A Clash of Cases: Jury Death Qualification and the Fair Cross-Section Requirement

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I. INTRODUCTION

Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of a jury trial.¹

The history of the development of the jury in America has demonstrated a progressive change in the role, and in the constitution of that body. The shaping of the jury has moved in concert with the ever broadening definition of a group of one's peers, chosen from the community. In recent years, perhaps the most interesting developments have occurred in the area of juror attitudes toward the death penalty. The fundamental question has been whether or not jurors' attitudes against the death penalty should bar their service on the jury.

This essay will focus on the clash which has developed as a result of two landmark cases from the United States Supreme Court which have had an impact upon this issue. In Witherspoon v. Illinois,² the Court ruled that jurors who could not, under any circumstances, vote to sentence a defendant to death could be excluded from service on the jury at the voir dire stage. In Taylor v. Louisiana,³ the Court ruled that a defendant was entitled to a jury

3. Voir dire is that portion of a trial in which potential jurors, drawn from a “venire” (i.e. group of 28 to 40 persons selected at random from the local list of jury-eligible citizens), are interviewed by the trial judge and/or counsel, as individuals, and often in groups, to determine each venireman’s fitness to serve on the jury. The survivability of each person as a juror depends first on his or her ability to fairly and impartially weigh the facts against the applicable law to arrive at a verdict. Veniremen who cannot perform such a task, either because of some personal prejudice or bias, or for some other good and sufficient reason, are “struck for cause” by the trial judge on request of either counsel. Survivability also depends, in part, on the arbitrary decisions of either counsel, who may, without cause or explanation, invoke a designated number of “peremptory challenges” to strike potential jurors who they deem, for whatever reason, will hinder the cause of their respective clients. The number of peremptory challenges allowed by each attorney is statutorily established, and varies from 7 to 21 or more. For a more complete treatment of this subject, see S. McCART, TRIAL BY JURY (1964).
drawn from a fair cross section of the community, and that systematic exclusion of any identifiable and distinct group from jury service violated the fair cross section standard.

Although numerous courts have taken up an examination of this apparent clash in rulings by the Supreme Court, no court has ruled definitively with respect to the proper answer to the question posed by these opinions. In August of 1983, however, the District Court for the Eastern District of Arkansas decided *Grigsby v. Mabry.* Grigsby represents a definitive review of all of the scientific research and fact finding relating to juror attitudes and the death penalty, as well as a searching review of the relevant case law which has had an impact on this issue. After a close inspection of both the *Witherspoon* and the *Taylor* decisions, this comment will address the question of whether *Grigsby v. Mabry* is a good decision.

II. EXCLUSION BY DEATH QUALIFICATION: *Witherspoon v. Illinois*

In 1968, the Supreme Court was faced with the question of whether a potential juror who had expressed conscientious scruples against the death penalty should sit on the jury in a capital case. In *Witherspoon,* the petitioner was tried for murder before a circuit court in Cook County, Illinois. The jury found the petitioner guilty and imposed the death penalty. The court dismissed petitioner's habeas corpus petition, and the Supreme Court of Illinois affirmed. The case came before the United States Supreme Court on certiorari to address the issue of whether the disqualification of jurors for having conscientious scruples against the death penalty violated petitioner's right to a trial by an impartial jury, and whether a jury so constituted tended to favor the prosecution.

At the jury selection voir dire in the instant case, an Illinois statute provided the prosecution with virtually unlimited challenges for cause of jurors who expressed conscientious scruples against the death penalty, or even bare opposition to capital punishment. This statute addressed concern by Illinois courts for the need to

6. 36 Ill. 2d 471, 224 N.E.2d 259 (1967).
7. ILL. REV. STAT. ch. 38, § 743 (1959), which provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." The 1967 revision of that statute, though somewhat abbreviated, has been held by the Illinois Supreme Court to incorporate the meaning of the former section 743. See People v. Hobbs. 35 Ill. 2d 263, 274, 220 N.E.2d 469, 475 (1966).
exclude jurors who might hesitate to return a sentence of death. As a result of the powerful weapon held by the prosecution in this circumstance, nearly half of the venire of prospective jurors were struck for cause when they expressed qualms about capital punishment. In its efforts to eliminate from the jury all who opposed the death penalty, the prosecution found a powerful ally in the trial judge.

Only one conscientious objector was questioned at any length regarding her views on the death penalty. Her responses could be characterized as equivocal, general, and lacking strong conviction. At no time did that venireperson ever indicate that she would refuse to give the death penalty under any circumstances. Nevertheless, the trial judge excused that person from service.

The petitioner's contention was that no jury so composed could fairly determine the issue of guilt, because such juries were not chosen from a cross-section of the community and were more prone to convict than juries which were not stripped of death penalty opponents. In support of his argument, the petitioner introduced evidence from a number of studies which tended to show that juries are prone to favor the prosecution when persons who have scruples against capital punishment are eliminated from those juries.

The Supreme Court was forced to reject the petitioner's contentsions because:

The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. In light of the presently available information, we are not prepared to announce a per se constitutional rule requiring a reversal of every conviction returned by a jury selected as this one was.
In any event, the first result of the Witherspoon decision was to permit the exclusion of persons who stated that under no circumstances will they impose the death penalty.\textsuperscript{16} The Court did not, however, deny all relief to the petitioner.

Although the majority had declined to rule that exclusion of those opposed to the death penalty made the jury conviction-prone, it found that jurors were improperly excluded from the penalty phase of the trial because of their death penalty attitudes. Mr. Justice Stewart, writing for a five member majority, found that elimination of these "mildly scrupled" jurors at the penalty phase of the trial "fell woefully short of that impartiality to which the petitioner was entitled under the sixth and fourteenth amendments."\textsuperscript{17} Furthermore, Witherspoon rejected the state's argument that mildly scrupled jurors cannot be relied on to vote for death when the law would make death a proper verdict.\textsuperscript{18} Justice Stewart wrote that the elimination of all death-opposed jurors from the penalty phase of the trial produced a jury "uncommonly willing to condemn a man to die."\textsuperscript{19} Observing the representative quality of such a hanging jury, the Court stated, "[c]ulled 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."\textsuperscript{20} The Court's poignant rhetoric established that no man could, under the Constitution, be put to death by a jury shorn of those who opposed capital punishment.

In a separate opinion filed by Mr. Justice Douglas, the first glim-
merings of the clash of opinions became apparent. Justice Douglas recognized the fair cross section concept as vital to and dispositive of the ultimate jury composition.\textsuperscript{21} The minority opinion raised the question of why a defendant may not have the benefit of community opinion against the death penalty, instead of having his fate entrusted to a jury that is enthusiastic about the death penalty, especially where "the law does not contain an inexorable command of 'an eye for an eye.'"\textsuperscript{22} Justice Douglas called upon the Court to assume\textsuperscript{23} that the absence of those opposed to the death penalty would "rob the jury of certain peculiar qualities of human nature as would the exclusion of women from juries."\textsuperscript{24} He stated:

I would not require a specific showing of a likelihood of prejudice, for I feel that we must proceed on the assumption that in many, if not most, cases of class exclusion on the basis of beliefs or attitudes some prejudice does result and many times will not be subject to precise measurement. Indeed, that prejudice "is so subtle, so intangible, that it escapes the ordinary methods of proof."\textsuperscript{25}

Thus, Witherspoon set the stage for review of future scientific evidence to replace what Mr. Justice Douglas offered as an assumption, that exclusion of jurors in opposition to the death penalty denied defendants their rights under the sixth and fourteenth amendments.

III. \textbf{THE DEVELOPMENT OF THE FAIR CROSS-SECTION RATIONALE: Taylor v. Louisiana}

A. \textit{Pre-Taylor}

Early in our nation's history, the composition of juries was not an issue, since, generally, only white males were permitted to serve as jurors. Through the first one hundred years of jurisprudence, all courts in this country followed an attitude best elucidated by the Supreme Court in Strauder v. West Virginia:\textsuperscript{26}

The constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. \textit{The very idea of a jury is a body of men}
composed of the peer or equals of the person who right it is selected or summoned to determine; that is of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.\textsuperscript{27}

The \textit{Strauder} Court's language emphasized the prevalent American feeling that women and blacks had no place on a jury, and that the composition of such a body needed to be exclusively male. It should come as no surprise that the development of the "fair cross section" requirement for juries followed a path made by the emancipation of Blacks and women in America.

The first state to allow women to serve on the jury was Utah in 1878,\textsuperscript{28} but no other state followed suit until spurred by a rash of judicial decisions in the 1920's.\textsuperscript{29} Finally, in a series of decisions beginning in 1940, the Supreme Court undertook to rule on the impact and the constitutionality of various practices relating to jury selection.

In \textit{Smith v. Texas},\textsuperscript{30} the Court ruled that systematic exclusion of Negroes form jury service violated the notion that juries be drawn from "a body truly representative of the community."\textsuperscript{31} In \textit{Glasser v. United States},\textsuperscript{32} the Court echoed its ruling in \textit{Smith}, stating that the jury should not be "the organ of any special group or class."\textsuperscript{33} Subsequently, in two decisions by the Supreme Court, the issue of exclusion of women from jury service was raised. In \textit{Bal- lard v. United States},\textsuperscript{34} it was held that the systematic exclusion of women from jury service was improper, and the conviction was reversed. \textit{Brown v. Allen}\textsuperscript{35} concluded that judicial supervision of state jury practices would only be invoked where the state's selection system did not operate to provide juries which "reasonably reflect[ed] a cross-section of the population suitable in character and intelligence for that civic duty."\textsuperscript{36} The \textit{Brown} decision went on to embrace the notion that women were included in that all-impor-

\begin{itemize}
  \item \textsuperscript{27} \textit{Id.} at 308 (emphasis added).
  \item \textsuperscript{28} See generally B. Babcock, A. Freedman, E. Norton, S. Ross, \textsc{Sex Discrimination and the Law — Causes and Remedies} 66-68 (1975).
  \item \textsuperscript{30} 311 U.S. 128 (1940).
  \item \textsuperscript{31} \textit{Id.} at 130.
  \item \textsuperscript{32} 315 U.S. 60 (1942).
  \item \textsuperscript{33} \textit{Id.} at 86.
  \item \textsuperscript{34} 329 U.S. 187 (1946).
  \item \textsuperscript{35} 344 U.S. 443 (1953).
  \item \textsuperscript{36} \textit{Id.} at 474.
\end{itemize}
tant term "cross-section."

These decisions, along with several later opinions, firmly established the right of women to serve on juries, absent a legitimate statutory exemption. Although a state was not permitted to create an exclusion as women from jury service, nothing in the above cases prevented states from exercising their right to create valid statutory exemptions. This was exhibited in Hoyt v. Florida. In Hoyt, the petitioner attacked the constitutionality of a Florida statute that provided that no woman would be eligible for jury service unless she had registered with the clerk of courts her desire to be placed on the jury list. The petitioner claimed that the effect of the statutory provision was to unconstitutionally exclude women from jury service. The petitioner argued that women added more understanding and more compassion to the jury than men, and, therefore, their exclusion hampered her ability to persuade the jury to her defense of temporary insanity. The Court held that the fourteenth amendment did not guarantee a jury tailored to the circumstances of a particular case, and that the only requirement was that juries be indiscriminately drawn from those in the community eligible for jury service “untrammeled by arbitrary exclusions.” Some of the bases chosen by the Court to support this ruling reveal the nature of the operational bias at that time:

In [no] respect can we conclude that Florida’s statute is not “based on some reasonable classification,” and that it is thus infected with unconstitutionality. Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities.

Thus, the Supreme Court upheld the “automatic exemption” of women from jury service, by justifying the state’s legitimate interest in keeping women the center of the home and family life.

39. 368 U.S. at 58. Her claim seems to have some substance, since female representation on Florida juries at that time amounted to less than 5% of the whole. Id. at 67.
40. Id. at 59.
41. Id.
42. Id. at 61.
B. The Taylor Decision

As a result of the Supreme Court rulings, beginning in 1940 with Smith v. Texas, it is obvious that no state could legitimately support a statute which excludes women altogether from jury service, and no state does. Today, many states still retain exemptions for various groups (for example, doctors and lawyers), including exemptions for mothers with children under the age of ten. But by 1974, five states still had statutes which provided for “automatic exemption” of women from jury service. Against this background, the Supreme Court convened to decide the landmark case of Taylor v. Louisiana.

Defendant Billy Taylor was indicted by a Louisiana grand jury for aggravated kidnapping. Taylor moved to quash the petit jury venire, claiming that systematic exclusion of women from jury service in that jurisdiction denied to him his federal constitutional right to “a fair trial by jury of a representative segment of the community.” Taylor’s motion was based on the fact that approximately fifty-three percent of those eligible for jury service in the Twenty-second Judicial District of Louisiana, the site of the instant trial, were women. Of that number, less than ten percent of the women eligible for service actually served on jury duty. Taylor contended that the reason for such poor attendance by women on juries was the Louisiana jury selection system itself. The motion to quash was denied by the trial court, and that decision was upheld by the Supreme Court of Louisiana. The United States Supreme Court granted certiorari to rule on “[w]hether the Louisiana jury-selection system deprived appellant of his Sixth and Fourteenth Amendment right to an impartial jury trial.”

In ruling on the above issue, the Court raised four sub-issues: (1) whether a man has standing to challenge the exclusion of women from a jury; (2) whether the presence of a “fair cross-section” of

43. 311 U.S. 128 (1940) See supra note 30 and accompanying text.
44. In addition to Louisiana, these states included Alabama, Georgia, Missouri, New York, and Tennessee. (citations omitted).
46. Id. at 524.
47. Id.
48. Id. It had been stipulated that the disproportionate number of men to women serving on juries was caused by operation of LA. CONST., Art. VII, § 41, and LA. CODE CRIM. PROC. ANN. art 402 (West 1967). The venire drawn was 175 jurors, none of which were women. This result was caused by the operation of the statutory automatic exemption of women from jury service. 419 U.S. at 524.
49. 419 U.S. at 525.
the community on jury lists is essential to the fulfillment of sixth and fourteenth amendment rights; (3) whether women are sufficiently numerous and distinct from men that if they were excluded, a fair cross section of the community cannot be had; and (4) whether the state has a legitimate interest in the role of mothers as the focal point of the family such that they can legitimately exempt them as a class from jury service. 50

Initially, the Court ruled that anyone has standing to object to a denial of his or her equal protection and due process rights. Justice White, writing for the majority, noted Peters v. Kiff, 51 wherein the petitioner challenged the venire because no Negroes appeared as potential jurors. Peters upheld the defendant’s standing to challenge the venire, despite the fact that the defendant was not a member of the class excluded. Similarly, the Taylor Court ruled that the defendant had equal standing to challenge the potential denial of his constitutional rights. 52

Continuing, the majority found that the presence in a jury of a fair cross section of the community was mandatory to the guarantees embodied in the sixth and fourteenth amendments to the Constitution. 53

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. . . . Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. 54

The next portion of the opinion addressed the question of whether women as a class contribute something which, by its very nature, is a significant and distinct part of the "fair cross-section" of society. Justice White observed that women do contribute a distinct and significant element to juries. This reasoning was supported by the observation that women neither act nor tend to act as a class, that a community of men or a community of women is different from a community of men and women, and that the two sexes are not fungible - there is a subtle interplay between both. 55

The opinion drew various and perhaps confusing conclusions with

50. Id. at 526, 531, 533.
52. 419 U.S. at 526.
53. Id. at 526-31. See supra notes 26-42 and accompanying text for a discussion of the development of the fair cross-section requirement.
54. 419 U.S. at 530.
55. Id. at 531-32.
respect to the contribution of women to jury service. The Court recognized that their contribution was "imponderable," and gave "a flavor - a distinct quality," "may not make one iota of difference," but further, was "unknown, unknowable." 56

Finally, the Court ruled on whether the state's legitimate interest includes protecting the role of mothers as the center of family life. In the past, the Court had strongly supported the notion that the presence of women on juries was an essential element in the fair cross-section requirement. In keeping with the spirit of the decision, the Court specifically overruled Hoyt v. Florida and said that states could not exclude all women from jury service on the basis that it would create a hardship for some mothers. 57

In holding that the sixth and fourteenth amendments required juries to be composed of a fair cross-section of the community, the Court concluded that this did not require that juries must mirror the actual percentage make-up of the community, nor that defendants were entitled to juries of any particular composition, and that states were free to permit reasonable statutory exemptions consistent with the above reasoning. 58

Justice Rehnquist's dissent began by challenging the decision that the defendant was entitled to a new trial. "[The Court reverses] without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected." 59 Justice Rehnquist further attacked the majority's interpretation of the fair cross-section requirement, stating that the only requirement imposed by the Constitution is that jury selection systems be developed which are unlikely to result in bias or partial juries. 60 This requirement, according to Justice Rehnquist, does not fairly encompass the neces-

56. Id. at 532, citing Peters v. Kiff. 407 U.S. 493, 502-04 (1972). The Court's ruling seems somewhat specious and contradictory. See infra the discussion on the dissent of Mr. Justice Rehnquist notes 59-63 and accompanying text.

57. The court stated:
   It is untenable to suggest these days that it would be a special hardship for each and every woman to perform jury service or that society cannot spare any women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgement represented by the jury in criminal trials.

419 U.S. at 534-35.

58. Id. at 538.

59. Id. at 538-39 (Rehnquist, J., dissenting).

60. Id. at 539 (Rehnquist, J., dissenting).
Finally, Justice Rehnquist demanded the demonstration of any workable logic in the suggestion that women give the jury a distinct flavor or quality. He asked why, if women give such a unique contribution to the jury system, that "flavor" is not of such importance as to offend the Constitution if any particular jury is not so enriched. Justice Rehnquist referred to this reasoning as "mysticism," and reflected that courts do not seem overly anxious to practice this mysticism equitably, since the exclusion of doctors, lawyers, and others from jury service continues to be recognized as constitutionally permissible. Justice Rehnquist closed with the protest, "[a]bsent any suggestion that appellant's trial was unfairly conducted, or that it was unreliable, I would not require Louisiana to retry him."  

C. Post-Taylor Developments

Although the Court in Taylor adopted the fair cross-section requirement, it left one issue unresolved. The Taylor Court struck down a Louisiana statute that provided an automatic exemption from jury service for women who did not affirmatively choose otherwise. In Duren v. Missouri, the Court reviewed the unresolved issue of the constitutionality of a statute which permitted women to elect an exemption to jury service. This active exemption resulted in jury service in Missouri by less than fifteen percent of the women eligible to serve. Consistent with the trend started in Taylor, the Duren Court ruled that any statutory provision which operated to exclude any large, well-defined class of people from jury service was ipso facto unconstitutional. The Missouri statute at issue did not, of course, survive this test.

61. Id.
62. Id. at 542 (Rehnquist, J., dissenting).
63. Id. at 543 (Rehnquist, J., dissenting).
64. 439 U.S. 357 (1978).
65. Id. at 360.
66. The Court qualified, "[w]e recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge." Id. at 370.

Mr. Justice Rehnquist's dissent was, again, long and eloquent. He stressed many of the same concerns that surfaced in his dissent in Taylor. His primary concern may be illustrated by this excerpt: "The reversal of concededly fair convictions returned by concededly impartial juries is, to say the least, an irrational means of vindicating the equal protection rights of those unconstitutionally excluded from jury service." Id. at 373 n.* (Rehnquist, J., dissenting).
In cases that have implicated the issues in Taylor and Duren, the Court has continued to cite both cases as accurate representations of the constitutional requirement for jury selection. In Daniel v. Louisiana,\textsuperscript{67} it was held that although Taylor accurately described the fair cross-section requirement, it could not be applied retroactively to those cases where the jury was impaneled prior to that decision date, since retroactivity would not operate to vindicate the addressed threat to the sixth amendment and would substantially hamper the criminal justice system.

In Craig v. Boren,\textsuperscript{68} the Supreme Court, consistent with Taylor, affirmatively rejected the "woman's role in the home" theory, and affirmed the "women in the marketplace of world ideas" analysis.\textsuperscript{69} Similarly, in Castaneda v. Partida,\textsuperscript{70} the high Court cited Taylor as the controlling test for discrimination in jury selection and the systematic exclusion of distinctive groups.\textsuperscript{71} More recently, in Bullington v. Missouri,\textsuperscript{72} the Supreme Court cited Duren as controlling on the question of a state statute providing an exemption for mothers from jury service.\textsuperscript{73}

The various circuits are currently citing both Taylor and Duren with approval. In United States v. Van Scoy,\textsuperscript{74} the United States

\textsuperscript{67} 420 U.S. 31 (1975). Appellant therein was tried before a Louisiana jury and convicted of armed robbery in 1973. The jury venire was chosen pursuant to LA. CONST. art. VII, § 41, and LA CODE CRIM. PROC. Ann. art. 402 (West 1967). Timely motion to quash the venire was denied, and the denial was affirmed on appeal to the Louisiana Supreme Court, on the issue of retroactive reach of Taylor v. Louisiana, 297 So. 2d 417 (1974).

\textsuperscript{68} 429 U.S. 190 (1976). Appellant therein brought an action for declarative and injunctive relief from an Oklahoma statutory scheme which he claimed exercised gender-based discrimination against males in the sale and service of "non-intoxicant" 3.2% beer. A three judge federal panel ruled that the Oklahoma statutory scheme was constitutional. 399 F. Supp. 1304 (W.D. Okla. 1975). This appeal followed.

\textsuperscript{69} 429 U.S. at 199.

\textsuperscript{70} 430 U.S. 482 (1977). Respondent therein, a Mexican-American, sought federal habeas corpus relief on his claim that the Texas "Key-man" system for selection of grand juries denied him his fourteenth amendment rights to due process and equal protection, claiming that such a system failed to incorporate significant numbers of Mexican-Americans into grand jury service, and that such representation was grossly imbalanced in relation to the percentage of eligible Mexican-Americans in that area. The district court's ruling that respondent had failed to prove his case, 384 F. Supp. 79 (S.D. Tex. 1979), was reversed on appeal. 524 F.2d 481 (5th Cir. 1975). From that reversal, the State of Texas appealed.

\textsuperscript{71} 430 U.S. at 510.

\textsuperscript{72} 451 U.S. 430 (1980). Petitioner therein sought reversal of a grant of writ of prohibition ordered by the Missouri Supreme Court. The writ permitted Missouri to retry the petitioner on first degree murder charges and invoke the same aggravating circumstances in seeking the death penalty for the petitioner as had been advanced at the original trial, thereby potentially implicating constitutional double jeopardy prohibitions.

\textsuperscript{73} Id. at 436. See also Jones v. Missouri. 441 U.S. 902 (1979).

\textsuperscript{74} 654 F.2d 257 (3rd Cir.), cert. denied, 454 U.S. 1126 (1981).
Court of Appeals for the Third Circuit ruled that the *Taylor* doctrine was not offended by the jury selection plan for the Middle District of Pennsylvania, a plan which provided that members of certain defined classes could be "excused" from service upon request. This provision distinguishes the plan from the strictures in *Taylor* relating to the exclusion of groups in the community. In addition, the appellant in *Van Scoy* failed to demonstrate that the plan did in actuality exclude a cognizable group from jury service.

It is apparent that the trend in the Court since the decision in *Taylor* in 1974 has progressed toward a stricter standard in judging potential discriminatory exclusion of women from jury service. The critical decisions discussed, *Taylor* and *Duren*, have established the fair cross-section test for judging the constitutionality of statutory provisions relating to exclusion of any group in society. Decisions in the federal circuits, along with important state court holdings, are fine tuning the application of this doctrine. The net effect, as time will demonstrate, should be the elimination of any exclusion of a definable group of people from jury service. If Justice Rehnquist will forgive the Court, and see the end as justifying the means, the results should fairly approach the goal intended by the drafters of the sixth amendment.

IV. THE APPLICATION OF THE STANDARDS: *Grigsby v. Mabry*

By now, the clash should be apparent. On the one hand, the *Witherspoon* Court requires that persons having an inability to vote for the death penalty under appropriate circumstances must be excluded from jury service. Cases construing *Witherspoon* have held that there is no prohibition from excluding persons having conscientious scruples against the death penalty from the jury. Yet the Supreme Court in *Taylor* has held that no identifiable or distinct class or group can be systematically excluded from service. A review of a recent case which attempted to address this conflict

75. 654 F.2d 257 at 263. Such individuals included, for example, lawyers, doctors, and various other professionals.

76. In *Van Scoy*, the issues involved service on the grand jury, as distinguished from the petit jury, but the legal analysis in which the court engaged is interchangeable to both types of juries.

77. *See*, e.g., Moultrie v. Martin, 690 F.2d 1078 (4th Cir. 1982); United States v. Abell, 552 F. Supp. 316 (D. Me. 1982).


79. *See supra* notes 6-25 and accompanying text.
will set the stage for the *Grigsby* holding of the Arkansas District Court.

A. *Spinkellink v. Wainwright*

In *Spinkellink v. Wainwright*, the Fifth Circuit Court of Appeals ruled on the habeas corpus contentions of the petitioner, which included the claim that the exclusion of two venirepersons because of their conscientious scruples against the death penalty violated his constitutional rights. With respect to the issues presented here, the court held that no proof existed that the death-qualification process caused the resulting jury to be guilt-prone; that death-qualification did not violate the *Taylor* fair cross-section requirement; and finally, that death-qualifying a jury did not impact on that jury's ability to "maintain a link between contemporary community values and the penal system." In ruling that death-qualifying did not create a conviction-prone jury, the *Spinkellink* court observed that "the veniremen chosen to be jurors indicated only that they had no conscientious scruples against the death penalty and that in a proper case they would recommend capital punishment . . . [s]uch persons cannot accurately be branded prosecution-prone." In support of this proposition, the court cited *Turberville v. United States*, wherein Judge Pettyman, writing for the majority made the following observations:

No proof is available, so far as we know, and we can imagine none, to indicate that generally speaking, persons not opposed to capital punishment are so bent in their hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case. *Being not opposed to capital punishment is not synonymous with favoring it* . . . [Therefore] we think the premise for the thesis has no substance.

On the basis of this dicta from the *Turberville* court, the majority in *Spinkellink* rejected the notion that death-qualifying creates a guilt-prone jury. The court went on to say that even if a death-qualified jury were conviction-prone, it would not necessarily lack

80. 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, reh'g. denied, 441 U.S. 937 (1979).
81. 578 F.2d at 596.
82. Id. at 597-98.
83. Id. at 599.
84. Id. at 594.
85. 303 F.2d 411 (D.C. Cir. 1961).
86. 303 F.2d at 420-21 (emphasis added).
impartiality. "That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution . . . ."87 The court reasoned that either of two attitudes might justifiably mark a juror as prosecution-prone. A juror might indicate a preconceived opinion as to the guilt or innocence of the defendant, or, that it was his duty to always recommend death as the punishment for first degree murder, without thought to any extenuating or mitigating circumstances.88 Hence, without reference to scientific studies in this area, the court in Spinkellink found no merit to the claim that death-qualified juries were, or could be, conviction-prone. The Fifth Circuit Court of Appeals stated:

Florida apparently has concluded that, if . . . a venireman clings so steadfastly to the belief that capital punishment is wrong that he would never under any circumstances agree to recommend the sentence of death, it is entirely possible - perhaps even probable - that such a venireman could not fairly judge a defendant's guilt or innocence when a capital felony is charged.89

The court indicated that Florida's interest in an even-handed and just administration of its laws, including its death penalty statute, were too important to risk a defendant-prone jury as a result of the inclusion of jurors expressing opposition to the death penalty.90 Therefore it was concluded that the exclusion of such jurors, together with the exclusion of jurors biased against the defendant,91 would result in an impartial jury. Thus, the Spinkellink court reasoned that to suggest that a jury which is culled of its death penalty opponents is prosecution-prone "is to misunderstand the meaning of impartiality."92

87. 578 F.2d at 594 (emphasis added). It would be charitable to characterize the court's reasoning here as lacking a certain logical and persuasive element.
88. Id. The brevity of the potential strikes related to death penalty views seems to underscore this court's predispositional bias in the area.
89. Id. at 595 (emphasis in original).
90. Id.
91. This concept remains undefined by the Spinkellink court. See infra notes 134-36 and accompanying text for a discussion of Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 13301, 168 Cal. Rptr. 128 (1980).
92. 578 F.2d at 596 & n.18. The court cites United States v. Puff, 211 F.2d 171, (2d Cir.), cert. denied, 347 U.S. 963 (1954), to reject the wisdom of a "balanced" jury (i.e., one including jurors who both favor and oppose the death penalty), since, under such a scheme, "any juror 'can hang the jury if he cannot have his way.'" 211 F.2d at 185 n.18 (citation omitted). The Puff court urged that the problem was that such juries would often find themselves embroiled in disagreements and that if successive trials failed to result in a conviction, the result would be "practical immunity from murder." 211 F.2d at 185. It is unclear
The Spinkellink court also examined the question of violation of the Taylor fair cross-section requirement by exclusion of those who expressed doubts about their ability to give the death penalty. Rejecting any possible violation of the Taylor standard, the court indicated that, assuming that those persons excluded under the Witherspoon standard constituted a distinct class, a real danger existed if those jurors would be allowed to serve, as a result of their bias. It compared the bias of those excludable under Witherspoon with the potential bias which would result if the jury was composed of veniremen who were related to the defendant. On that basis, and without more, the court rejected any suggestion of a violation of the Taylor requirement. Finally, the notion that the composition of the jury was related to the jury’s role as a mirror of the contemporary values of the society was rejected.

B. The Grigsby Decision

Even as the Court in Witherspoon invited the various courts to

from this passage quoted by the majority just what the criteria are for innocence for a defendant faced with a murder charge, while at the same time being clothed in the presumption of innocence. It is equally unclear what the real role of the jury is when courts like the ones in Puff and Spinkellink fear to have jurors who disagree. The author believes that such disagreement lies at the very heart of the safeguard of liberty envisioned by the sixth amendment.

93. 578 F.2d at 597.
94. Id. The Spinkellink court seriously suggests that a similar prejudice exists with WEs as with relatives of a given defendant, and in so doing, rejects the contention that WEs or others mildly opposed to the death penalty constitute a distinctive class as described by the Taylor Court. To suggest that those citizens who have, through perhaps the most noble and reasoned of motives, declined to recognize or sanction the severity of capital punishment have the same lack of justice and non-prejudice as, for example, the defendant’s mother or son, is to demonstrate a paucity of common sense so contemptible that it should be reserved only for the author of the court’s opinion.

95. Id. at 598 (citing Woodson v. North Carolina, 428 U.S. 280 (1976)). The California Supreme Court recently undertook an analysis of the current scientific research on the issue of guilt-proneness of death-qualified juries in Hovey v. Superior Court of Alameda County, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). In Hovey, the court examined many of the studies which were before the court in Grigsby, (i.e., the Zeisel study, the Goldberg study, the Jurow study, etc.). See infra note 126 and accompanying text. The critical failure of the current studies for the Hovey court was the lack of research on the existence of persons who would automatically vote for the death penalty upon conviction despite the circumstance. The impact of these “ADPs” (automatic death penalty) could not accurately be measured without further research. The suggestion implicit in the Hovey ruling was that there is a strong possibility that the exclusion of ADPs would tend to offset the exclusion of WEs. As observed by the Arkansas District Court in Grigsby, the heavy dependence by the California Supreme Court on the Shure study in determining the high incidence of ADPs in America was misplaced, causing a skewed analysis in that court’s balancing test. See infra notes 131-36 and accompanying text.
come to an understanding about the real impact of the death-qualification process, opinions like Spinkellink and Hovey v. Superior Court of Alameda County, were drafted which either ignored or misapprehended the advances in this science since 1968. It is interesting to note that these more recent opinions have both cited Taylor, and interpreted it, all the while failing to recognize the patent conflict in the two holdings. In Grigsby v. Mabry, the district court confronted the inconsistency, developed a cogent interpretation of the statistics and studies, and applied that interpretation to achieve a realistic solution to the controversy.

In Grigsby, three defendants brought federal habeas corpus appeals after being convicted of first degree murder in various state courts in Arkansas. The district court, on remand from the Eighth Circuit Court of Appeals, addressed two issues: (a) whether prospective jurors in these habeas cases were disqualified for their death penalty views; and (b) whether the resulting death-qualified juries were more prone to convict petitioners than would be non-death qualified juries. The opinion breaks down into five major areas of concern, which will be discussed seriatim.

1. The Fair Cross-Section Requirement

As a result of the first evidentiary hearing in this case, the district court concluded that exclusion of Witherspoon Excludables at the guilt phase of the trial seemed to offend sixth amendment guarantees. There were two roadblocks to this conclusion. They were first, the Witherspoon decision itself, and second, that there was no distinction between those mildly opposed to the death penalty and those adamantly opposed to it. That is, (in light

97. All three defendants, James T. Grigsby, Dewayne Hulsey and Ardia McCree, were convicted of capital murder. Defendants McCree and Grigsby received life sentences; defendant Hulsey received the death sentence.
98. 637 F.2d 525 (8th Cir. 1980). The appeal resulted from an initial evidentiary hearing in the district court. Id. at 527.
101. For a definition of "Witherspoon Excludables," see supra note 16 and accompanying text.
102. 483 F. Supp. 1372.
of the Taylor requirements)\textsuperscript{103} there was not sufficient proof of a difference so as to implicate two distinctive groups in society. In order to resolve this conflict, the Grigsby court invoked the three part test developed in Duren v. Missouri\textsuperscript{104} to determine whether a violation of the "fair-cross-section" requirement had been violated. The Duren test required that three factors be present for such a determination:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.\textsuperscript{105}

The threshold problem which the district court on remand considered was whether or not a distinction could be drawn between Witherspoon Excludables and mildly scrupled jurors for the purpose of determining whether or not mildly scrupled jurors constituted a "distinctive" class under part (1) of the Duren test.\textsuperscript{106} The court looked to United States v. Olson,\textsuperscript{107} for guidance respecting what constituted a recognizable group. In Olson, the court refused to recognize eighteen to twenty year olds as an identifiable group, because of a failure to show that the attitudes represented by that group were not adequately represented by individuals who were several years older.\textsuperscript{108} The Witherspoon Court had previously stated that Witherspoon Excludables constituted a distinct class,\textsuperscript{109} but the Grigsby court questioned whether, under Olson, mildly scrupled jurors were a recognizable group, since that group had a common or shared attitudinal perspectives.\textsuperscript{110} Further, the majority noted that death-qualification was the only procedure which eliminated whole groups of otherwise impartial jurors based on a shared attitude.\textsuperscript{111} The conclusion reached by the Grigsby court

\textsuperscript{103} 569 F. Supp. at 1278. The first Grigsby court relied heavily, for this proposition, on U.S. v. Olson, 473 F.2d 686 (8th Cir. 1973) (18-20 year olds held not to be a distinctive group in society). See 483 F. Supp. 1372.
\textsuperscript{104} 439 U.S. 357. See supra note 64 and accompanying text.
\textsuperscript{105} 439 U.S. at 364.
\textsuperscript{106} 569 F. Supp. at 1282. Mildly scrupled jurors are those who hold opinions generally against the death penalty but who do not rise to the level of WEs. Id. at 1283.
\textsuperscript{107} 473 F.2d 686 (8th Cir. 1973). See supra note 103 and accompanying text.
\textsuperscript{108} 473 F.2d at 688.
\textsuperscript{109} 391 U.S. at 520.
\textsuperscript{110} 569 F. Supp. at 1282-83. See also the first Grigsby opinion, 483 F. Supp. at 1382.
\textsuperscript{111} 569 F. Supp. at 1284.
may be summarized by the following excerpt:

No jury system can survive which permits exclusion upon the basis of a showing of just any unconscious predilections which might tend to favor the defendant or the state. Once again we must start with the democratic premise of the inclusion of those who can honestly swear that they can, and will, try the case upon the law and the evidence.112

Therefore, the first part of the Duren test was met by Grigsby's holding that mildly scrupled jurors could not adequately reflect the opinions of Witherspoon Excludables, so that each group comprised a distinct identifiable segment of the community.

The second part of the Duren test required a showing that the representation of this group in jury venires is not proportional in relation to the number of such persons in the community.113 Citing the first Grigsby opinion, the court found that the number of Witherspoon Excludables in the community at large is significant, ranging from eleven to seventeen percent of the jury-eligible citizens.114 It also found that the exclusion of such a large number of individuals clearly met the second part of Duren, and also violated the basic rule favoring inclusion instead of exclusion.115 In so holding, the court found that the guarantee for a given defendant was not any specific jury composition, but instead, was a guarantee that no systematic exclusion would be exercised to eliminate any specific groups.116 The final digit of the Duren test, which required a showing that such underrepresentation was due to a systematic exclusion of the group, was therefore met as the court found, in a single line, that underrepresentation (which amounted to zero representation) violated part three of the Duren test.117

Thus, the first holding by the Grigsby court was that exclusion of Witherspoon Excludables and mildly scrupled jurors violated the Taylor fair cross-section rule, when measured against the Duren three part test for prima facie violation of that standard. As to the effect of such a result, it was stated that "trial by jury cease(s) to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races otherwise

112. Id. (emphasis in original).
113. Id. at 1285.
114. Id. See 483 F. Supp. at 1383.
115. 569 F. Supp. at 1285.
116. Id. at 1284 (citing Adams v. Texas, 448 U.S. 38 (1980)).
qualified to serve as jurors in a community are excluded as such from jury service.”

2. Guilt-Proneness of Death-Qualified Juries

Perhaps the most significant result of the Grigsby decision was the interpretation of data related to the issue of whether or not the death qualification process tends to create a guilt-prone jury. In Grigsby, the petitioner introduced a massive quantity of evidence relating to this issue, which included expert testimony from three witnesses. Each expert had done extensive research in the area of juries and jury decision-making, with special emphasis on the death-qualifying process. In addition, the petitioner presented expert testimony on relevant demographic studies, together with some 270 exhibits, including research, articles and displays.

Each of the experts testified that he had reached the following conclusions respecting the guilt proneness of death-qualified juries: (1) that persons excused by the qualification process are collectively distinguishable from those not excluded by it; (2) that death-qualified juries are prone to favor the prosecution; (3) that such juries are prone to be hostile to the defendant; (4) that death-qualified juries have a lighter regard for constitutional rights; and (5) that juries so constituted tended to make judgments against minorities more so than non-death-qualified juries.

The court recognized that among the studies relied on by the experts, at least two tended to directly support the conclusion that persons who strongly oppose the death penalty (i.e. Witherspoon Excludables) differ from not only those who favor the death penalty, but also, significantly differ from those who mildly oppose the death penalty, and that no other group adequately represented the


119. The experts included Dr. Edward Bronson, Professor of Law and Politics, Cal. State at Chico, B.S., J.D., LL.M., Ph.D(Poli-Sci); Dr. Craig W. Haney, Professor of Psychology, U. of Cal., Santa Cruz, J.D., Ph.D(Psych); Dr. Reid Hastie, Professor of Psychology, Northwestern University, Ph.D (Psych). 569 F. Supp. at 1291.

120. Testimony on these demographic studies was given by Mr. Dale Enoch, President of Precision Research Inc., Little Rock, Arkansas. The company which had conducted the study. Id. at 1292-93.

121. Id. at 1293. The experts reached the stated conclusions by relying on the following studies: Wilson, 1964; Bronson/Denver, 1970; Bronson/Butte, 1980; Bronson/Butte Followup, 1980; Bronson/Los Angeles, 1980; Goldberg, 1970; Harris, 1971; Ellsworth/Fitzgerald, 1979. 569 F. Supp. at 1293.
life perspective of the Witherspoon Excludables. In addition, it was found that the effect of death-qualifying tended to disproportionately decrease the representation of Blacks and women on the jury. Having made these factual determinations, the court reaffirmed its holding that death-qualified juries violate the Taylor fair cross-section requirements.

Blacks and women constitute significant and distinctive groups of jury eligible citizens. Death qualification results in their systematic disproportionate removal from juries which try the guilt-innocence of persons accused of capital crimes, without adequate justification, in violation of the accused's right to a representative jury comprised of a fair cross-section of the community.

To support the contention of guilt-proneness, the petitioner introduced evidence in the nature of seven major studies, each of which indicated that by excluding all those from jury service who indicated that they could not give the death penalty under any circumstances, the resulting jury was prone to decide the issue of guilt against the defendant. As a result of reviewing this evidence, the court made the following rulings respecting this issue: First, that systematic exclusion of Witherspoon Excludables les-

122. Id. See, e.g., Bronson/Denver, 1970 and Bronson/Butte, 1980 studies to support this conclusion.
123. 569 F. Supp. at 1293. See also Bronson/Los Angeles, 1980; Goldberg, 1970; Harris, 1971; and Ellsworth/Fitzgerald, 1979, to support this conclusion. See supra note 121 and accompanying text.
124. 569 F. Supp. at 1293-94. See supra notes 26-78 and accompanying text.
125. 569 F. Supp. at 1294.
126. Id. at 1294-95. The following studies were introduced by the petitioner in support of the guilt-proneness contentions.
1. Wilson, 1964 - First study to show that those in favor of death penalty were more likely to convict, and also that death-qualified juries were more pro-prosecution and handed out stiffer penalties.
2. Goldberg, 1970 - Agrees with Wilson findings, but subject to certain criticisms, and generally viewed as unreliable.
3. Zeisel, 1968 - Used actual criminal jurors. Demonstrated what is “intuitively known by judges, lawyers,” etc., that death-qualified juries are more likely to convict.
5. Harris Poll, 1971 - Random sample, further evidence that death-qualified juries are conviction-prone.
6. Ellsworth, 1979 - Actually 5 studies; in-depth analysis proves that persons who meet the Witherspoon test for death-qualification are substantially more ready to find guilt.
7. Haney, 1979 - Confirmed “gut” opinion held by many in the legal field that death qualifying leads to guilt-proneness. Also examined the question of whether or not the process of asking death-qualifying questions tends to prejudice the jury against the defendant. See infra note 128 and accompanying text.
Id. at 1295-1304.
sens the likelihood of an acquittal; second, that death-qualified juries vote to convict twenty to twenty-five percent more often than non-death-qualified juries; and third, that subjects sitting on “mixed” juries get a better grasp of the case through intense jury deliberation.127

As a final concern related to guilt-proneness, the court examined the petitioner’s claim, as highlighted by the results of the 1979 Haney study, that the very process of death-qualification tends to create prejudice in the minds of the remaining jurors against the defendant. In substance, the claim is that the questions used by the prosecution during voir dire tend to isolate and focus the issue of the death penalty, thus creating in the minds of the jurors a feeling of foregone conclusion respecting the issue of the defendant’s guilt. In that connection, the findings of the 1979 Haney study were as follows:

[T]hat jurors exposed to the process of death qualification during voir dire, simply by virtue of that exposure, as compared to subjects not exposed to that process, are (1) more predisposed to convict the defendant, (2) more likely to assume before the trial begins that the defendant will be convicted and will be sentenced to death, (3) more likely to assume that the judge, the prosecutor and the defense attorney all believe the defendant to be guilty and that he will be sentenced to die, (4) more likely to assume that judges, prosecutors and defense attorneys believe that defendant is guilty and will ultimately be sentenced to die, and (5) are themselves far more likely to believe that the defendant deserves the death penalty.128

As a result of this study, the Grigsby court found that the very act of asking death-qualifying questions at voir dire implants in the minds of potential jurors the prejudice of guilt toward the defendant.

The death-qualification process traps the participants into the necessity of communicating false cues to the jury . . . By focusing on the penalty before the trial actually begins the key participants, the judge, the prosecutor and the defense counsel convey the impression that they all believe the defendant is guilty, that the real issue is the appropriate penalty, and that the defendant really deserves the death penalty.129

To summarize the court’s holding on this issue, it was found that the death-qualification process skews the predispositional balance of the jury pool by excluding those prospective jurors who unequivocally express opposition to the death penalty, and that evi-

127. Id. at 1301-02.
128. See id. at 1303 (emphasis in original). See supra note 126, number 7.
129. Id.
Jury Death Qualification

Evidence shows that persons who favor the death penalty are more likely to be in favor of the prosecution and uncommonly predisposed to convict the defendant. 130

3. The Automatic Death Penalty Issue

The Grigsby court briefly examined respondent's contention that the existence of ADPs, 131 together with the availability of strikes for cause regarding these individuals, tended to offset any possible prejudice which resulted from the exclusion of Witherspoon Excludables. Respondents relied heavily on the Shure study 132 to support the above stated proposition. 133

It was noted that the California Supreme Court had an opportunity, in Hovey v. Superior Court of Alameda County, 134 to review much of the evidence which was before the Grigsby court, and, that the court in Hovey was favorably impressed, especially with the conviction-proneness studies. The Hovey court concluded, however, that because of the nature of the California jury selection process, the issue of guilt-proneness by elimination of Witherspoon Excludables was irrelevant, since any such prejudice is offset by the ability to exclude ADPs. 135 In Grigsby, the respondent State of Arkansas urged that the Arkansas statute, which contained similar provisions, afforded the same protection as the California statute. The Grigsby court pointed out that it was disingenuous of the state to argue, on the one hand, that no prejudice occurs from death-qualification, while, on the other hand, argue that the prejudicial effects of such a process could be cured by the exclusion of a group at the opposite end of the spectrum. In addition, it was determined that the Shure study was inaccurate in that it failed to recognize the gross disparity in number between Witherspoon Excludables and ADPs in the society. 136 On these grounds, the Grigsby majority rejected the notion that the exclusion of ADPs fairly

130. Id. at 1303-04.
131. That is, persons who, under all circumstances, would vote to give the death penalty upon conviction in a capital case. Id. at 1288. See supra note 95 and accompanying text.
132. Study by Dr. Gerald H. Shure on the "Automatic Death Penalty Issue." See 569 F.2d at 1305.
133. Id.
134. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).
135. Id. at 82, 616 P.2d at 1344, 168 Cal. Rptr., at 182.
136. 569 F. Supp. at 1307-08. The court took apparent judicial notice of unnamed studies which put the number of WEs in Arkansas at over 14%, with the corresponding number of ADPs at somewhere closer to .5% - 1% of the population.
offset the potential prejudice created by the exclusion of Wither-spoon Excludables.

4. **State Justification For The Challenged Practice**\(^{137}\)

The suggested solution to death-qualification that operated throughout the opinion was the use of a bifurcated trial, where two juries would be impaneled, one to try the issue of guilt or innocence, and one to try the issue of penalty. The State of Arkansas raised objection to that solution, claiming, in essence, that the financial burden to the state would be too great to require the impaneling of two juries for each capital case tried.\(^ {138}\) The court recognized the state's legitimate interest in the imposition of a death penalty, and further, that death qualification of the sentencing jury would be permissible.\(^ {139}\) But, it concluded that the existence of a non-death-qualified jury at the guilt determination phase was essential to the protection of the rights of the defendant. The state's protest about the expense which would be placed on it by such a procedure was flatly rejected on the basis that, "[I]t is clear to the Court . . . that said cost would be relatively small . . . It is a rare situation when the United States Supreme Court permits financial considerations to take priority over constitutional rights. To deserve such priority, the asserted interests of the state must be substantial."\(^ {140}\) In so ruling, the court effectively eliminated any substantial impediments raised by respondent's objections.

5. **The Court's Conclusions**

Initially, the *Grigsby* court points out that the United States Supreme Court has assumed that juries in capital cases tend to reflect "the conscience and the standards of decency of the community" when they make decisions regarding the death penalty.\(^ {141}\) But it also found that, where groups of people are excluded from service, the jury's ability to mirror community values is impaired.\(^ {142}\) Here, the court ruled that juries devoid of representation by strong oppo-

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137. For the court's discussion of the impact of using peremptory challenges affecting the issue of a fair cross-section of the community, see *id.* at 1308-13.
139. *id.* at 1318.
140. *id.* at 1320.
141. *id.* at 1321.
142. *id.*
nents of the death penalty lacked the ability to fairly portray the values of "a fair cross section of the community," and stated:

The evidence introduced here makes it abundantly clear that juries death-qualified under Witherspoon standards are not as representative of the community as they could, and should be, and, therefore, do not serve the objective of interposing between the state and the defendant the conscience and broad collective wisdom of that community.143

In so holding, the Grigsby court definitively ruled that the petitioners were, as a result of the death-qualification process, denied their right to a neutral and representative jury.144

C. After Grigsby

It may come as little surprise that within eleven weeks of the decision in Grigsby, the Supreme Court of Arkansas delivered its opinion in Rector v. State,145 wherein that court ruled that the Grigsby court erred and that it was proper to bar jurors unalterably opposed to the death penalty. Excerpts from the court's opinion demonstrate that Arkansas may be the stage for a real political tug of war, thinly clothed in a veil of judicial interpretation. The Rector majority made these observations: "The district judge's decidedly critical analysis of our cases would be disturbing if it were not so readily apparent that the analysis and criticism are totally and demonstrably wrong."146

And further:

[W]e cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality. In the various studies on the subject there is almost uniformly an undercurrent of thought, not expressed but easily sensed, that jurors who believe in the death penalty are by their nature barbarians in modern society. That view certainly condemns most Americans.147

Though the Arkansas Supreme Court's attacks may be subject to complaints of accuracy, a real concern left open by the Rector decision is what effect that ruling will have on the precedential value of Grigsby. It may well be that the Rector decision has effectively taken the teeth out of the powerful opinion crafted by the district

143. Id.
144. Id. The court directed that, since Hulsey was denied relief for failure to preserve these issues through objection, and since Grigsby was already dead, that only McCree would be required to be retried, or to be set free. Id. at 1324.
146. Id.
147. Id.
court in Arkansas. Perhaps the only thing that can save Grigsby as a trend setter in American jurisprudence is intervention in the nature of certiorari by the United States Supreme Court, a possibility that no scholar on this issue would wisely rule out.

V. CONCLUSION

The author's bias in favor of the Grigsby decision was, no doubt, obvious throughout. The necessity to expand on such a well-drafted and complete decision may, therefore, not exist. However, a few observations on the fate of this issue may be in order.

It will be remembered that Grigsby recognize the right of the state to seat a death-qualified jury at the penalty phase of a bifurcated capital proceeding. It will also be remembered that Taylor recognized that the role of the jury was to mirror the current community values and principles. Some courts and commentators have suggested that, where the jury is selected from a random sampling of the community, that jury speaks with as much authority with respect to the legitimate interests of the state as does the legislature. Accepting that hypothesis, a strong argument may be developed that no juror may be eliminated because of his bias relating to the death penalty, since he or she, together with all other attitudes represented, constitutes the conscience of the community.

A second question which might be raised by Grigsby is the effect a bifurcated trial might have upon the defendant in terms of an ability to build rapport with the jury. An argument could be made that if a second jury was caused to be impaneled at the penalty phase, the defendant might lose the benefit of whatever human empathy the first jury had developed for the defendant during the long hours of sitting at the trial. The dispassion of a second jury might arguably work to the detriment of the defendant.

This comment declines to address the argument related to the claim that Witherspoon Excludables would necessarily violate their oaths as jurors because of an inability to give the death penalty, in

148. See supra notes 137-40 and accompanying text.
149. See supra notes 43-63 and accompanying text.
151. The author declines to offer more on this argument at this time, leaving such discussion to future commentators.
light of the flux in the Arkansas death penalty statute near the time of the selection of the jury in the trials in *Grigsby*. In 1977, less than a year before the capital trials in question, the Arkansas legislature amended its death penalty statute\(^{152}\) to require that a jury return a sentence of death when, under statutorily defined circumstances, certain factors are present. Prior to 1977, the act provided only that the jury "may" give the death penalty when certain defined circumstances were present. Therefore, under the old law in Arkansas, a Witherspoon Excludable might still be able to fulfill his oath as a juror if he knew that he was not required by law to give the death penalty under any circumstance. A suggestion is therefore raised as to how *Witherspoon* and *Grigsby* apply in jurisdictions still recognizing the discretion of the jury in a capital case. Suffice it to say, it is difficult to determine for certain that the trial judge was influenced by so recent a statutory pronouncement, but if he was not, then it is unclear on what legitimate basis he may be permitted challenges for cause against jurors irrevocably against the death penalty.

These and other issues are left open by the *Grigsby* decision. It is altogether probable that this issue, whether through the medium of this decision, or some other decision yet unborn in the appeals process, will be heard by the Supreme Court, to settle, perhaps once and for all, the critical issues first raised by the clash of cases and affirmatively dealt with by the district court in Arkansas in *Grigsby v. Mabry*.

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