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

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

1. See Logan v. United States, 144 U.S. 263 (1892).
3. Id. at 521.
4. Id. at 521-23.
5. Id. at 522-23, n.21. The Court stressed that the decision did not bear upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.

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

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

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

7. Id. at 523 (Douglas, J., concurring).
attack that recently has been renewed by the United States District Court for the Eastern District of Arkansas. In *Grigsby v. Mabry*\(^8\) that court argued that eliminating those highly scrupled jurors who are able to assess guilt fairly from the guilt determination phase of the trial violates defendant's sixth amendment right to be tried by an impartial jury drawn from a cross-section of the community.\(^9\) Nonetheless, the court felt constrained by stare decisis to reject defendant's claim that his right to a jury drawn from a cross-section of the community had been violated\(^10\) but remanded for further hearings on defendant's claim that a death-qualified jury is per se partial on the issue of guilt.\(^11\) Chief Judge Eisele's analysis of the cross-section claim has thrown considerable doubt on the continued validity of this aspect of *Witherspoon* in light of subsequent Supreme Court pronouncements. *Grigsby* reflects the growing concern over the soundness of *Witherspoon*,\(^12\) a concern which must eventually be answered by the Supreme Court.

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

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

\(^9\) *Id.* at 1376-84. The sixth amendment provides that the "accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI.

The requirement that a jury be chosen from a cross-section of the community has its origins in the fourteenth amendment's equal protection clause. In *Strader v. West Virginia*, 100 U.S. 303 (1879), the Court held that a jury selection process that excluded blacks violated a black defendant's right to equal protection. In a later application of this principle the Court stated that it is "part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). In reviewing a federal conviction the Court stated in dictum that the cross-section requirement was part of the "traditional requirements of jury trial" embodied in the sixth amendment. *Glasser v. United States*, 315 U.S. 60, 86 (1942). To bring a jury challenge under the cross-section requirement a defendant did not need to demonstrate that any prejudice had resulted from the exclusion of an identifiable group in the community. However, until the Court held in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the sixth amendment was applicable to the states, it insisted that the defendant in a state court proceeding be a member of the excluded group, and in cases of exclusion of non-racial groups, that the defendant demonstrate prejudice. *Fay v. New York*, 322 U.S. 261, 287 (1947). Justice Murphy dissented in *Fay*, arguing that "[w]e can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel. Such prejudice is so subtle, so intangible, that it escapes the ordinary methods of proof." *Id.* at 300 (Murphy, J., dissenting). Justice Marshall gave this argument authority by using it to find that the exclusion of black jurors from a white defendant's trial violated due process. *Peters v. Kiff*, 407 U.S. 493, 503 (1972).

\(^10\) 483 F. Supp. at 1385.

\(^11\) *Id.* at 1389.

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

\(^13\) 483 F. Supp. at 1375, n.2. The court noted that if Arkansas followed the federal practice in which the judge fixes the sentence after a jury verdict of guilt, or, if Arkansas required a separate "sentencing" jury, the problem would not arise because it would obviously be improper to excuse a juror for cause (in the guilt-determination-trial) solely upon the basis of his irrevocable opposition to the death penalty. *But see Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) which suggests to the contrary.

*Id.* See the discussion of *Spinkellink* in text accompanying notes 54-61 infra.
rors who believed that they could be impartial on the question of guilt not be removed for cause from that phase of the trial. Grigsby also requested a continuance to present evidence in support of his claim that a death-qualified jury, even under the Witherspoon limitation, is conviction prone in that it is more likely to convict than a jury that has not been rid of scrupled jurors. Both requests were denied. Over Grigsby's objection three of the veniremen were excused because they were irrevocably opposed to the death penalty, and the jury chosen from among the remaining veniremen found Grigsby guilty. Grigsby received a sentence of life imprisonment after the prosecution waived the death penalty. He unsuccessfully appealed to the Arkansas Supreme Court and then petitioned the district court for a writ of habeas corpus. The court rejected defendant's claim that his jury was not drawn from a cross-section of the community but remanded the case for an evidentiary hearing on his claim that the jury was conviction prone and therefore violated his right to an impartial jury.

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

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

15. See note 9 supra.
17. Id. at 528.
18. Id. at 526. This was the interpretation given to the Taylor decision by the court in Grigsby. 483 F. Supp. at 1377. The Taylor decision made it clear that the issue was the substantial underrepresentation of a cognizable group in the community; there is no requirement that juries "must mirror the community and reflect the various distinct groups in the population." 419 U.S. at 538. In Taylor the excluded group was women, a group formed to be cognizable in a previous case decided on statutory grounds. See Ballard v. United States, 329 U.S. 187 (1946). In finding cognizability the Ballard Court reasoned that the truth is that the two sexes are not fungible . . . the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either is excluded.

Id. at 193-94 (footnote omitted). The Court also advanced another rationale for not requiring a demonstration of actual prejudice in stating that "the injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Id. at 195.
fair and reasonable in relation to the number of such persons in the
community; and (3) that this underrepresentation is due to system-
atic exclusion of the group in the jury-selection process.20

In Grigsby defendant claimed that removal for cause of jurors absolutely
opposed to the death penalty violated the principles established in Taylor and
Duren. Because the Supreme Court had not yet formulated these principles
when it decided Witherspoon, the Grigsby court was confronted with the ques-
tion of whether a post-Taylor Supreme Court would have decided With-
spoon differently. While the Supreme Court was aware when deciding
Witherspoon that the exclusion of mildly scrupled jurors would produce a jury
that did not reflect the makeup of the community,21 the majority chose to
ignore the issue of whether this exclusion violated the cross-section require-
ment. Rather, it merely stated that “we cannot conclude, either on the basis of
the record now before us or as a matter of judicial notice, that the exclusion of
jurors opposed to capital punishment results in an unrepresentative jury on the
issue of guilt or substantially increases the risk of conviction.”22 This state-
ment, as the court in Grigsby noted, demonstrates “the conflict in analysis that
permeates Witherspoon.”23 Did the Court mean that it was unwilling to recog-
nize scrupled jurors as an identifiable group in the community, or did it hold
that there was insufficient evidence to support the claim that a death-qualified
jury was conviction-prone, and thereby lacking impartiality?24 Or was the de-
cision based on rejecting both claims? The Grigsby court was troubled by the
lack of analysis in Witherspoon of the implications of exclusion of scrupled
jurors under the cross-section requirement and decided to re-examine the issue
in light of Taylor and Duren.

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

20. Id. at 364.
21. In light of Douglas' concurring opinion it is impossible to conclude that the majority was
unaware of the cross-section argument. Douglas thought that the majority had disregarded the
principles of the cross-section requirement in allowing highly scrupled jurors to be excluded.
Douglas could

22. Id. at 517-18.
23. 483 F. Supp. at 1379.
24. By rejecting the claim that the jury was conviction-prone and the claim that it was unrep-
resentative in the same breath, the Court seemed to be treating two distinct constitutional require-
ments as one. There is no need to demonstrate prejudice to sustain a challenge under the cross-
section requirement. See note 9 supra. The implication of the Taylor decision was not a novel
one, but it had never been applied to a challenge of a state selection system, except on racial
grounds. A proper analysis of the factors to be considered in deciding a challenge under the cross-
section requirement—cognizability of the excluded group, degree of underrepresentation, the
cause of the underrepresentation, and the state's interests—was not done by the Witherspoon
Court, so Witherspoon serves as ambiguous precedent on the cross-section claim in Grigsby.

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

Applying the Olson test the court found that it “cannot be doubted that by that standard those excluded for cause pursuant to Witherspoon constitute an identifiable group. No one else will represent their strong viewpoint on the jury in their absence.” However, the ambiguity of the Supreme Court’s treatment of the question in Witherspoon prevented the court from assuming that the Supreme Court would reach the same result if confronted with the question today. While the decision in Witherspoon differentiated between mildly and highly scrupled jurors, it is not clear how this distinction was to be viewed. The Grigsby court considered the possibility that “the Supreme Court was saying there is an important difference in the two groups when it comes to sentencing but not in relation to guilt determination.” In other words,
Witherspoon could be interpreted as holding that highly scrupled jurors are a cognizable group during the sentencing phase but not during the guilt determination phase of the trial. An alternative interpretation of the holding in Witherspoon is that it stood only for the proposition that a death-qualified jury was not impartial on the issue of sentencing and did not address the issue or cognizability under the cross-section requirement at all. This position was not adopted by the court in Grigsby, which instead rejected the possibility that Witherspoon had held that highly scrupled jurors are not a cognizable group during the guilt determination phase of the trial on the basis of the number of highly scrupled jurors in the population. The court noted that the excluded jurors constituted 16% of the population, "which is larger than another identifiable group which the Court has stated may not be excluded."32 Although the court's finding of cognizability may be correct its reasoning is unsound.33

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

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

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

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

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

Justice Douglas did advance this argument in Witherspoon, stating:

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

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

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

35. Labat v. Bennet, 365 F.2d 698 (5th Cir. 1966).
Duren test requires that representation of the excluded group in venires is "not fair and reasonable in relation to the number of such persons in the community."\textsuperscript{36} The court held that the consistent and total exclusion of a group constituting 16\% of the population is clearly neither fair nor reasonable.\textsuperscript{37} The final element of a prima facie case of a cross-section violation requires that the exclusion be "systematic," meaning that the cause of the exclusion is "inherent in the particular jury-selection process."\textsuperscript{38} Several prior decisions had argued that a defendant's right to representation of a cross-section of the community ended with the selection of the jury pool, so that any skewing of the representative nature of the jury that occurred during voir dire was immaterial.\textsuperscript{39} The Grigsby court apparently rejected this argument and found that the exclusion of highly scrupled jurors presented the required systematic exclusion.\textsuperscript{40}

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

\textsuperscript{36} 439 U.S. at 364.

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

\textsuperscript{38} 439 U.S. at 366.

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

\textsuperscript{40} 483 F. Supp. at 1383.

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

\textsuperscript{42} 483 F. Supp. at 1384-85.

\textsuperscript{43} \textit{Id}. at 1385.
whether the state's interest in excluding highly scrupled jurors is sufficient to outweigh defendant's right to a representative jury.

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

The state's interest in excluding scrupled jurors is based on the state's right to try a case before an impartial jury.\textsuperscript{48} The state's argument is that scrupled jurors should be excluded because "a juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."\textsuperscript{48} At the time that this state interest was accepted as valid, however, it was common for a state to inflict the death penalty automatically whenever a defendant was convicted of a capital crime. Allowing scrupled jurors to sit during the guilt phase of the trial resulted in juries acquitting guilty men to avoid the harshness of the gallows.\textsuperscript{49} The jury's role has been altered drastically since then. Jurors are now permitted to exercise their discretion in determining if death is the proper penalty.\textsuperscript{50} While several states recognize that this extra flexibility lessens the interest of the state in excluding jurors with scruples against the death penalty,\textsuperscript{51} the pre-
The prevailing view is still that those jurors absolutely opposed to capital punishment cannot be impartial on the issue of guilt. In Spinkellink v. Wainwright the Fifth Circuit Court of Appeals maintained that a highly scrupled juror will hang the jury on the issue of guilt rather than allow another jury to hang the defendant during the sentencing phase of the trial. Thus, the court argued, even a bifurcated system providing separate juries on the issues of guilt and sentencing will not remove the bias brought to the jury by highly scrupled jurors. The Fifth Circuit found that the interest in preventing hung juries constituted the "weightier reason" required to overcome a defendant's right to a jury drawn from a cross-section of the community. The Grigsby court did not consider this argument, but apparently viewed a dual jury system as a viable solution to the problem.

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

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

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

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

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

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

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

58. 578 F.2d at 595.


60. Id. at —, 616 P.2d at 130, 168 Cal. Rptr. at 137. The court reasoned that if this had been the real concern in Witherspoon these jurors would be properly excludable in future cases involving capital crimes on the basis of actual prejudice against the defendant. Id.
mirrors the diversity of experience and relevant viewpoints of those persons in the community who can fairly and impartially try the case." This "diffused impartiality" test obviously incorporates the cross-section requirement as a factor in determining impartiality.

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

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

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

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

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

28 Cal. 3d at --, 616 P.2d at 1312-13, 168 Cal. Rptr. at 139-40. The perceived partiality of death-qualified juries on the issue of guilt is reflected by the practice of some prosecutors of waiving the death penalty after a conviction has been obtained. By death-qualifying a jury when there is no real intention of seeking the death penalty the prosecution hopes to "get a 'better' jury for its purpose--one that will be more responsive to the prosecution's case on the guilt-innocence issue."

63. 483 F. Supp. at 1388 n.23.
64. Id.
65. 391 U.S. at 518. The Court left open the possibility that a defendant in the future might establish that the jury was not impartial. Id. at 520 n.18.
of guilt, and that they consistently favored the prosecution. 66

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

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

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

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66. 483 F. Supp. at 1386.
68. 483 F. Supp. at 1387. "Authoritarian" personality traits include:
   conservatism, rigidity, punitiveness (in the sense of being "in complete agreement with the administration of harsh punishment"), moralism and inability to understand or tolerate deviant behaviour, and hostility toward low status persons (persons considered socially inferior, uneducated, etc.). The Authoritarian juror identifies with the prosecution's effort to punish a deviant, and often lower-class or minority group, defendant.
   Jurow, supra note 55, at 570-71 (footnotes omitted).
69. 483 F. Supp. at 1388.
70. Tuberville v. United States, 303 F.2d 411, 419 (D.C. Cir. 1962).
standard of proof demanded of the state less seriously than will his scrupled counterpart.72 Jurors with scruples against the death penalty are also more likely to accept a plea of insanity.73 These results do not stem from neutrality but from the "political conservatism, dogmatism, authoritarianism, lack of self-doubt, and legal attitudes favoring punishment and constituted authority" which nonscrupled jurors are likely to exhibit.74

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

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

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72. Id. at 595-96.
75. See Comment, Proposals to Balance Interests of the Defendant and State in the Selection of Capital Juries: A Witherspoon Qualification, this issue.