Witherspoon - Will the Due Process Clause Further Regulate the Imposition of the Death Penalty?

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Witherspoon—Will the Due Process Clause Further Regulate the Imposition of the Death Penalty?

INTRODUCTION

In a society of ever increasing awareness of the importance of the individual and his dignity, it is only natural that such a drastic sanction as the destruction of a human life should fall victim to the closest scrutiny. Today, not only is the imposition of the death sentence decreasing, but so is its ultimate effectuation, due mainly to permissive appeal procedures and executive clemency. Furthermore, capital cases are largely responsible for impeding the effective administration of all other criminal cases because they consume a large portion of the court's time, while the deterrent effect of the death penalty has been found to be at least questionable.

With these developments, together with the growing public sentiment against capital punishment, fifteen states have abolished the death sentence. In this atmosphere, the Supreme Court of the United States has been asked to decide whether the Due Process Clause of the Constitution requires further regulation of the imposition of the death penalty.

3. Id. at 39.
4. supra note 2.
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States has been beseiged by arguments in favor of either the total abolishment or at least increased regulation of the death penalty.\(^7\)

The Supreme Court, however, ignored the clamor until only recently.

It is the purpose of this paper to explore three possible arguments which, in the light of recent Supreme Court developments, will doubtlessly be pressed forth. Briefly, these arguments are: (1) that a juror must be empaneled in the sentence determination of a capital case regardless of the juror’s view on capital punishment; (2) that those who favor the death penalty are “prosecution prone” because they possess highly dogmatic authoritarian personalities. This acceptance would mean that the present composition of the jury determining the guilt issue in a capital case, where all jurors favor the death sentence, denies the defendant his right to impartiality, and his conviction would be reversed. And, (3) that certain factual pre-requisites should be established to act as condition precedents for the imposition of the death sentence.

**Historical Development**

The Eighth Amendment was one of the first sources used for arguing against the death penalty.\(^8\) It was proposed that capital punishment was forbidden by the Eighth Amendment’s proscription against cruel and unusual punishment.\(^9\) The United States Supreme Court in 1879 unanimously rejected the proposition.\(^10\) By 1963 the Court’s position on the cruel and unusual punishment argument remained unchanged; the Court felt that capital punishment was justified because of its historical usage and its wide acceptance.\(^11\)

It is interesting to observe that today the death penalty is no longer widely accepted, as demonstrated by recent professional poll surveys.\(^12\) But in spite of the public sentiment against capital punishment, and the position that the Eighth Amendment “must draw its meaning

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7. See discussion, infra.
8. U.S. CONST. amend. VIII.
12. Opinion polls, supra note 5.
from the evolving standards of decency that mark the progress of a maturing society," the cruel and unusual punishment argument has not found judicial favor.

Undaunted by the failure of the courts to accept the cruel and unusual argument, the protestors of capital punishment regrouped their intellectual stamina and turned toward the Equal Protection Clause. Noting that only some defendants in capital cases received the death penalty, they maintained that this was a selective application of the law in an unequal manner. But this argument too met with disapproval. The Supreme Court held that as long as all other persons in the same class as the defendant are subject to the same punishment there is no denial of Equal Protection of the Law. Nor is there a denial of Equal Protection if only in capital cases veniremen are selectively excluded from jury duty because of their views on the death penalty.

The third constitutional argument directed against capital punishment was found in the Sixth Amendment's guarantee of an impartial jury. This argument first directs its attention to the procedure in selecting a jury from the community. The selection process begins with a group of veniremen who are selected from the community in a random fashion and are then questioned in the voir dire examination. The purpose of the voir dire is to determine a prospective juror's fitness for actual jury duty. If the trial judge finds that a venireman is unfit, he is challenged for cause—or, excused from jury duty. Presently, and at common law, there are four classifications into which a prospective juror may fall: (1) propter honoris respectum, exempted because of respect to his position, i.e. a lord, or congressman; (2) propter defectum, exempted because of his failure to fulfill a necessary
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qualification, i.e. citizenship; (3) *propter delictum*, excluded because of a felony or misdemeanor conviction and, (4) *propter affectum*, excused because of a certain belief, bias or partiality maintained by the venireman.

The impartial jury argument focused on the last challenge for cause used against veniremen maintaining particular beliefs, and found its way into the Supreme Court docket by 1820 in *United States v. Carnell.* In *Carnell,* a capital case, all veniremen who were Quakers were challenged for cause because they did not believe in the death penalty. On appeal to the Circuit Court, Mr. Justice Story decided that the defendant's right to an impartial jury had not been denied and the inclusion of such jurors would "corrupt the very sources of justice." The question finally reached the United States Supreme Court where it was held that the practice of excluding veniremen who had conscientious scruples against the death penalty was constitutional. As a result most states continued to challenge a venireman for cause if he did not believe in the death penalty.

23. Id. at 656.
25. Id. at 298.

The issue seemed settled until recent dicta revived the position that a challenge for cause due to scruples against the death penalty was inconsistent with the impartial jury concept. In *Smith v. Texas* the Court said, "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." In other decisions, it was observed that the impartial jury concept would negate not only arbitrary class exclusions based on race or color, but all exclusions that single out any class of people, and that the jury is a body truly representative of the community which must be a cross-section of that community. And Mr. Justice Murphy, dissenting in *Fay v. New York* described the jury as a


27. 311 U.S. 128 (1940).
28. Id. at 130.
32. Id. at 86.
33. 332 U.S. 261, 296 (1947).
cross-section . . . includ[ing] persons with varying degrees of training and intelligence and with varying economic and social positions . . . . We can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof. It may be absent in one case and present in another; it may gradually and silently erode the jury system before it becomes evident.34

Through this dicta and other cases35 the revitalized impartial jury argument was re-examined in Witherspoon v. Illinois,36 in which the defendant was convicted of first degree murder and sentenced to death by a traditional unanimous jury verdict. According to Illinois jury selection procedure37 all veniremen were challenged for cause if they had conscientious scruples against the infliction of the death penalty. The additional finding that the venireman could lay aside his scruples to impose the death sentence was left unconsidered during the voir dire.38 The Supreme Court of the United States readily narrowed the issue to the constitutionality of this jury selection procedure which excluded all scrupled veniremen (those opposed to the death penalty) without determining whether or not they could lay aside their scruples and impose the death penalty.39

Turning to the Sixth Amendment the Court examined the right of defendants to an "impartial jury"40 in state procedures in which the jury determines the sentence.41 To be impartial in the sentence determination the jury must "express the conscience of the community on the ultimate question of life or death"42 and "maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly

34. Id. at 299.
36. 88 S. Ct. 1770 (1968).
39. Id. at 1773.
40. 88 S. Ct. at 1776 and also the concurring opinion of Mr. Justice Douglas at 1778.
41. Although a state is not required by the United States Constitution to have the sentence determination considered by a jury, once such a procedure is adopted, the Fourteenth Amendment demands that the Sixth Amendment "impartial jury" requisite be observed by that state. E.g., Parker v. Gladden, 385 U.S. 363 (1966); Frady v. United States, 348 F.2d 84, 98 (D.C. Cir. 1965), cert. denied, 382 U.S. 909 (1965). See Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 357 U.S. 12 (1956).
42. 88 S. Ct. 1770, 1775.
reflect the 'evolving standards of decency that mark the progress of a maturing society.' With this concept of an impartial jury, supported by past cases, the Court then considered available public opinion polls on the death penalty, a source endorsed by the American Bar Association as representative of public opinion but discouraged by the Witherspoon dissent.

The statistics presented to the Court through Gallup and others demonstrated that the Illinois procedure would exclude for cause forty-two to forty-seven per cent of the population because of their opposition to the death penalty. Consequently, the Court found that the jury could not speak for the community because it was "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." Limiting the decision to condemned capital defendants the Court reversed only the sentence determination of death as violative of due process, while the conviction itself was affirmed. The Court, however, would still permit a challenge for cause of those who would never inflict the death penalty. Two states, however, have held that challenging a juror for cause because he would never inflict the death penalty is unacceptable and impermissible.

Initially, it should be mentioned that in most capital cases, if the defendant is convicted, the same jury must then determine the proper sentence. Consequently, after having his sentence reversed, the pe-

44. See supra notes 27, 29, 31, 33 and 35.
45. ABA ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, Project on Standards Relating to Fair Trial and Free Press (1967).
46. 88 S. Ct. at 1783 (Mr. Justice Black, dissenting).
47. See supra note 5.
48. See Brief for the A.C.L.U. as Amicus Curiae at 42, Witherspoon v. Illinois, 88 S. Ct. 1770 (1968), and polls presented therein.
49. 88 S.Ct. at 1776.
50. This holding was applied retroactively to all capital cases where the unexecuted defendant was sentenced by a jury composed solely of non-scrupled veniremen, 88 S.Ct. at 1777, n.22, but not to defendants sentenced to life imprisonment by a non-scrupled jury. Bumper v. Hall, 88 S.Ct. 1779 (1968).
52. South Dakota and Iowa are the only states holding this view. See State v. Garrington, 11 S.D. 178, 179, 76 N.W. 326, 327 (1898), and State v. Lee, 91 Iowa 499, 60 N.W. 199 (1894).
53. This is the procedure in thirty-five states retaining the death penalty, supra note 6.
titioner argued to reverse his conviction. In support of this motion, psychological reports were presented indicating that jurors who favored the death penalty were “prosecution prone” because they possessed highly dogmatic authoritarian personalities. This bias in favor of the state, the petitioner maintained, denied his right to the consideration of the guilt issue by an impartial jury. Although such a jury was characterized as a “hanging jury,” “callous to suffering,” and “most likely not to recommend mercy,” the Court refused to reverse the conviction. The primary reason for not reversing the guilt determination by a jury that had no scruples against the death penalty was based on the Court’s view that current data on the subject was inconclusive. Specifically, the Court stated that “we are not prepared to announce a per se constitutional rule requiring the reversal of every conviction returned by a jury” where all scrupled veniremen were excluded.

THE THREE POSSIBLE RESULTS OF WITHERSPOON

The possibility of including scrupled veniremen as jurors in the PENALTY determination of a capital case

The Witherspoon analysis categorizes veniremen into four groups based on their feelings about capital punishment. These are: (A) non-scrupled veniremen—those who are in favor of only death if the defendant is found guilty (hereinafter referred to as Group A); (B)


Mr. Justice Douglas, however, accepts the “prosecution prone” concept and consequently would also reverse the conviction. 88 S. Ct. at 1781. See Oberer, supra note 50.

55. 88 S. Ct. at 1777.

56. “The implication of the majority opinion is . . . that people who do not have conscientious scruples against the death penalty are somehow callous to suffering and . . . ‘prosecution prone’.” 88 S.Ct. at 1785, Mr. Justice Black dissenting.

57. 88 S.Ct. at 1781, Mr. Justice Douglas concurring.

58. 88 S.Ct. at 1775.

59. I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of “an eye for an eye”). Yet the logical result of the majority’s holding is that such persons must be allowed so that the “conscience of the community” will be fully represented.

88 S.Ct at 1784, Mr. Justice Black dissenting.
non-scrupled veniremen—those who would also consider life imprisonment\(^6\) (hereinafter, Group B); (C) scrupled veniremen—those who could lay aside their feelings and impose the death sentence\(^6\) (hereinafter, Group C); (D) scrupled veniremen—those who would never impose the death penalty\(^6\) (hereinafter, Group D). Prior to Witherspoon, the Illinois procedure challenged for cause Groups C and D; after the Witherspoon determination, Group C could no longer be challenged for cause without violating the Sixth Amendment. Group D, however, still could be constitutionally challenged for cause because they could not “consider all of the penalties provided by law”\(^6\) and they were “irrevocably committed, before . . . trial . . . , to vote against the penalty of death.”\(^6\) It is obvious, however, that those who would only select death as a sentence (Group A) in a capital case would also be incapable of “consider[ing] all of the penalties provided by law” because they would never consider a life sentence. But this incapacity was left unrecognized in the Court’s opinion.

One reason for the continuing exclusion of Group D may rest in the depth of data available at the time of the Witherspoon decision. Gallup Polls and others\(^5\) only indicated that forty-two to forty-seven percent of the adult U.S. population opposed capital punishment (Groups C and D combined). But the forty-two to forty-seven percent has never been broken down to demonstrate the difference between Group C, those who could lay aside their opposition to the death penalty and sentence a man to death, and Group D, those who would never sentence a man to death.\(^5\) The majority in Witherspoon, how-

\[^{54}\text{The inclusion of this group is also recognized elsewhere. In Collins v. People, 194 Ill. 506, 519, 62 N.E. 902, 905 (1902) the court stated that if a juror believed "that a man who would shoot his wife without cause should be strung up is not a disqualifying condition of mind . . . . Good citizens do and should condemn crime, and should favor the infliction of severe punishment upon the man who kills his wife without cause." And in State v. Jefferson, 131 N.J.L. 70, 71, 34 A.2d 881, 882 (1943), a venireman could not be challenged because he believed "that everyone convicted of murder in the first degree should suffer the death penalty," in the absence of any malice or ill will. See Spencer v. Beto, 398 F.2d 500 (1968), cert. denied, 398 U.S. 935 (1969) (No. --). See also N.J. STAT. ANN. §§ 2A:78-4, 2A:113-4 (1952).}

\[^{55}\text{Recognizing that not all non-scrupled jurors fall within Group A described in note 54, supra, the conclusion that some non-scrupled jurors can "consider all of the penalties provided by law" is logically inferred. 88 S. Ct. at 1777.}

\[^{56}\text{Concerning the scrupled juror (Group C), the court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious scruples against its infliction," 88 S. Ct. at 1777.}

\[^{57}\text{Id. at 1777, n.21.}

\[^{58}\text{Id. at 1777.}

\[^{59}\text{Id.}

\[^{60}\text{Supra note 5.}

\[^{61}\text{The Witherspoon case, decided on June 3, 1968, gave no specific indication that} \]
ever, found that the exclusion of Group C from jury service constituted a significant portion of those opposed to capital punishment\textsuperscript{67} while the dissent assumed that members of Group C were insignificant.\textsuperscript{68} Mr. Justice Black, dissenting, felt that the inclusion of Group C "is based on a semantic illusion and . . . the practical effect . . . will not produce a significantly different kind of jury from the one chosen in this case."\textsuperscript{69} To assist the resolution of this conflict which affected the basis of both the majority and dissenting opinions, a survey of

\begin{table}[h]
\centering
\caption{Findings of the Duquesne Capital Punishment Opinion Poll}
\begin{tabular}{l l}
\hline
45.8\% & had no scruples against capital punishment (Groups A and B). \\
54.2\% & had scruples against capital punishment (Groups C and D). \\
\hline
9.6\% & would impose death in all cases (Group A). \\
36.2\% & favored death, but would consider life (Group B). \\
33.0\% & opposed death, but would consider it (Group C). \\
21.2\% & opposed death in all cases (Group D). \\
\hline
100.0\% & \\
100.0\% & \\
\end{tabular}
\end{table}

188 university students was taken in November, 1968, at Duquesne University to determine the relative sizes of Groups A, B, C, and D. The students in the sample consisted of the following sub-samples: 14 in the Law School, 23 in Philosophy, 26 in Sociology, 55 in the Business Night School, and 70 in the Business Day School. The questionnaire answered by the students is reproduced in the Ap-

the following Gallup Poll of 1504 adults reported in February of 1968 was considered.

\begin{table}[h]
\centering
\caption{Gallup Poll Using "Scruple" Categories}
\begin{tabular}{l}
\hline
34\% & have scruples \\
65\% & have no scruples \\
1\% & don't know \\
\hline
100\% & of those who have scruples \\
18\% & would never vote for death. [Group D in \textit{Witherspoon}] \\
7\% & only in the most terrible cases. [Group C = 13\%] \\
6\% & only if there were no mitigating circumstances. \\
3\% & don't know. \\
34\% & \\
\hline
\end{tabular}
\end{table}

\textsuperscript{67} The exclusion of Group C “crossed the line of neutrality” in favor of the prosecution. 88 S. Ct. at 1776.
\textsuperscript{68} \textit{Id.} at 1786.
\textsuperscript{69} \textit{Id.}
The validity of these figures is supported by similar findings in a 1965-66 Gallup Survey of 621 college students in which:

**Table II. Gallup Survey of College Students, 1965-66**

<table>
<thead>
<tr>
<th></th>
<th>N = 621</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor</td>
<td>45.5%</td>
</tr>
<tr>
<td>Oppose</td>
<td>54.5%</td>
</tr>
<tr>
<td>Total</td>
<td>100.0%</td>
</tr>
</tbody>
</table>

Furthermore, it is informative to observe the similarity of the _voir dire_ examination of veniremen in _Witherspoon_ itself:

**Table III. The Witherspoon Findings**

<table>
<thead>
<tr>
<th></th>
<th>N = 143</th>
</tr>
</thead>
<tbody>
<tr>
<td>Favor</td>
<td>51%</td>
</tr>
<tr>
<td>Oppose</td>
<td>49%</td>
</tr>
</tbody>
</table>

Historically, the Supreme Court has invalidated jury selection procedures devised to exclude veniremen based solely on physical characteristics, i.e., Negroes, women, or on economic status, i.e., wage earners. Exclusions based on legally permissible beliefs have also been abolished on the state supreme court level and now in the United States Supreme Court through _Witherspoon_. If the results of the Duquesne Survey that the legally permissible belief of Group D is maintained by almost one-half of the scrupled population are confirmed by larger professional public opinion services, such as Gallup, the issue concerning the continuing exclusion of Group D from jury service will swiftly rise again. The Court will then be faced with the issue of whether or not the systematic exclusion of those who would never inflict the death penalty is unconstitutional.

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71. Brief for Petitioner at 5.
75. Schowgurow _v._ State, 240 Md. 121, 218 A.2d 475 (1965) (exclusion of atheists improper); Juarez _v._ State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (exclusion of members of the Catholic faith improper).
The core of the proposed contest to include Group D consists in the definition of a constitutional impartial jury. The majority in *Witherspoon* views an impartial jury as a true "cross-section of the community,"\textsuperscript{76} "a body truly representative of the community,"\textsuperscript{77} and a group which "reasonably reflects a cross-section of the population."\textsuperscript{78} Furthermore, the rationale reaffirms the holding of *Glasser*

\begin{itemize}
  \item \textsuperscript{76} Fay v. People of State of New York, \textit{supra} at 296.
  \item \textsuperscript{77} Smith v. Texas, \textit{supra} at 190.
  \item \textsuperscript{78} Brown v. Allen, \textit{supra} at 474.
\end{itemize}
v. United States discouraging any tendency in selection which might result in a jury slightly less than representative of the population. The logical conclusion to this line of reasoning would require a jury to be composed of a statistical cross-section which would include Group D. But this does not square with the holding in Witherspoon which excluded Group D from considering the sentence in a capital case. For although the language infers a random type sample of the entire community, the Witherspoon holding still excuses Group D for cause. Furthermore, the Court made no mention of the existing practice of challenging a venireman for cause based on (1) exemption, i.e. congressmen, (2) disqualification, i.e. aliens, (3) exclusion, i.e. felons, (4) excuse, i.e. bias or partiality. Consequently a constitutional "cross-section" is not synonymous with a statistical "cross-section," and this fact is recognized by both the concurring and dissenting opinions.

The dissent would narrow the selection of an impartial jury even further, however, by maintaining that not only should Group D be excused for cause, but Group C should also be subtracted. The result is, according to both the majority and the dissent, that a "cross-section" can only be drawn from a particular segment of American society. For the majority, if the Duquesne Poll results are confirmed, this segment constitutes 78.8 percent of the adult U.S. population and less if other challenges for cause are included; a result at odds with the literal definition of an impartial jury. For the dissent, the portion of the community from which to draw an impartial jury withers to 42% or 45.8 percent, which is even more paradoxical.

Not only is the exclusion of Group D by the majority incompatible with its rationale, observes Mr. Justice Douglas, concurring, but it also "results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy." The result being a jury disproportionately comprised of the extremists of society.

79. 315 U.S. 60 (1942).
80. Id. at 89. See also Hopkins v. Nashville, C. and St. L. Ry., 96 Tenn. 409, 34 S.W. 1029 (1869).
81. See discussion supra.
82. 88 S. Ct. at 1778.
83. Id. at 1784.
84. Gallup Political Index, supra note 5.
85. Duquesne Poll, Table I, supra.
86. 88 S. Ct. 1778, 1781, Mr. Justice Douglas concurring.
87. Id. See Oberer, supra note 51.
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It is suggested that the primary reason for the majority limitation of jury service to 78.8 percent of the population was due to the lack of sufficiently detailed statistical data. Once the relative size of Group D is finally determined and reckoned with, it is predictable that the Court should find that excluding Group D results in the "wholesale exclusion of a class that makes up a substantial portion of the population produc[ing] an unrepresentative jury."\textsuperscript{88} This prediction is strengthened when the Court's decision holding the size of Group C as significant, is considered together with the size of Group D as indicated by the Duquesne Poll. If the Duquesne Poll results are confirmed, it is dubious that 21.8 percent of the population (Group D) would be considered insignificant, when the Court in \textit{Witherspoon} has already found that Group C, making up 33.0 percent of the society, was significant.

Broadening the impartial jury concept to include Group D would also render any examination during \textit{voir dire} concerning the venireman's scruples on the death penalty irrelevant, since scruples would no longer be a basis for a challenge for cause. The trial court in its discretion, however, may permit scruple examinations for the purpose of a pre-emptory challenge.

\textit{The possibility of including all scrupled veniremen as jurors in the GUILT determination of a capital case}

While the sentence determination by a non-scrupled jury in \textit{Witherspoon} was reversed, the conviction or guilt determination by the non-scrupled jury was affirmed. This distinction stemmed from the Court's consideration of psychological data\textsuperscript{89} which demonstrated that those favoring capital punishment were biased in favor of the prosecution, or "prosecution prone,"\textsuperscript{90} because they possessed highly dogmatic authoritarian personalities.

The defendant argued: (1) that jurors determining the guilt issue favored the death penalty; (2) that those who favored the death penalty were highly dogmatic individuals; (3) that highly dogmatic jurors were prosecution prone. From the above premises the defendant

\begin{itemize}
  \item \textsuperscript{88} 88 S. Ct. at 1782.
  \item \textsuperscript{89} Supra note 54.
  \item \textsuperscript{90} 88 S. Ct. at 1782. Other studies supported the petitioner's position, but they were not directly discussed by the Court. See T. Adorno, \textit{The Authoritarian Personality} 175-78 (1950); V. Boehm, \textit{Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problems of Jury Bias}, 68 Wisc. L. Rev. 734 (1968).
\end{itemize}
concluded that a non-scrupled jury determining the guilt issue was "prosecution prone" which denied him the right to impartiality.

Examining the defendant's argument the Court accepted the first premise, for this was a demonstrable fact: the jury that considered the guilt issue all favored the death penalty, because scrupled jurors were challenged for cause. Furthermore, the conclusion that a jury that is prosecution prone is unconstitutional, was also acceptable. But was the conclusion proved by the defendant? Were non-scrupled jurors highly dogmatic? And, did this make them prosecution prone? The Supreme Court answered in the negative. The difficulty with the argument rested in premises two and three, since the evidence presented in support of these premises was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt,"91 which would force the Court to "speculate . . . as to the precise meaning of the terms used in those studies."92 But even though the Court declined to reverse the conviction, the constitutional ramifications of the "prosecution prone" concept were left unresolved for final determination at a later date,93 indicating that the Court may have felt that there was some merit to the defendant's contention and would have reversed the conviction if more complete and compelling psychological evidence had been presented. Mr. Justice Douglas, concurring, however, found the available data sufficient to reverse the conviction.94 The following material is presented in order to test the validity of the defendant's second and third premises.

Dogmatism, as discussed by Milton Rokeach95 and others,96 refers to a way, or style of thinking; a total system of ideas and beliefs distinguished from rigidity, which points to difficulties in overcoming single beliefs encountered in solving specific tasks; it relates to how

91. 88 S. Ct. at 1774.
92. Id. n.11.
93. Id. at 1775.
94. Id. at 1782.
96. E.g., Vacchiano et al., Structure of Dogmatism Scale, 20 PSYCHOLOGICAL REP'S 847-52 (1967); Korn, Scoring Methods and Construction Validity of the Dogmatism Scale, 24 EDUCATIONAL PSYCH. MEASUREMENT 867-74 (1964); Plant et al., Some Personality Differences Between Dogmatic and Non Dogmatic Groups, 67 J. SOCIAL PSYCH. 67-75 (1965); Vacchiano et al., Personality Correlations of Dogmatism, 32 J. CONSULTING CLINICAL PSYCH. 83-85 (1968).
one holds one's beliefs, and one's "total framework for understanding his universe."  

As a result of extensive psychological testing, the dogmatism phenomenon has recently been pinpointed and refined to a degree which makes it susceptible to statistical measurement and evaluation. Psychologists have developed a scale questionnaire to empirically measure dogmatism on a continuum from highly dogmatic or closed-minded (closed belief system), to less dogmatic or open-minded (open belief system). The more dogmatic a subject is, the less capable he is in evaluating information based on its own intrinsic merits; he is increasingly subject to irrational inner forces; he cannot commiserate with the feeling of others; he is submissive, conforming and needs the support of others, more that those who are less dogmatic. The typical highly dogmatic person is also found to be immature, impulsive, defensive, conventional, conservative and stereotyped in his thinking. On the other hand, low dogmatics possess opposite characteristics—openness, independence, tolerance, etc.

The statements or items comprising the dogmatism questionnaire were the product of research by Milton Rokeach of Michigan State University and are commonly known as the Form E Dogmatism Scale, also referred to by the psychological reports used by the petitioner in Witherspoon. To develop the Scale, Rokeach initially began with a larger group of statements he thought closed-minded people would strongly agree with, while, it was assumed, open-minded individuals would strongly disagree with. These statements were then submitted by Rokeach to various samples including "left-of-center groups (communists and religious non-believers) and ... right-of-center groups (Catholics) ..." who were expected to "score relatively high on the Dogmatism Scale" because they generally clung to their respective belief systems in a tenacious fashion.

97. Rokeach at 35.
98. Supra note 96.
99. Rokeach at 57.
100. Supra note 96.
101. Rokeach at 102.
102. Id. at 116-17.
104. See Appendix, infra.
105. Rokeach at 71-91.
106. E.g., Brief of Rebecca B. Madden as Amicus Curiae at 36, supra.
107. Rokeach at 108.
108. Id. at 129.
109. Id.
The test is preceded by instructions, appearing in the Appendix, which inform the subject that it is a study of his opinions and that there are no right or wrong answers. Each subject is then told to respond to each statement according to how much he agrees or disagrees with it. Answers range from +3, I agree very much, to −3, I disagree very much.

Rokeach's initial results established a relationship between certain statements and closed-minded characteristics. Thereafter, the Dogmatism Scale went through five revisions in which individual statements found to have a low degree of correlation between a subject's response and his open or closed belief system were deleted. According to Rokeach, by the fifth revision (Form E), a significantly high degree of reliability was achieved between the forty test statements and a subject's dogmatism level.110

In order to test the validity of the defendant's second premise, that non-scrupled jurors were highly dogmatic, the Dogmatism Scale was administered to 188 college students at Duquesne University in November, 1968. To relate the student's dogmatism level to his Position on the death penalty (Group A, B, C, or D), an additional question, item 41 in the Appendix, was added at the end of the Scale.

By adding the value +4 as a constant to the +3 through −3 response values indicated in the Form E instructions, infra, the following figures were developed showing the relationship found, for the entire sample and each sub-sample, between dogmatism111 and the four Witherspoon Positions as revealed by item 41, supra. On Figures 2 through 7, below, the dotted line shows a theoretical significant relationship, the solid line portrays the average dogmatism score for those students selecting a particular Witherspoon Position in item 41. Furthermore, in Figure 8, each average dogmatism score for each Position was checked through a "scatter plot" of the actual scores which demonstrated that the average scores were not the result of unusually high or low scores.

The graphs below present the conclusion that no significant relationship was found between one's dogmatism level and one's position on

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110. The reliability of a statement was determined by noting the degree of consistency of a person's scores from one half of the test to the other half, by repeating the test on two separate occasions, or by taking two similar, not identical, forms of the test. Consistency is typically expressed as a correlation ranging from 1.00 (perfect positive correlation), to zero (no correlation), to −1.00 (perfect negative correlation). Rokeach at 73. The level of reliability for Form E ranged between .68 to .93.

111. As recommended by Rokeach, the highest dogmatism score would be +4 added to +3 as a response for all 40 items in the Dogmatism Test, or, +280. Conversely, the lowest score indicative of an open mind would be [(+4) + (−3)] (40) = 40.
Comments

**Figure 2. Relationship between Dogmatism and Positions on the Death Penalty for the Total Sample (N = 188)**

**Figure 3. Relationship between Dogmatism and Positions on the Death Penalty for the Law Sub-Sample (N = 14)**
capital punishment, as measured by item 41 for the entire sample or any sub-sample. This is true even though there seems to be a slight trend toward a higher dogmatic level when we move from response D to response A, as seen most clearly in the Philosophy sample in Figure 4. But this trend cannot be considered statistically significant (i.e., that a relationship exists that is not due to mere chance and probably will occur again). Perhaps a more sensitive measurement (scale) of dogmatism would make the trend more meaningful as suggested by the theoretical line.

Finally, no particular statements within the scale itself, in the sample or any sub-sample, were found to correlate significantly with the four Witherspoon Positions, even after using the most liberal significance levels for evaluation of correlation coefficients.

But even if it can be shown by future psychological studies that non-scrupled jurors are highly dogmatic (premise (2)), the defendant's third premise, that highly dogmatic jurors are "prosecution prone," must be shown before one could conclude that a non-scrupled jury is "prosecu-
Comments

Witherspoon Position

FIGURE 5. RELATIONSHIP BETWEEN DOGMATISM AND POSITIONS ON THE DEATH PENALTY FOR THE SOCIOLOGY SUB-SAMPLE (N = 26)

Witherspoon Position

FIGURE 6. RELATIONSHIP BETWEEN DOGMATISM AND POSITIONS ON THE DEATH PENALTY FOR THE BUSINESS DAY SUB-SAMPLE (N = 70)
highly dogmatic

![Graph]

**Witherspoon Position**

*Figure 7. Relationship between Dogmatism and Positions on the Death Penalty for the Business Night Sub-Sample (N = 55)*

tion prone." Examining premise three in conjunction with the characteristics of a dogmatic or closed-minded individual alone, it is difficult to understand how a closed-minded individual is more often "prosecution prone" than not in determining guilt. The characteristics of the closed-mind, discussed *supra*, in no way suggests a propensity toward a guilty verdict. The only possible time the highly dogmatic individual *might* be "prosecution prone" is when the defense argues *against* something the dogmatic believes in. And this does not have to be capital punishment. Indeed, it is conceivable that both scrupled and non-scrupled juries could be equally dogmatic in their feelings about capital punishment.

Although these findings question the validity of the psychological reports and the defendant's second and third premises in *Witherspoon*, it would be premature, inappropriate and extremely unscientific to extend the Duquesne Poll to the general population. One could, however, appropriately use the Duquesne Poll as an aid in the evaluation of veniremen with college backgrounds.

Apart from the applicability of the Poll, the resolution of the question of the role of dogmatism in jury selection can only effectively be determined by an in-depth study covering a larger and more mean-
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ingful segment of the population, and perhaps by using a more sensitive measuring instrument. Only then will it be known if the non-scrupled juror is highly dogmatic, and the highly dogmatic individual is “prosecution prone.” Until that time, however, the present report tends to demonstrate the fallacy in accepting the petitioner’s incomplete data in Witherspoon to reverse any capital conviction made by a jury comprised solely of non-scrupled veniremen.112

The possibility of creating standards or factual pre-requisites for a jury to find before imposing the death penalty

The Witherspoon Court held that excluding Group C from penalty determinations in capital cases was inconsistent with the impartial jury requirement applicable to the states through the Due Process Clause of the Fourteenth Amendment. Superficially this statement seems innocuous, being only directed to the composition of the sentencing jury. But considered together with other Supreme Court cases describing due process, the statement can be interpreted to inject the due process concept into the procedure of selecting a particular penalty over another in a capital case, rather than being limited to jury composition. Through Witherspoon and other cases discussed below all present penalty determinations may be unconstitutional as violative of the Due Process Clause, since all determinations are now made without statutory or judicial standards to assist the judge or jury in distinguishing why one convicted defendant should die and another live. This procedure results in a penalty determination that is completely arbitrary and unreviewable on appeal.113

A dissenting opinion by Judge Gerald F. Flood of the Pennsylvania Superior Court was the first appellate opinion to herald the application of due process standards in penalty selections in Commonwealth v. Giaccio114 in 1963. In Giaccio the defendant was charged with wantonly pointing and discharging a firearm in violation of the Penal Code.115 The jury acquitted the defendant, but, according to the statute involved, costs were imposed on the acquitted defendant subjecting him

112. But concurring Mr. Justice Douglas would have reversed the conviction because the petitioner’s psychological data tended to show that “some prejudice” did exist. In this area, he wrote, no specific showing of prejudice was necessary. 88 S. Ct. at 1782. The contrary finding in the Duquesne Dogmatism Poll may hinder further reasoning in this direction.
115. Id. at 297. Pa. STAT. ANN. tit. 18, § 4716 (1939).
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to incarceration upon default of payment. The sole reason given for the jury’s determination rested in the statutory rationale that the imposition of costs was within the “discretion” of the jury. On appeal, Judge Flood, dissenting, was persuaded by the defendant’s argument that the practice violated the Due Process Clause of the Fourteenth Amendment because the statute gave no guidelines as to why one defendant may be penalized with costs and another not. Judge Flood found that this result imposed a penalty in a vague, uncertain and indefinite manner which would render any defense against imposing costs futile. “Against what is he to defend?”, queried Judge Flood. Affirmed on appeal to the Pennsylvania Supreme Court, the “acquitted” defendant appealed to the United States Supreme Court which reversed unanimously. Mr. Justice Black, writing for the Court, concluded that the Pennsylvania penal statute was invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs . . . .

It is well established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. . . . This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury’s power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him . . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This Act as written does not even begin to meet this constitutional requirement. (Emphasis added, authorities omitted.)

The Giaccio decision was the first to apply the due process “void for vagueness” doctrine to a statutory penalty imposition. This becomes clear when the two authorities cited for the Giaccio holding are ex-

116. Id.
118. 415 Pa. 139 (1964).
120. Id. at 402-03.
amined, since neither involves a penalty issue. In *Lanzetta v. State of New Jersey*\(^{121}\) a state penal statute, specifying the requisites for a guilt determination of "gangsterism,"\(^{122}\) was determined to be "void for vagueness" because the statutory definition of "gangsterism" was so vague and indefinite that the application of the statute was rendered uncertain, violating the fundamental right to know the exact prohibited conduct.\(^{123}\) In *Baggett v. Bullitt*\(^{124}\) a similar due process doctrine known as the "overbreadth" doctrine was invoked to strike down a broad state statute requiring teachers to swear that they were neither subversive persons, nor members of a subversive organization.\(^{125}\) The Supreme Court found that the vague statutory language needlessly interfered with the right of free speech when the same legitimate legislative purpose could be achieved by a narrower and more specifically worded statute.

Thus, *Giaccio*, through *Lanzetta* and *Baggett* extended the overlapping due process doctrines of "void for vagueness" and "overbreadth" to a penalty issue, whereas prior to *Giaccio*, such doctrines were used only to control statutes regulating guilt determinations\(^{126}\) and conduct.\(^{127}\)

In *United States v. Jackson*\(^{128}\) the Supreme Court again extended due process application to the penalty issue. There, the penalty procedure of the Federal Kidnapping Act\(^{129}\) specified that the death penalty could be imposed only when the defendant pleaded not guilty and requested a jury trial. Invoking the due process "overbreadth doc-

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122. Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or any other State, is declared to be a gangster.
123. 306 U.S. at 619.
125. "Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence.
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trine,"130 this procedure was found to violate the Fifth and Sixth Amendment rights by needlessly encouraging waiver of jury trials and guilty pleas.131

The Witherspoon case applied the Due Process Clause to the penalty issue even more vividly. There, the Court found that a sentence or penalty determination by a non-scrupled or "hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law." (Emphasis added, footnotes omitted.)132 Furthermore, merely because the Due Process Clause has not been used traditionally in the penalty issue "does not mean that basic requirements of procedural fairness can be ignored simply because the [penalty] determination differs . . . from the traditional assessment of whether the defendant engaged in a proscribed course of conduct." (Emphasis added.)133

Upon examination of this language together with the reasoning used in previous cases leading to Witherspoon, it appears unlikely that the present trend of applying due process to sentence determinations will become dormant. Instead of limiting due process application to cost impositions on acquitted defendants as in Giaccio, sole death determinations by a jury as in Jackson, and the composition of a sentencing jury as in Witherspoon, the next step can logically extend procedural due process to the selection of one particular penalty over another, i.e., life imprisonment or death, by the jury because it is an unguided and arbitrary determination.

The only present authority recognizing this due process extension is the dissent in In re Anderson134 in which Justice Tobriner found that although the California death penalty statute enumerated some factors135 for the jury to consider, the statute neither indicated which circumstances were mitigating nor which were aggravating, nor the extent of aggravation or mitigation necessary to impose the death penalty. Thus, the sentencing jury, unguided by any standard or factual prerequisites, has the "absolute discretion" to determine an arbitrary death

131. 390 U.S. at 583.
132. 88 S. Ct. at 1776.
133. Id.
134. 73 Cal. Rptr. 21, 86, 447 P.2d 117, 192 (1968).
135. Penalty evidence may be presented at trial "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or
penalty selection, unreviewable on appeal on the question of abuse of discretion. The opinion ends without suggesting any standards itself.

The Model Penal Code does, however, suggest proposed standards. According to §210.6 of the 1962 draft, the death penalty should only be imposed by a jury if (1) the judge agrees, (2) one aggravating circumstance was found such as:

(a) The murder was committed by a convict under sentence of imprisonment.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

And, (3) no mitigating circumstance was found such as:

(a) The defendant has no significant history of prior criminal activity.

(c) The victim was a participant in the defendant’s homicidal conduct or consented to the homicidal act.

(f) The defendant acted under duress or under the domination of another person.

(h) The youth of the defendant at the time of the crime.

The above quoted portion of the Model Penal Code may not be the final word on which pre-requisites should or should not be considered, but it is submitted that it effectively demonstrates what is meant by the application of standards to penalty determinations, currently non-existent in any criminal sentence determination.

mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented.” CAL. PENAL CODE § 190.1 (West 1955).

136. 73 Cal. Rptr. at 41, 447 P.2d at 137.

137. MODEL PENAL CODE § 210.6 (1962).
The direction of current decisions has increased the likelihood of the following three developments:

(1) Future juries determining a particular sentence in criminal cases may possibly be composed without regard to their views on the death sentence. This conclusion is based on the findings in *Witherspoon* that the exclusion from a jury of those who oppose the death penalty but who could still impose it, was the exclusion of a significant group of the community which denied the defendant’s right to have a jury drawn from a cross-section of that community; although it was also suggested that the exclusion of those who would never impose the death penalty constituted an insignificant group and was therefore still permissible.

The Duquesne Poll first of its kind and yet supported by other studies, demonstrates that both groups may be significant. Upon confirmation of this finding, it is suggested that the continuing exclusion of those who would never impose the death penalty denies the capital defendant his right to have his sentence determined by a jury representative of a cross-section of the community.

(2) Guilty verdicts in capital cases may be reversed if the jury was composed of only those who favored the death penalty due to a newly demonstrated bias prevalent in such people. This conclusion is founded on the assumption that the future development of psychological testing positively shows that those who favor the death penalty are biased in favor of the prosecution. The present psychological tests are, however, questionable in view of the Duquesne Poll which found that (a) current psychological tests (i.e., the Dogmatism Scale) do not evaluate one’s tendency to be prosecution prone, and (b) even if they did measure the prosecution prone bias, no significant relationship was found between dogmatism and one’s view of capital punishment.

Conclusion (2) can find additional support in the analogous argument that excluding all those who oppose the death penalty from considering the issue of guilt in a capital case is a systematic arbitrary exclusion of a certain group; this has already been held to be unconstitutional (e.g., the exclusion of Negroes) even when no statistically significant bias can be shown to have resulted. Furthermore, the exclusion of those who disapprove of the death sentence should not be confused with the proper exclusion from jury service of those who believe that a particular unlawful act should not be legislatively sanctioned at all.
To the contrary, those who oppose capital punishment do not disagree with the law itself, but have made a choice of a particular penalty (life imprisonment) which is a legally permitted decision.

(3) Another possibility is that once a man is found guilty of a capital offence, he may only suffer capital punishment after the jury finds certain factual pre-requisites with which the judge agrees. The conclusion rests on the proposition that an unguided sentence determination controlled only by the arbiter's "discretion" is contrary to due process of law. Without the legislative or judicial establishment of these factual pre-requisites, the judge or jury is guided only by its own subjective feelings which a defendant cannot defend against, nor can the appellate court review. This lack of guidance in determining different penalties is extremely hazardous in cases where the guilty defendant is the subject of community prejudice against his race, color, or creed.

It is hoped that these three developments be soberly considered by both legislators and jurists together with the concept that a society in its entirety can be evaluated by examining its administration of criminal justice.138

Salvatore J. Cucinotta*

APPENDIX

Form E**

The following is a study of what the general public thinks and feels about a number of important social and personal questions. The best answer to each statement below is your personal opinion. We have tried to cover many different and opposing points of view; you may find yourself agreeing strongly with some and perhaps uncertain about others; whether you agree or disagree with any statement, you can be sure that many people feel the same as you do.

Mark each statement in the space provided on the answer sheet according to how much you agree or disagree with it. Please mark every one. Write +1, +2, +3 or -1, -2, -3, depending on how you feel in each case.

138. F. DOSTOEVSKII, CRIME AND PUNISHMENT (Dutton ed. 1911).
* Extreme gratitude is extended to Dr. John South, Associate Professor of Behavioral Science, whose advice and assistance was invaluable in computing and evaluating the statistical data, and to Dr. Constance Fischer, Assistant Professor of Psychology, who made herself available for consultation and suggested the use of Rokeach's Dogmatism Scale.
<table>
<thead>
<tr>
<th>Comment</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>+1:</td>
<td>I agree a little</td>
</tr>
<tr>
<td>-1:</td>
<td>I disagree a little</td>
</tr>
<tr>
<td>+2:</td>
<td>I agree on the whole</td>
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<tr>
<td>-2:</td>
<td>I disagree on the whole</td>
</tr>
<tr>
<td>+3:</td>
<td>I agree very much</td>
</tr>
<tr>
<td>-3:</td>
<td>I disagree very much</td>
</tr>
</tbody>
</table>

1. The United States and Russia have just about nothing in common.
2. The highest form of government is a democracy and the highest form of democracy is a government run by those who are most intelligent.
3. Even though freedom of speech for all groups is a worthwhile goal, it is unfortunately necessary to restrict the freedom of certain political groups.
4. It is only natural that a person would have a much better acquaintance with ideas he believes in than with ideas he opposes.
5. Man on his own is a helpless and miserable creature.
6. Fundamentally, the world we live in is a pretty lonesome place.
7. Most people just don't give a "damn" for others.
8. I'd like it if I could find someone who would tell me how to solve my personal problems.
9. It is only natural for a person to be rather fearful of the future.
10. There is so much to be done and so little time to do it in.
11. Once I get wound up in a heated discussion I just can't stop.
12. In a discussion I often find it necessary to repeat myself several times to make sure I am being understood.
13. In a heated discussion I generally become so absorbed in what I am going to say that I forget to listen to what the others are saying.
14. It is better to be a dead hero than to be a live coward.
15. While I don't like to admit this even to myself, my secret ambition is to become a great man, like Einstein, or Beethoven, or Shakespeare.
16. The main thing in life is for a person to want to do something important.
17. If given the chance, I would do something of great benefit to the world.
18. In the history of mankind there have probably been just a handful of really great thinkers.
19. There are a number of people I have come to hate because of the things they stand for.
20. A man who does not believe in some great cause has not really lived.
21. It is only when a person devotes himself to an ideal or cause that life becomes meaningful.
22. Of all the different philosophies which exist in this world there is probably only one which is correct.
23. A person who gets enthusiastic about too many causes is likely to be a pretty "wishy-washy" sort of person.
24. To compromise with our political opponents is dangerous because it usually leads to the betrayal of our own side.
25. When it comes to difference of opinion in religion we must be careful not to compromise with those who believe differently from the way we do.

26. In times like these, a person must be pretty selfish if he considers primarily his own happiness.

27. The worst crime a person could commit is to attack publicly the people who believe in the same thing he does.

28. In times like these it is often necessary to be more on guard against ideas put out by people or groups in one's own camp than by those in the opposing camp.

29. A group which tolerates too much differences of opinion among its own members cannot exist for long.

30. There are two kinds of people in this world: Those who are for the truth and those who are against the truth.

31. My blood boils whenever a person stubbornly refuses to admit he's wrong.

32. A person who thinks primarily of his own happiness is beneath contempt.

33. Most of the ideas which get printed nowadays aren't worth the paper they are printed on.

34. In this complicated world of ours the only way we can know what's going on is to rely on leaders or experts who can be trusted.

35. It is often desirable to reserve judgment about what is going on until one has had a chance to hear the opinions of those one respects.

36. In the long run the best way to live is to pick friends and associates whose tastes and beliefs are the same as one's own.

37. The present is often all too full of unhappiness. It is only the future that counts.

38. If a man accomplishes his mission in life it is sometimes necessary to gamble "all or nothing at all."

39. Unfortunately, a good many people with whom I have discussed important social and moral problems don't really understand what is going on.

40. Most people just don't know what's good for them.

Please answer the following question by circling the corresponding letter on your answer sheet.

41. A legally sane man is accused of murder, punishable by death. If you were questioned as a potential juror, which of the following positions would be most like your own? (Circle one letter on the answer sheet.)

   If the man was found guilty of murder,

   A. I would definitely agree with the imposition of the death penalty.
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B. I would probably agree with the imposition of the death penalty, but under certain circumstances I would consider a "life sentence."

C. I would probably be opposed to imposition of the death penalty, but under certain circumstances I would consider it.

D. I would definitely disagree with the imposition of the death penalty.