacks cannot be defended by any purpose related to those groups' ability to serve. It is based instead on invidious attribution to the groups of characteristics shared in widely differing degrees by the individuals within those groups. By contrast, exclusion of individuals claiming to be "biased but unbiased," who come from different economic, religious, ethnic, geographical and political backgrounds, is based upon substantial concern about their ability to follow the law in determining guilt or innocence.

C. *The Relevance of Social Scientists' Findings to Constitutional Adjudication: The Conviction-Proneness Studies*

One of the most controversial issues in *McCree* concerned the weight the Court should give the fifteen social scientific studies that McCree had presented in the district court.[148] These studies suggest that capital juries from which *Witherspoon* excludables had been stricken for cause were conviction-prone.[149] Some studies found that, in general, the remaining jurors were more likely to convict and to view all evidence more favorably to the prosecution than would *Witherspoon* excludables.[150] Some studies also concluded that a jury including *Witherspoon* excludable members was more likely to be critical of all witnesses and remember the facts of the case more accurately than a jury from which these individuals were excluded.[151] On their face, the studies seemed overwhelmingly to support McCree's due process argument.[152] Yet, the Court of Appeals split five to four on the issues, and other courts assumed that studies such as those offered by McCree to be valid but concluded that they made no difference.[153]

1. The Case for McCree: A Uniform Conclusion from Social-Scientific Research, Consistent with the "Fireside Induction" and Ensconced in the Comfortable Status of a Finding of Fact

McCree's case was appealing, in part, because it was straightforward and simple. All of the studies appeared to point in a single direction: unified juries in death penalty cases were conviction-prone. The number of studies and the uniformity of their results enhanced the ostensible reliability of this inference. The American Psychological Asso-

147. *McCree*, 106 S. Ct. at 1765.

148. *See supra* note 58 and accompanying text.

149. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd* 758 F.2d 226, 232-36 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

150. *See* Zeisel; Wilson; Goldberg; Cowan; Thompson, *supra* note 58.

151. Cowan, *supra* note 58.

152. Grigsby v. Mabry, 758 F.2d 226, 238 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

153. *E.g.*, Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986); Smith v. Balkcom, 660 F.2d 573, 578 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858, *cert. denied sub nom.* Tison v. Arizona, 459 U.S. 882 (1982).

ciation, as amicus curiae, informed the Court that cross-methodological consistency was an important factor supporting the acceptance of social scientific research within the scientific community.[154] These studies, moreover, were consistent not only across differences in methodology, but also across a long period of time and with many independent researchers.[155]

There were additional reasons for accepting McCree's arguments. First, the Supreme Court has used social science in constitutional decisionmaking; in fact, it has done so precisely in the context of due process issues in jury formation.[156] In *Ballew v. Georgia*, for example, the Court based its holding in part on scientific studies showing that juries of fewer than six members deliberated less thoroughly.[157] *Witherspoon* itself indicated the possible relevance of statistical showings in the nature of those presented by *McCree*.[158] Secondly, McCree had obtained findings of fact supporting his arguments in the lower courts based upon social scientific literature and testimony as evidence.[159] Thus, McCree could invoke the principle that a finding of fact, upheld as against a "clearly erroneous" attack in a court of appeals, is ordinarily binding on the Supreme Court.[160]

Third, the conviction-proneness conclusion was consistent with what the literature referred to as the "fireside induction."[161] That is, the conclusion that juries culled of *Witherspoon* excludables would be conviction-prone, arguably, was the same inference that an intelligent nonexpert would draw while sitting by the fireplace, reflecting upon human experience rather than relying upon statistical data. Finally, McCree's argument gained force from the principle that capital cases, if they differ from other criminal cases, should differ in providing for less risk of bias against the defendant rather than more.[162] The studies used by McCree seemed to show the deck stacked against the defendant precisely in those cases in which, if anything, it should be stacked in his favor. In short, if one accepted the social scientific studies as showing what McCree persuasively argued they did, it seemed that the only logi-

154. Brief for Amicus Curiae American Psychological Association at 26-7, Lockhart v. McCree, 106 S. Ct. 1758 (1986).

155. *See supra* note 58 and accompanying text.

156. *See* Brown v. Louisiana, 447 U.S. 323 (1980); Colgrove v. Battin, 413 U.S. 149 (1973); Williams v. Florida, 399 U.S. 78 (1970).

157. 435 U.S. 223 (1978).

158. Witherspoon v. Illinois, 391 U.S. 510, 520 n.18 (1968).

159. Grigsby v. Mabry, 569 F. Supp. 1273, 1287-1308 (E.D. Ark. 1983), *aff'd* 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

160. FED. R. CIV. PRO. 52(a); Anderson v. Bessemer City, North Carolina, 470 U.S. 564, 573 (1985); Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949) (The Supreme Court cannot "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.") However, the Court has also indicated that where "constitutional facts" are at issue, it will review them de novo. *See* Turner v. Arkansas, 407 U.S. 366, 368 (1972); Ashe v. Swenson, 397 U.S. 436, 442-43 (1970).

161. *See* MEEHL, LAW AND FIRESIDE INDUCTIONS: SOME REFLECTIONS OF A CLINICAL PSYCHOLOGIST, IN LAW, JUSTICE AND THE INDIVIDUAL IN SOCIETY (1977).

162. *See supra* note 21 and accompanying text.

cal result was to find Arkansas' unitary jury system unconstitutional in capital cases.

One need not reject the studies used in *McCree*, however, to reach the majority's ultimate conclusion. It is possible for an intelligent non-expert to accept the fireside induction — that *Witherspoon* excludables are more hesitant to convict than other jurors — and still conclude consistently with the majority in *McCree* that other considerations are paramount and dictate a contrary result. The reason lies in the definition of the legal issue, a matter which social science cannot address. It also lies in the nature of social science, which presents a paradox: the Justices are bound in some cases to defer to it, if they are to avoid becoming anti-scientific troglodytes; and yet in other cases, they cannot defer to it, because to do so would violate theories of government fundamental to the system of which the Court is a part.

2. The Simpler Case Against *McCree*: Definition of the Issue and Deficiencies in the Experimental Method

a. *Defining the Issue: What Excluded Category "Counts?"*

McCree's studies were not determinative in the Supreme Court because, in the first place, most of them did not address the determinative issue. The relevant question was not whether juries without *Witherspoon* excludables were conviction-prone. Most *Witherspoon* excludables would be excludable in any event precisely because they could not judge guilt or innocence fairly. It is easy to see that a jury culled of nullifiers, who would acquit regardless of the evidence, would certainly be more conviction-prone than a jury including nullifiers; but the comparison is trivial. The latter jury never would convict, and no one, including McCree, argued to the Supreme Court that the state must accept such a jury. Thus, the venire members that counted were those in the elusive "biased but unbiased" category. The issue, in other words, was whether a venire that included those particular *Witherspoon* excludables, who accurately claimed the ability to decide guilt or innocence uninfluenced by their bias against capital punishment, would produce a less conviction-prone jury than a venire from which all *Witherspoon* excludables had been removed.

Significantly, most of McCree's studies failed to distinguish *Witherspoon* excludables who also would be biased at the guilt-innocence trial, or who might tend to vote against guilt to prevent the imposition of capital punishment.[163] Only one of the studies[164] attempted to identify or account for the likely effect the presence of these *Witherspoon* excludables, who were also nullifiers on guilt, would have in determining guilt or innocence. Thus one way to understand *McCree* is to view it as a decision that resulted because the majority of the Court simply was un-

163. For a description of studies and their methodology, *see* Grigsby v. Mabry, 758 F.2d 226, 232-35 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

164. *See* Cowan, *supra* note 58.

willing to give this single experiment controlling constitutional significance.[165]

The majority's conclusion also can be defended by reference to the fireside induction. While it may seem uncontroversial to conclude from human experience that persons who absolutely refuse to consider capital punishment would also probably require stronger evidence to convict, the conclusion is less easily reached in the case of the "biased but unbiased" venire member. This individual's mind, by definition, is capable of such cold logic that although her revulsion to the death penalty leads her substantially to exclude considering it, yet, it does not enter into her decision to find the defendant guilty and thus subject the defendant to the penalty that she finds so revolting. It seems doubtful that the intelligent non-scientist, sitting by the fireside, would feel confident in predicting the behavior of this hypothetical venire member as a juror. In fact, if the "biased but unbiased" individual exists and can be identified, the possibility also exists that her superhuman capacity for logic, irrespective of the human consequences, might not make her acquittal-prone. It might make her conviction-prone in the extreme, with the result that all of McCree's studies would point in the wrong direction.

Furthermore, when the focus is on these "biased but unbiased" jurors, rather than upon all *Witherspoon* excludables, definition becomes a key factor in the measurement. It is difficult to determine how much "bias" it takes to label a person a *Witherspoon* excludable in the first place. After a person is so categorized, it is also unclear how much assurance of freedom from bias on guilt is required to place her in the smaller category of "biased but unbiased" venire members who must be part of the jury pool for deciding guilt. The size of the disputed category of venire members depends upon these judgments, which are difficult to define and quantify with the precision necessary to support accurate categorizations, upon which reliable studies could be based.[166]

The difficulty in defining the excluded category enhances the importance of yet another consideration. Some potential jurors are excluded from serving upon capital juries because of a bias *in favor of* the death penalty. If a capital crime is generally described to them, these individuals are able to predict the likelihood of their voting for the sentence of death, even in advance of their hearing the evidence. In the literature, these individuals are characterized as having "automatic death penalty" bias, or as "ADP's."[167] Presumably, if *Witherspoon* excludables who are unbiased on guilt can serve at the guilt-innocence

165. It should be noted, however, that in addition to the Cowan study in *Grigsby*, two other studies, Fitzgerald and Precision Research, attempted to account for "biased but unbiased" jurors in their analyses. Although these two studies were conducted subsequent to *Witherspoon*, they were attitudinal studies only. They did not attempt to determine the effect "biased but unbiased" jurors would have on a guilt-innocence determination in a capital case. *See* Cowan; Fitzgerald; Precision Research, *supra* note 58.

166. *See* Wainwright v. Witt, 469 U.S. 412, 423-25 n.6 (1985); Schnapper, *supra* note 119.

167. *See* Grigsby v. Mabry, 569 F. Supp. 1273, 1305 (E.D. Ark. 1983), *aff'd* 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

stage, so can ADP's who are unbiased on guilt.[168] The crux of the problem is that the removal of ADP's may make the jury less conviction-prone; thus, this phenomenon may cancel or even reverse the effect attributed to removal of *Witherspoon* excludables. The problem is compounded in that the studies show no consistent measure of ADP's; their numbers, in the studies, vary considerably. In some studies, ADP's unbiased on guilt outnumber *Witherspoon* excludables unbiased on guilt, although it must be added that the data are not sufficiently reliable to support such a conclusion.[169] In other words, the fireside induction — when properly defined and examined — simply may be erroneous, as many fireside inductions prove to be.

Finally, fragmentary evidence exists in the form of opinions of experienced capital trial lawyers. Expert testimony offered by the state against McCree on this issue, in fact, suggests that capital juries in fact are not conviction-prone; instead, they may be more acquittal-prone than other juries, when their real-world behavior is observed.[170] If capital juries do lean toward acquittal, the phenomenon may reflect a heightened burden of proof imposed by jurors contemplating the death penalty decision, rather than a balance of *Witherspoon* excludables or ADP's. That heightened burden of proof, in turn, is one of the cardinal advantages claimed by supporters of the unitary jury. *McCree's* supporters, however, vigorously disputed each of these conclusions,[171] and it is impossible to prove or to disprove them from data currently available.

b. *Experimental Methodology*

The social scientists' findings that McCree offered were not based upon statistics gathered from actual juror participants in death penalty cases, because trial courts are reluctant to permit studies of ongoing trials for fear of tainting the results. Instead, most of the studies were based on interviews or out-of-court simulations.[172] In some of the surveys, random subjects were asked to rate on a scale their attitudes toward the death penalty and then asked certain questions about criminal justice issues. These studies purported to measure the degree to

168. *See* Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 1346, 168 Cal. Rptr. 128 (1980); Winick, *Prosecutorial Peremptory Challenges in Capital Cases: An Empirical Study and Constitutional Analysis*, 81 MICH. L. REV. 1, 54 n.184 (1982).

The court in *Hovey* estimated that ADP's could be anywhere from less than one percent to as much as 28% of the general population. *Hovey*, 616 P.2d at 1344. The district court in *McCree* concluded that the number of ADP's would be "negligible when compared to the number of those who would never under any circumstances vote for the death penalty." *McCree*, 569 F. Supp. at 1308. On the other hand, Dr. Gerald Shure, an expert witness for the state in *McCree*, found that 33% of the population he surveyed were ADP's. Dr. Shure admitted, however, that his figures appeared to him to be unreasonable. *Id.* at 1307-08.

169. *See* D. Crump, *supra* note 98 at 28-30.

170. Record at 1643-45, Lockhart v. McCree, 106 S. Ct. 1758 (1986). *See* D. Crump, *supra* note 98 at 28-30.

171. *See, e.g.*, Brief for Appellee at 29, 42, *McCree*, 106 S. Ct. 1758.

172. *See supra* note 58. Of the studies listed in this note, only Jurow, Cowan, Thompson, and Haney attempted in any manner to simulate an actual capital case. The remainder of the studies were based on participant interviews.

which subjects were conviction-prone.[173] Other studies asked subjects, who had been exposed to truncated versions of simulated trials, to render their own verdicts in such cases on the basis of limited deliberation. Their votes were then compared to determine if there was a relationship between guilt determinations and the subjects' stated views of the death penalty.[174] Some of the studies were based on interviews with actual jurors who had served in non-death penalty felony cases. These studies tested the correlation between each juror's first ballot vote and his or her views about the death penalty generally.[175]

The State of Arkansas saw several significant methodological criticisms in these studies.[176] Few individuals included in the studies were likely to have experience from which to simulate the "feel" of a capital case.[177] The severity of the penalty may play a larger restraining role in the decision of capital cases than do similar restraints in other kinds of cases. That factor may, for example, account for reports of greater difficulty for the state in obtaining convictions in capital than non-capital cases.[178] The effect of actual participation in a capital trial is difficult to measure and even more difficult to recreate in simulated jury trials; it is impossible to recreate in general interviews.

Indeed, there is reason to conclude that these kinds of "real world" factors could have influenced the results of the studies. For example,

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173. *See* Bronson I; Bronson II; Harris; Fitzgerald, *supra* note 58.

174. *See* Cowan; Jurow, *supra* note 58.

175. *See* Zeisel, *supra* note 58.

176. Brief of Appellant at 41-44, Lockhart v. McCree, 106 S. Ct. 1758 (1986).

177. The study that came the closest to simulating a real capital trial was the Ellsworth Study which subjected 288 subjects to a two and one-half hour video-tape of a murder trial. This study has been characterized by at least one court as "an outstanding piece of research." Hovey v. Superior Court, 28 Cal. 3d 1, 2, 616 P.2d 1301, 1302, 168 Cal. Rptr. 128, 129 (1980). However, even the *Hovey* court questioned the data to some degree because it failed to account for the effect of ADP's. *Id.*

In addition, the subjects of the study came from a limited area in California and were described as "suburban upper-middle class" with a "median educational level . . . slightly less than a baccalaureate degree." Cowan, *supra* note 58. The cultural attitudes and educational levels of these subjects would clearly be unrepresentative of actual jurors in a capital trial. Secondly, *Witherspoon* excludables were classified as being unbiased in determining guilt or innocence on the basis of the following questions asked over the telephone:

> Which of the following expresses what you would do if you were a juror for the [guilt-innocence] trial [of a capital case]?
>
> (a) I would follow the judge's instructions and decide the question of guilt or innocence in a fair and impartial manner based on the evidence and the law, or
>
> (b) I would not be fair and impartial in deciding the question of guilt or innocence, knowing that if the person was convicted he or she might get the death penalty.

By the wording of the questions and the total lack of any attempt to verify the subjects' responses, it seems very likely that the resulting categorizations are inaccurate. Few people, even those with strongly held beliefs against the death penalty, would be likely to admit they could not be fair or impartial or follow the law in a mock situation.

Additionally, other studies considered in *Grigsby* fell far short of this attempt to simulate an actual capital trial. For example, the Jurow study only provided the participants with audio records of a simulated murder trial and allowed no deliberations. *See also* Thompson; Haney, *supra* note 58.

178. *See supra* note 169 and accompanying text.

during the evidentiary hearing in *Lockhart v. McCree*[179] in the district court, the state presented testimony from Dr. Gerald Shure, a Professor of Psychology and Sociology at the University of California at Los Angeles. Dr. Shure criticized many of McCree's studies because subjects were categorized as *Witherspoon* excludables on the basis of only one question.[180] Shure's own study, which included a short, simulated voir dire examination, showed that many subjects reclassified themselves after being rehabilitated through additional questioning of the kind that would occur in an actual trial.[181] Another state's witness, Dr. Carl Hummel, testified that unless studies are conducted in a courtroom with real participants, where all stages of trial are simulated, including deliberation, accurate results from simulations are unlikely.[182]

These kinds of deficiencies have caused courts other than the Eighth Circuit to remain skeptical about the validity of the social scientific surveys at issue in *McCree*.[183] The confidence that results from consistency in results across different investigators, methods, and studies is undermined by the exposure of consistently flawed assumptions across the same range. Thus, the methodological criticisms may have been valid considerations in determining the weight the studies should have been given. The question remains, however, whether the studies should have been rejected as a basis for demonstrating what they purported to show.

In *McCree*, these claims of methodological deficiency received sharply differing treatments from the dissent, the respondent, the majority and the state. The dissent in *McCree* argued that the studies were determinative of the underlying issue. Justice Marshall concluded that guilt-innocence juries were balanced in favor of the prosecution.[184] McCree's attorneys and the American Psychological Association strongly urged that the studies were utterly reliable.[185] The majority of the Court, on the other hand, devoted a considerable part of its opinion to a discussion of the alleged deficiencies as a basis for expressing skepticism about the studies' validity.[186] The State of Arkansas was even more definite in its argument that the studies were entitled to no weight because they lacked minimal credibility and were "pseudo-scientific."[187]

As these differences suggest, the significance of the methodological criticisms may depend upon the reader's predispositions and may prove to be the least interesting aspect of the *McCree* decision in the long term. No sociological study can be designed in such a manner that it is free from all methodological criticisms. In a pragmatic but imperfect world,

179. 106 S. Ct. 1758 (1986).
180. Record at 980-82, 985, 987, 1008, *McCree*, 106 S. Ct. 1758.
181. *Id.*
182. *Id.* at 906, 1009-10, 1230, 1366, 1510.
183. *See supra* note 5 and accompanying text.
184. *McCree*, 106 S. Ct. at 1774 (Marshall, J., dissenting).
185. Brief of Appellee at 32-35, *McCree*, 106 S. Ct. 1758; Brief of Amicus Curiae American Psychological Association at 21-30, *McCree*, 106 S. Ct. 1758.
186. *McCree*, 106 S. Ct. at 1762-64.
187. Brief of Appellant at 40-48, *McCree*, 106 S. Ct. 1758.

experiments are like any other engineering undertaking. The effort to control all other variables without affecting the one variable under study can never be completely achieved. Yet, such studies are worth undertaking. They can be a valuable guide to behavior in a proper context. Marketing decisions involving hundreds of millions of dollars are frequently based upon surveys that are necessarily imperfect.[188]

Sociological studies can even be appropriate bases for legal decisions in the right kind of cases. Thus, the studies on jury deliberation in *Ballew*, which addressed the intangible balance between the state's legitimate interests and the values advanced by the petitioner, seem an arguably valid basis for a constitutional decision.[189] An easier case is presented by the statistical evidence used in adjudication, such as the showing of invidious discriminatory design on the part of a defendant in a Title VII case.[190] The significant methodological flaws and room for interpretation in studies in many of such cases are counterbalanced by the need to give controlling significance to the evidence in individual adjudications if congressional intent underlying laws such as Title VII is to be honored. Likewise, if the statistics in *McCree* had addressed the determinative issue, their deficiencies in methodology should not have prevented their consideration. It was their failure to ask the correct question, and, to a greater extent, it was the relationship of that question to the ultimate constitutional issue that furnished the most persuasive basis for the majority's opinion in *McCree*.

3. The Better Case Against *McCree*: Current Sociological Truth as a Basis for Constitutional Imposition of Theories of Government in a Federal System

A constitutional question presents a kaleidoscopic inquiry, in which intangible and immeasurable factors are balanced against other, equally immeasurable, and often incomparable, factors. Logical or statistical proofs, on the other hand, result from efforts to narrow and confine the inquiry. As one author has said, "persistent" errors result from the use of sociological evidence in court because:

> [s]tatisticians do not have to deal with burden of proof, and hence bury in their use of regression assumptions that a lawyer would challenge were he or she more keenly aware of them; and, conversely, that attorneys do not have to deal with the statistical concept of a "null hypothesis". . . .[191]

Sociological or statistical studies generally must begin with the construction of a "model," which has the precise purpose of simplifying a com-

188. *See* Seymour, *Numbers Don't Lie—Do They?*, 27 BUS. HORIZONS 36 (1984); Zonderman, *Forecasts From Teacups?*, 30 DATAMATION 28 (1984).

189. Ballew v. Georgia, 435 U.S. 223 (1978).

190. Civil Rights Act of 1964, § 703(a)(1) (codified as amended at 42 U.S.C. § 2000e-2(a)(1)(1972)).

191. Campbell, *Regression and Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299, 1301-02, (1984) [hereinafter Campbell].

plex and untidy world so that a single variable can be isolated for study. The model may reflect the investigator's prejudices or preconceptions and his or her balancing of interests that are not essential to the variable under study. Furthermore, "it is entirely acceptable within economics, and other social sciences, to use a model to help explain observed behavior when no other model works better, even though in an absolute sense, the model does not describe the data very well at all."[192] For these reasons, statistical evidence is more appropriate for disproving than for proving hypotheses.[193]

Thus, even if they are strong and consistent in addressing the narrowly focused issue, one basic problem with enacting propositions derived from statistical proofs into positive constitutional law is that they do not provide any guide for weighing considerations outside the idiosyncratic sociological model in question. They may appear to have "solved" the constitutional dilemma, when in fact all that they have done is to provide evidence on one of a myriad of considerations that must be balanced.

In this regard, sociological evidence can be most misleading precisely when it is at its scientific best. By furnishing ostensibly definite proof of a lesser interest among the myriad considerations to be weighed, it may be used to draw the courts' attention away from more important, but less quantifiable, interests. The Supreme Court has had occasion to reverse circuit courts for precisely this kind of statistically induced myopia. For example, in *Mayor v. Educational Equality League*, the Court reversed the circuit court's holding that had recognized a prima facie case based upon sociological and statistical evidence, because it "did not assign appropriate weight to the constitutional considerations raised by the Mayor."[194] In *International Brotherhood of Teamsters v. United States*, the Court held that the acceptance of statistical and sociological evidence must be limited in purpose because such evidence did not address "the legitimate expectations of non-victim employees," for which a court must draw on "qualities of . . . practicality."[195]

Lockhart v. McCree[196] presented a similar problem. Indeed, part of the problem may have been that the argument constructed from McCree's studies was simple and appealing. For the reasons set out in preceding sections of this article, McCree's studies were also subject to serious methodological criticisms, and they failed to address the relevant question because most of them lumped together all *Witherspoon* excludables indiscriminately. However, a more significant problem would

192. *Id.* at 1303. *See also* Wilkins v. University of Houston, 654 F.2d 388, 410 (5th Cir. 1981) ("[T]he day is long past . . . when we proceed with any confidence toward broad conclusions from crude and incomplete statistics. That everyone who has eaten bread had died may tell us something about bread, but not very much"); EEOC v. Federal Reserve Bank, 698 F.2d 633, 656-57 (4th Cir. 1983) (providing a collection of cases involving judicial rejection of statistical conclusions).

193. *See* Campbell, *supra* note 190, at 1304.

194. 415 U.S. 605, 615 (1974).

195. 431 U.S. 324, 375 (1977).

196. 106 S. Ct. 1758 (1986).

remain even if the studies were accepted as McCree proposed. The statistical evidence did not show whether the proper conclusion was that unitary capital juries were conviction-prone, or whether the inclusion of some *Witherspoon* excludables who might be nullifiers would be unduly acquittal-prone. Furthermore, the statistics could not tell the courts whether the advantages claimed for the unitary jury in fact existed, or how to weigh them in the balance. Indeed, the majority of the Eighth Circuit fell into a trap. It failed to give any weight to the disadvantages it created for convicted capital defendants, who arguably lost the advantages of having sentencing jurors who had wrestled with residual doubts. It also failed to consider the difficulty of identifying the "biased but unbiased" juror, the inducement it thereby provided for the abandonment of juries in favor of judge sentencing, and other disadvantages arguably created by the alternate schemes proposed by the defendant.

There is another, equally fundamental reason for defending the majority's caution in *Lockhart v. McCree*.[197] Sociological studies have proven to be an inadequate bases for constitutional decision making. In some cases, even when they have been apparently convincing, studies have been shown to be inadequate simply because science changes as does social science. For example, the absence of a deterrence effect in capital punishment was "demonstrated" by numerous studies prior to the work of Isaac Erlich.[198] Erlich showed that, in fact, such a deterrent effect could be computed mathematically from regression models (but Erlich, a careful sociologist, pointed out that neither deterrence nor nondeterrence could be "demonstrated" from his study).[199] Similarly, more recent efforts to measure the effect of including the "biased but unbiased" juror have been more sophisticated, and some of them have suggested that the earlier research may lead to erroneous conclusions.[200] Thus, a major problem with the enactment of sociological proofs and compositive constitutional law, is that the courts would be required to reverse their interpretations of the Constitution with each new study that contradicted the basis of an earlier holding.[201]

This consideration, indeed, may have furnished a countervailing consideration to McCree's correct assertion that his argument was based upon findings of fact. The Supreme Court generally accepts findings of fact made by district courts, particularly when they have withstood attack

197. *Id.*

198. *See, e.g.*, BEDAU, THE COURT, THE CONSTITUTION AND CAPITAL PUNISHMENT 55-57 (1977); SELLIN, THE DEATH PENALTY, REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE, 21-22, 34, 63 (1959).

199. *See* Gregg v. Georgia, 428 U.S. 153, 184-85 (1976) (Marshall, J., dissenting) (citing Erlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975)).

200. *See supra* note 68 and accompanying text.

201. *See* O'Brien, *The Seduction of the Judiciary: Social Science and the Courts*, 64 JUDICATURE 8, 20 (1980) (by judicial use of social science data "the status of constitutional rights may actually become more uncertain and precarious"); Tanke & Tanke, *Getting Off a Slippery Slope*, 34 AM. PSYCH. 1130, 1138 (1979) ("Few persons, social scientist included, would be content to have fundamental constitutional liberties turn on the results of the latest experimental study.") *See also* McCleskey v. Kemp, 107 S. Ct. 1756 (1987).

under the "clearly erroneous" standard of review in the circuit courts.[202] McCree attempted unsuccessfully to invoke this deferential approach in the Supreme Court. Such an approach, however, would enable a single district judge, relying upon changeable sociological evidence, not only to bind the nation but to set quasi-legislative facts in the concrete of a constitutional holding. As a consequence of this problem, the Court has repeatedly held that "questions of general importance," including "constitutional claims," are not controlled by "resolving conflicting testimony."[203]

A final consideration, and probably the most fundamental, is that *Lockhart v. McCree*[204] was not merely a case in which there was a debate about conviction proneness; it also was a case about ultimate questions of federalism. The appropriate balance between the state and the defendant in a capital case, the tolerable level of risk of erroneous conviction, and the weight to be given the arguable advantages of the unitary jury in the sentencing phase as versus the disadvantages McCree claimed in the guilt-innocence phase, all are deep philosophical questions, and they cannot be answered by scientific methods, even if those measurements help to determine relevant facts. The Eighth Circuit invalidated a system for capital sentencing that had been in use for many years.[205] No state requires, and none has ever required, the cumbersome two-jury, replacement, or variable-sized juries that McCree advocated as alternatives.[206] Those approaches were certainly not in use when the fourteenth amendment was adopted. In *Marsh v. Chambers*, the "Legislative Chaplain Case," the Supreme Court held that "a practice [that] has continued without interruption ever since [the earliest] session of Congress" did not violate the Constitution.[207] Perhaps the same argument could be made for the unitary jury, which has persisted in capital cases since a time before the adoption of the amendment under which it was challenged.

The Supreme Court probably expressed these conclusions best as follows:

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202. FED. R. CIV. PRO. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573 (1985).

203. Neil v. Biggers, 409 U.S. 188, 193 n.3 (1972)(fact findings rejected where "the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them"); Derenyi v. Immigration Serv., 385 U.S. 630, 636 (1967) (court is not bound by fact findings "when constitutional claims may depend on their resolution"); Great Atl. and Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153 (1953).

204. 106 S. Ct. 1758.

205. ARK. STAT. ANN. § 41-1301 (1977) provides that: "If a defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence . . . and to determine sentence in the manner provided by section 1302 . . . ." This unitary jury system has always been the law in Arkansas for capital as well as non-capital crimes. Rector v. State, 280 Ark. 385, 395, 659 S.W.2d 168, 173 (1983), *cert. denied*, 104 S. Ct. 2370 (1984).

206. *See supra* note 7 for a listing of the states which currently provide for jury sentencing in capital cases. In each of these 33 states, the same jury composed of the same members either sentences directly or acts in an advisory role. *But cf.* N.J. STAT. ANN. § 12C:11-3 (West 1982) (A unitary jury is the rule but a separate jury is available at the sentencing phase of a capital trial for "good cause" shown).

207. 463 U.S. 783, 788 (1983).

> The phrase "finding of fact" may be a summary characterization of complicated factors of varying significance for judgment. . . . Findings on so-called ultimate "facts" more clearly imply the application of standards of law . . . . Particularly is this so where a decision here for review cannot escape broadly social judgments — judgments lying close to opinion regarding the whole nature of our government and the duties and immunities of citizenship.[208]

As in *Baumgartner*, *Lockhart v. McCree*[209] involved "judgments lying close to opinion regarding the whole nature of our government and the duties and immunity of citizenship," rather than discrete fact findings.

It would be inappropriate, however, to attribute these concerns, as did McCree's attorneys, to a "desire to denigrate all social scientific evidence."[210] Instead, this reasoning would place the responsibility for weighing the statistical evidence of the kind at issue in *Lockhart v. McCree*[211] in legislatures. The legislative branch has investigative abilities that better enable it to evaluate methodological and definitional imperfections. The legislature's decisions are not set in the concrete of a constitutional holding, and they can be changed as scientific knowledge changes without doing violence to stare decisis.

V. CONCLUSION

At one level, and viewed simply, the decision in *Lockhart v. McCree* preserves the values of the unitary capital jury. It recognizes the legitimate interests of the states in avoiding the cumbersome alternatives suggested by McCree. In so doing, it allows the states to remove hidden nullifiers and to preserve a uniform, as opposed to an ad hoc, procedure for treating their most serious cases of murder. It also avoids the fruitless and counterproductive effort that would be required to separate jurors simultaneously "biased but unbiased," from other venire members.

Perhaps more importantly, however, the *McCree* decision protects procedures that actually may be fairer to capital defendants. It means that every juror who considers a death sentence will have shared the salutary community function of grappling with large and small doubts about guilt before ever reaching that stage. No juror will be able to find guilt with the assurance that he can pass responsibility for sentencing on to other jurors. Finally, the decision will remove the inducement to replace sentencing juries with judges. The decision preserves jury responsibility for criminal cases that merit most community judgment.

At another level, the decision vindicates the American system of government known as federalism. While the sociological evidence offered by McCree was based upon simple and appealing theories, it was properly subject to criticisms that limited its effect. More to the point, it

208. Baumgartner v. United States, 322 U.S. 665, 670 (1943).
209. 106 S. Ct. 1758 (1986).
210. *See* Memorandum of Respondent in Response to Petition for Certiorari at 8, Lockhart v. McCree, 106 S. Ct. 103 (1986).
211. *McCree*, 106 S. Ct. 1758.

would have been inappropriate for the Court to enact such studies into positive constitutional law even if their validity had been clearly established. Such studies provided no guidance on the essential question, which concerned the relative weights to be assigned the competing theories, interests, and philosophies of government which were at stake. This question properly belongs before the legislative branch.

In order to accept the Supreme Court's decision, one need not decide that McCree's evidence was unworthy of consideration. Death penalty opponents may still be able to persuade legislatures that their concerns are appropriate or that one of their suggested models is superior to the traditional unitary jury.[212] Furthermore, their arguments could prompt a legislative discussion resulting in solutions retaining the benefits of the unitary jury while addressing the concerns McCree raised. These arguments and the solutions that might result from them, however, merit some skepticism. It is likely that their origin lies primarily in their use as vehicles to mount a systematic attack on past sentences and convictions, not in a campaign to improve procedures for future trials. If that pessimistic view proves incorrect, and if opponents successfully use such arguments to prompt legislatures to create a better capital jury system, then the fallout from *Lockhart v. McCree* may continue to develop for many years to come.

212. In fact, there is an indication that as a result of cases such as *McCree* and *McClesky*, death penalty opponents are refocusing their efforts in an attempt to persuade Congress to act in some manner to halt executions. These proposals vary considerably. One proposal suggests that Congress pass a non-binding resolution advising states to set a moritorium on executions until it is "conclusively determined" that capital defendants are not convicted or sentenced because of racially motivated reasons. Other proposals suggest that Congress should appoint experts to study statistics on race and executions or pass a law permitting death penalty defendants to use statistical evidence to challenge their convictions. HOUS. CHRON., July 19, 1987, § 1, at 21, col. 1.