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Constitutional Law -- Capital Punishment and the Challenge for Cause

Steven Wisotsky

Justification for immunity in this case is likewise not found in the assertion that other remedies are available to the injured spouse. Some courts have suggested that divorce or criminal sanctions brought against the defendant are sufficient.[31] Aside from the limited application of these remedies,[32] they are in all cases inadequate because they do not compensate the plaintiff for his injuries.[33]

Finally, post divorce suits for personal torts have been barred based upon the admonition that divorce should not open the door to litigation and should act as a final settlement of tort claims between parties.[34] Where the right of action arose before marriage, the marriage was an obstacle to its enforcement; removal of the obstacle by divorce should no more affect the right of action for a tort than it would affect a similar right of action for property or in contract.

As the result of the instant case, a strongly criticised legal anomaly has been extended to circumstances which by their unique character defy all rational justifications which can be offered for similar situations.[35] It appears, however, that if the slightest deviation from the blanket immunity of the common law is to be made, the cry for help must first be heeded by the legislature.[36] From all indications, the courts are either unwilling or unable to abolish a rule of law which has been obsolete for more than half a century.

PHILIP GERSON

CONSTITUTIONAL LAW—CAPITAL PUNISHMENT AND THE CHALLENGE FOR CAUSE

At the *voir dire* examination in the petitioner's trial for murder in a state court of Illinois, the prosecution successfully challenged for cause forty-seven of the ninety-six prospective jurors under the authority of the following statute:

> 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.[1]

31. *See* note 8 *supra*.

32. These remedies would not even apply to the instant case, for the parties are already divorced and no criminal action could be brought against the defendant for ordinary negligence.

33. *See* Courtney v. Courtney, 184 Okla. 395, 87 P.2d 660 (1939).

34. *See* note 9 *supra*.

35. *See* note 28 *supra*.

36. Judicial restraint seems to be the watchword for leaving changes of such magnitude to the legislature. *See* Thompson v. Thompson, 218 U.S. 611 (1910); Corren v. Corren, 47 So.2d 774 (Fla. 1950).

1. Ill. Rev. Stat., chs. 38, 743 (1959).

The *voir dire* questioning was generally superficial; no systematic inquiry was made to determine the extent to which a venireman's objections to capital punishment would impair his ability to render an impartial verdict.[2] Only five of the forty-seven veniremen thus dismissed declared themselves unconditionally opposed to capital punishment. Six others said merely that they did not believe in the death penalty; they were not asked whether they could nevertheless impose it upon a finding of guilt. In no case was a prospective juror asked whether his scruples regarding capital punishment would bias his determination of the defendant's guilt or innocence.

The jury found the defendant guilty and imposed the death penalty. The Supreme Court of Illinois denied post-conviction relief,[3] and on certiorari to the Supreme Court of the United States,[4] *held*, reversed: the imposition of the death penalty by a jury from which all persons who harbor reservations about capital punishment are systematically excluded is a denial of due process of law and of the right to trial by an impartial jury. A prospective juror who professes scruples against the death pen-

2. The following excerpts from the voir dire examination are contained in Brief for Petitioner at Appendix 1, Witherspoon v. Illinois, 391 U.S. 510 (1968):

PETER F. COSENZA

* * *

Q. Do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. Yes.

Mr. Kissane: Cause, Judge.

The Court: All right, step aside.

(Prospective juror excused.)

* * *

JOHN M. KRIZ

* * *

The Court: Let's get these conscientious objectors out of the way, without wasting any time on them. Ask him that question first.

Mr. Kissane: Yes, sir.

Q. Mr. Kriz, do you have a conscientious or a religious scruple against the infliction of the death penalty in a proper case?

A. No, not in a proper case.

Q. Now, if it should be your opinion, along with the other eleven jurors, and you're one of the twelve in this case, do you understand that the only thing you are to consider is what the facts are as to what is testified to under oath and that then you follow the rules of law as given by his Honor Judge Salter and you retire to the jury room and, based on the evidence as you have heard it here in the courtroom, the rules of law as given by the presiding judge, it should be your opinion, along with the other eleven jurors, that the defendant Witherspoon is guilty of murder and that the proper penalty is that of death in the chair, would you say so by signing a guilty verdict?

A. Yes, sir.

* * *

VIOLET C. LAYMAN

* * *

Q. Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?

A. Yes, I do.

The Court: Now, you see, you should have asked that first. Step aside. (Prospective juror excused.)

* * *

3. 36 Ill. 2d 471, 224 N.E.2d 259 (1967).

4. 389 U.S. 1035 (1968).

alty may not be automatically disqualified from serving in a capital case unless his beliefs are such as to (1) bias his determination of the primary issue of guilt or innocence, or (2) prevent him from *considering* the death penalty as a possible punishment upon a finding of guilt. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

The challenge for cause of jurors scrupled against capital punishment was a necessary adjunct to trials of capital crimes in an era when conviction carried with it a mandatory sentence of death.[5] Given the requirement of unanimity, a single juror could deny the state a fair trial if his views with respect to capital punishment should predispose him to acquit despite convincing evidence of guilt. To avoid juror nullification of capital crimes, it became the universal practice to exclude from capital juries all those who entertained conscientious objections or other scruples against the death penalty.[6]

This historic justification for the challenge for cause of jurors with scruples against the death penalty has been largely obviated by the adoption in most capital jurisdictions[7] of statutes which vest in the jury an absolute discretion as to choice of punishment. These statutes fall into two major categories. One simply leaves to the jury, upon a finding of guilt, the decision whether to assess either the death penalty or life imprisonment.[8] The other makes the death penalty mandatory unless the jury qualifies its verdict with a recommendation of mercy, which results in a sentence of life imprisonment.[9] In addition, there are several variations in the procedures by which the jury exercises its sentencing discretion,[10] but there are no significant differences among these variants with regard to the use of the challenge for cause against jurors opposed to the death penalty.

This general shift away from compulsory capital punishment is, at least in part, the reflection in law of the more humanitarian ethos prevailing in contemporary society. There is also a highly pragmatic reason for the change: convictions are easier for the prosecution to obtain if a sentence of death is not the mandatory penalty. When the moral conscience of the jury is offended by the prospect of the execution of the defendant, it is not unlikely that the jury will vote for acquittal when it is the only alternative to the repugnant result.[11]

5. *See*, Comment, *Jury Challenges, Capital Punishment*, and *Labat v. Bennet: A Reconciliation*, 1968 DUKE L.J. 283, 295.

6. *Id.; see also* note 11 *infra*.

7. For a list of those states in which capital punishment has been abolished in whole or in part, *see* Witherspoon, 391 U.S. at 527, n.7 (concurring opinion of Justice Douglas).

8. ALA. CODE, Tit. 14, § 318 (1959) provides, "Any person who is guilty of murder in the first degree, shall, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury."

9. FLA. STAT. § 919.23(2) (1967) provides, "Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life."

10. *See* Witherspoon, 391 U.S. at 525 (concurring opinion of Justice Douglas).

11. *See, e.g.*, State v. Molnar, 133 N.J. 327, 334, 44 A.2d 197, 202 (1945), for a statement of the thesis of juror nullification.

Notwithstanding the general disappearance of the historic justification for the challenge for cause, it remains in effect in every capital jurisdiction with the exceptions of South Dakota[12] and Iowa.[13] The basic principle advanced to justify this result is juror impartiality: jurors must be free of bias with respect to all of the issues in a case, both as to penalty as well as to guilt, in order to remain neutral between the prosecution and the defense. This reasoning was advanced three-quarters of a century ago in the leading case of *Logan v. United States*:[14]

> As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on *voir dire* that they had "conscientious scruples in regard to the infliction of the death penalty for crime" were rightly permitted to be challenged by the government for cause. 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.[15]

In addition to the principle of neutrality, the exclusion of jurors who are opposed to capital punishment has been justified on the ground that the state, as well as the defendant, has rights at the trial of a capital offense; specifically, the statutory right to seek the imposition of the death penalty. To allow scrupled jurors to serve, it is argued, would foreclose the possibility of one of the penalties authorized by the legislature being levied and thus deny the state a fair trial on the issue of punishment.[16]

Finally, use of the challenge for cause in jurisdictions where capital punishment is optional has been defended on the ground that jurors are required to have an open mind on the question of punishment.[17] In other words, the statutory discretion reposed in the jury necessitates a neutral state of mind so that there can be a meaningful exercise of that discretion. Persons who entertain conscientious scruples against capital punishment are unable to maintain this state of mind because their decision on the penalty to be imposed is predetermined by those scruples. The Supreme Court of California has expressed this view thus:

> The statute calls for the exercise of a legal discretion, not for the unswerving application of views formulated before trial

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12. *See* State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898).

13. "The statute authorizes [capital] punishment, in the discretion of the jury, . . . but the state has no right to a trial by jurors who have no objection to inflicting the death penalty, except as it can secure them by challenging peremptorially those who have such objections." State v. Lee, 91 Iowa 499, 502, 60 N.W. 119, 121 (1894). *See also,* State v. Wilson, 234 Iowa 60, 11 N.W.2d 737 (1943).

14. 144 U.S. 263 (1892).

15. *Id.* at 298.

16. State v. Leland, 190 Ore. 598, 277 P.2d 785 (1951).

17. *See* Commonwealth v. Pasco, 332 Pa. 439, 2 A.2d 736 (1938); State v. Juliano, 103 N.J. 663, 138 A. 575 (1927).

> that will compel a certain result no matter what the trial may reveal.[18]

The defect in the foregoing rationalizations is obvious. They presuppose that all hostility to the death penalty is tantamount to true conscientious objection, *i.e.*, unequivocal opposition in every case. Yet typically no attempt is made at the *voir dire* examination to ascertain whether such is in fact the case; instead, a standardized question such as the following is put to the veniremen:

> Do you have a conscientious or religious scruple against the infliction of the death penalty in a proper case?[19]

It is reasonable to assume that a juror who is not wholly comfortable with the idea of capital punishment will tend to answer "yes" to the question even though his objection is not so strong as to be classed a "conscientious or religious scruple." In short, such a *voir dire* question fails to differentiate among the wide variety of objections which people commonly hold and which are symbolized by an affirmative response to the above question.[20] Nevertheless, such an answer generally results in immediate dismissal of the venireman from the panel without any inquiry as to whether he is capable of returning a verdict based on the law and the facts of the case.[21] Furthermore, a prospective juror who acknowledges scruples against the death penalty but attempts to qualify his answer by saying he can disregard his personal beliefs if instructed to do so is nonetheless not qualified to serve, in a majority of jurisdictions.[22]

The practical result of this *voir dire* procedure is to eliminate many prospective jurors who do not adhere to genuine conscientious scruples against capital punishment but who are, instead, merely hesitant to impose it. Practically nowhere is complete opposition to the death penalty requisite to a challenge for cause.[23] On the contrary, the cases are numerous in which challenge for cause has been sustained against a juror whose opinions in regard to the death penalty were merely in the nature of reluctance to see it exercised. Thus, jurors who are opposed but would

18. People v. Riser, 47 Cal. 2d 566, 575, 305 P.2d 1, 7 (1956), *cert. denied*, 353 U.S. 930 (1957).

19. *See, e.g.*, note 2, *supra*.

20. "[I]t cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty . . . thereby affirms that he could never vote in favor of it or that he would not consider doing so in the case before him." Witherspoon, 391 U.S. at 515-16, n. 9.

21. *See* People v. Hoyt, 20 Cal. 2d 306, 125 P.2d 29 (1942). *Contra*, People v. Stewart, 7 Cal. 140 (1857); Atkins v. State, 16 Ark. 568 (1855).

22. "By the weight of authority a juror is incompetent in a capital case who states that he has conscientious scruples against finding the defendant guilty of an offense punishable with death, although he further states that, if satisfied beyond a reasonable doubt of defendant's guilt, he would render a verdict accordingly." State v. Williams, 50 Nev. 271, 278, 257 P. 619, 621 (1927). *Contra*, Stratton v. People, 5 Colo. 276 (1880).

23. *See, e.g.*, Rhea v. State, 63 Neb. 461, 88 N.W. 789 (1902). One of the very few cases to require absolute opposition by the juror to the death penalty as a prerequisite to a challenge for cause is State v. Narten, 99 Ariz. 116, 407 P.2d 81 (1965).

sometimes condemn,[24] or who are opposed in most instances,[25] or who incline to oppose[26] have been held properly dismissed for cause. Such a rule is paradoxical in that, while its rationale is to obtain jurors impartial as to punishment, its tendency is to empanel jurors favorably disposed to the death penalty. In Florida, for example, it has been held proper to systematically exclude jurors who are *inclined* to recommend mercy.[27]

The perfunctory type of *voir dire* inquiry discussed above has a further deficiency; it ignores all questions of the effect, if any, of conscientious scruples or other objections upon the juror's determination of the threshold issue of a defendant's guilt or innocence. The irony of this omission is that the challenge statutes of many states are couched not in terms of objections to capital punishment, as in Illinois,[28] but in terms of opinions affecting a consideration of the defendant's *guilt*. The Florida statute is typical:

> No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be allowed to serve as a juror on the trial of any capital offense.[29]

Thus the anomaly exists that the purported challenge statutes of many states do not, if read literally, actually authorize the challenge for cause of persons scrupled against or otherwise opposing the death penalty, absent a further showing of prejudice against a finding of guilt. However, in rejecting the argument that since a juror has an absolute discretion to recommend mercy he should not be disqualified for scruples against capital punishment so long as he is neutral on the issue of guilt, the Supreme Court of Florida construed the statute to require, as a matter of policy, juror impartiality on both the issue of guilt and the issue of punishment.[30] Similar statutes in other jurisdictions are uniformly so construed.[31]

The practical motivation for such construction, which is in no way authorized by the language of the statutes, is clearly a fear of juror nullification in capital cases. In Florida, for example, this fear of sabotage has been expressed quite bluntly:

> It is not unlikely that such a [scrupled] juror would vote

24. Untreiner v. State, 146 Ala. 26, 41 So. 285 (1906).
25. Mickens v. State, 149 Ga. 185, 99 S.E. 779 (1919).
26. State v. McIntosh, 39 S.C. 97, 17 S.E. 446 (1893).
27. Pitts v. State, 185 So.2d 164 (Fla. 1966).
28. ILL. REV. STAT., chs. 38, 743 (1959).
29. FLA. STAT. § 932.20 (1967).
30. "It is . . . not enough that a juror be able fairly and impartially to determine guilt or innocence. It is equally essential that he be free of any preconceived opinions, beliefs, or convictions which will prevent or preclude his joining in a verdict which will take the life of the defendant." Piccott v. State, 116 So.2d 626 (Fla. 1959), *cert. denied*, 364 U.S. 293 (1960).
31. *See, e.g.*, Commonwealth v. Ladetto, 349 Mass. 237, 207 N.E.2d 536 (1965); People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930 (1957).

> "not guilty" merely to avoid the death penalty, if six other jurors refused to join in a recommendation of mercy.[32]

And in California, where a similar statute was interpreted in like manner, the Supreme Court, in an opinion by Justice Traynor, asserted that it would be a usurpation of the legislative power to seat jurors opposed to the death penalty even though they were able to return a verdict of guilty, because this would probably work "a *de facto* abolition of capital punishment."[33]

It is arguable that such *"de facto"* abolition of capital punishment is within the scope of statutes which vest in the jury an absolute discretion as to whether one found guilty of a capital offense shall live or die. The death penalty will not fall into desuetude unless there is a substantial segment of community opinion opposed to it, and the reflection of the "conscience of the community" is a major justification for the adoption of jury discretion in sentencing the guilty. Be that as it may, the apprehension of chaos in the administration of criminal law (specifically in capital cases) is a compelling force in those jurisdictions which require a unanimous verdict on both guilt and the penalty to be assessed. For example, in capital cases in federal courts[34] and in certain state courts[35] no verdict can be returned by a jury agreed on guilt but divided as to punishment. Under such a rule, a single juror opposed to capital punishment can hang the jury and cause a mistrial.

One final aspect of the use of the challenge for cause merits attention: the determination of the qualifications of a venireman is a matter resting wholly within the discretion of the trial judge.[36] This discretion extends to the dismissal of veniremen *sua sponte, i.e.*, in the absence of challenge by the prosecution.[37] Furthermore, the judge's interpretation of the applicability of the governing challenge statute to a particular venireman is generally final: his decision will not be reversed unless the defendant can demonstrate prejudice in being required to accept an unqualified juror.[38] Thus, the exclusion of prospective jurors who can qualify on the death penalty (but who are nevertheless desirable from the defendant's point of view because not enthusiastic about capital punishment) is irremediable. It is said that a defendant is not entitled to any particular juror; his right is that of rejection rather than selection. Therefore there is no reversible error committed in wrongfully dismissing a

32. Piccott v. State, 116 So.2d 626, 628 (Fla. 1959), *cert. denied*, 364 U.S. 293 (1960).

33. People v. Riser, 47 Cal. 2d 566, 576, 305 P.2d 1, 7 (1956), *cert. denied*, 353 U.S. 930 (1957).

34. Andres v. United States, 333 U.S. 740 (1948).

35. *See, e.g.*, People v. Hicks, 287 N.Y. 165, 38 N.E.2d (1941); State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963), *cert. denied*, 377 U.S. 1000 (1964).

36. Singer v. State, 184 So.2d 7 (Fla. 1959); Sims v. State, 184 So.2d 217 (Fla. 2d Dist. 1966).

37. Sims v. State, 184 So.2d 217 (Fla. 2d Dist. 1966); People v. Shipp, 59 Cal. 2d 845, 382 P.2d 577 (1963).

38. Rollins v. State, 148 So.2d 274 (Fla. 1963).

qualified juror for cause, so long as no prejudiced or otherwise unqualified person sat on the actual jury:[39]

> The right of an accused in respect to the panel and the final jury are (1) that there be no systematic exclusion of any section of the community and (2) that there be left as fitted for service no biased or prejudiced person.[40]

The thrust of the *Witherspoon* case is to expand the frontiers of due process requirements in criminal law. Yet the scope of the decision is rather limited. It comprehends, first of all, only those criminal trials which are also capital cases. It has no application whatsoever to jurisdictions in which the jury determines only the question of guilt while sentencing is left to the trial court. Reduced to its essence, the mandate of *Witherspoon* is that, where the power of life and death is reposed in a jury, the challenge for cause may not be employed to exclude from the jury persons whose objections to capital punishment fall short of unequivocal opposition:

> The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out. . . .[41]

Thus the permissible scope of the challenge for cause is to be restricted to those who are genuine conscientious objectors rather than those who are merely "opposed" to capital punishment.

In short, what the Supreme Court has done is to repudiate the fallacious reasoning whereby a majority of states equate, for challenge purposes, one who opposes capital punishment generally with one who condemns it universally.

Yet this distinction is neither very subtle nor very new. Long ago a few courts held that mere theoretical opposition to capital punishment is not a sufficient basis to exclude a juror for cause in the absence of a further showing that his opinions are such as to preclude a rendition of a fair verdict on the law and the evidence of the case.[42] Much more recently, the difference between conscientious scruples and other objections

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39. United States v. Puff, 211 F.2d 171 (2d Cir. 1954).

40. Tuberville v. United States, 303 F.2d 411, 419 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962).

41. Witherspoon, 391 U.S. at 522 (1968), n. 21 (emphasis in original).

42. *See, e.g.*, Stratton v. People, 5 Colo. 276 (1880); People v. Stewart, 7 Cal. 140 (1859); Atkins v. State, 16 Ark. 568 (1855).

was thoroughly delineated in an opinion by the United States Court of Appeals for the District of Columbia, in *Tuberville v. United States:*[43]

> Opposition to capital punishment may be for any one of a variety of reasons. They range from an unshakeable religious conviction as stark as the Old Testament Commandment to a mere intellectual or philosophical distaste. Not all "opposition" to the penalty creates incompetence for jury service. So not all who are "opposed" to capital punishment are necessarily unqualified for service in a capital case. The nub of disqualification on this ground is whether the opposition is of such nature as to preclude an impartial judgment on the facts and the law of the case to be tried.[44]

Recognizing the deficiency in a challenge procedure which failed to make the fundamental distinction between conscientious scruples and other opposition, the court went on to

> urge upon the District Court that a better practice would be to proceed one more step in this questioning on *voir dire* to ascertain in general terms the weight of the opposition the juror entertains, when measured against his ability to render a fair and impartial verdict in the case on trial, based upon the evidence presented in that case and the law applicable thereto.[45]

This is the same proposition for which *Witherspoon* stands, *i.e.,* that the *voir dire* inquiry must be expanded in a meaningful way to discover the venireman's true position in regard to capital punishment. The net result is that the challenge for cause of opponents of capital punishment may be properly used only against

> those who [make] unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the 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.*[46]

Only if this formula is followed may a state constitutionally execute a defendant sentenced to death by a jury.[47] Otherwise, the court will have

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43. 303 F.2d 411 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 946 (1962).

44. *Id.* at 419. This case is cited by Justice Black in his dissenting opinion, joined by Justices Harlan and White, in Witherspoon, 391 U.S. at 532. The gravamen of the dissent is that being not opposed to capital punishment is by no means tantamount to favoring it. Thus, in the view of the dissenters, the conclusion of the majority that a jury qualified on the death penalty is more likely to return a sentence of death is without foundation in logic.

45. Tuberville v. United States, 303 F.2d 411, 420 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 946 (1962).

46. Witherspoon, 391 U.S. at 522, n.21 (emphasis in the original).

47. *Id.*

crossed the line of "neutrality" and produced a jury "uncommonly willing to condemn a man to die."[48]

This is not the end of the matter, however. Questions arise as to a defendant's remedies when his constitutional right to a jury impartial on the issue of punishment is violated. The answers of *Witherspoon* are clear. In no case does its holding invalidate the conviction of guilt.[49] Thus, petitioner Witherspoon remains convicted of murder; only his sentence of death was overturned. Secondly, the decision is not applicable to a jury's rendition of any punishment less than death.[50] Accordingly, in the case of *Bumper v. North Carolina*,[51] decided the same day as *Witherspoon*, the Supreme Court held that Bumper could not sustain his attack on the conviction of rape since the jury assessed his penalty at life imprisonment. Because the constitutionally repugnant bias in favor of capital punishment did not materialize, there was no prejudice. The error in the death-qualification of the veniremen was harmless.

Thus the apparent meaning of *Witherspoon* is that the unjustified exclusion for cause of veniremen opposed to capital punishment is a violation of a defendant's fourteenth amendment right to due process of law and of the sixth amendment right to trial by an impartial jury. However, such violation is irremediable unless the defendant was actually prejudiced by having been sentenced to death. In that event, the sentence of death, but not the conviction of guilt, will be reversed. In short, the rights guaranteed by the *Witherspoon* decision are not of such kind that their infringement will *ipso facto* vitiate the entire proceedings.

This result will, no doubt, be less than satisfactory to those who believe that a jury qualified on the death penalty has a greater propensity to *convict* than one not so qualified, quite apart from a greater tendency to return the capital sentence. If this assertion is true, it results in an obvious denial of due process on the issue of *guilt:*

> (1) Under modern statutes the guilt issue has been separater from the punishment issue. (2) The necessity which justified death-qualification under the old mandatory, one-issue statutes no longer obtains. (3) A jury qualified to the prosecution's satisfaction on the punishment issue is correspondingly disqualified from the defendant's standpoint on the guilt issue. (4) The logical consequence is that when the same jury decides both issues, the defendant is denied due process of law through having forced upon him a partial jury on the most critical issue in the case—that of guilt or innocence.[52]

48. *Id.* at 520-21. In this vein, the Court further stated, "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution." *Id.* at 523.

49. Witherspoon, 391 U.S. at 522, n.21.

50. *Id.*

51. 391 U.S. 543 (1968). This case has been cited and followed directly by Seals v. State, 213 So.2d 645 (Ala. 1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968).

52. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment*

This position was urged upon the Supreme Court in *Witherspoon* and was squarely rejected because "the data adduced by the petitioner . . . 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."[53] The contention was also rejected by the Court in *Bumper v. North Carolina*[54] where petitioner was not sentenced to death and therefore had to rely solely on the due process argument. It is true, however, that the Supreme Court did not entirely foreclose the possibility of the future establishment of this proposition.[55] Nonetheless, the argument that a death-qualified jury is partial to the prosecution on the issue of guilt has been expressly rejected by the lower federal courts in *Pope v. United States*,[56] *Tuberville v. United States*,[57] and *United States v. Puff*.[58] The same position is adhered to by the state courts.[59]

There is support for the "partiality" thesis in only one case, *Crawford v. Bounds*.[60] Judge Sobeloff, concurring specially, accepts the contention that a death-qualified jury is more guilt-oriented than one drawn from a random cross-section of the community. He concludes that a jury so constituted is an infringement of the defendant's sixth amendment guarantee of trial by an impartial jury of peers. In addition, Judge Sobeloff would apparently agree with the concurrence of Justice Douglas in *Witherspoon* that due process of law is vitiated by a *voir dire* procedure which excludes a proportion of the venire large enough to destroy the representative character of the jury. It must be remembered, however, that the major opinion in the case bases its holding upon different legal grounds.[61]

Constitute Denial of Fair Trial on Issue of Guilt?, 39 TEXAS L. REV. 545, 555 (1961). This article is a leading exposition of the thesis that belief in capital punishment and readiness to convict are correlatives. *See also*, Comment, *Jury Challenges, Capital Punishment, and Labat v. Bennet: A Reconciliation*, 1968 DUKE L.J. 283, 295-99; Wilson, *Belief in Capital Punishment and Jury Performance*, Brief for Petitioner at Appendix 4, Witherspoon v. Illinois, 391 U.S. 510 (1968). Further psychological studies are cited by Note, *Allowing Challenge for Cause to a Prospective Juror Opposed to Capital Punishment*, 45 N.C.L. REV. 1070, 1072, n. 14 (1967).

53. Witherspoon, 391 U.S. at 517.

54. 391 U.S. 543 (1968).

55. Witherspoon, 391 U.S. at 520, n. 18.

56. 372 F.2d 710 (8th Cir. 1967).

57. 303 F.2d 411 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962).

58. 211 F.2d 171 (2d Cir. 1954).

59. *See, e.g.*, State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967).

60. 395 F.2d 297 (4th Cir. 1968).

61. *Crawford* was decided before *Witherspoon* and reached the same conclusion independently, *i.e.*, that a denial of due process results when a defendant is tried and sentenced to death by a jury predisposed to capital punishment. But in reversing the conviction of murder and the sentence of death, the court went further and placed the decision on an alternate ground: that there is a denial of equal protection of the laws when there is systematic exclusion of a cognizable segment of society, *i.e.*, objectors to capital punishment. "Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws." Crawford v. Bounds, 395 F.2d 297, 308 (4th Cir. 1968). Thus this court goes further than any other in opening up to constitutional attack *convictions* returned by a death-qualified

Judicial interpretation of *Witherspoon* has been sparse at the date of this writing[62] because very little time has elapsed since the decision was handed down, and because there have been very few sentences of death to appeal. However, a few cases demonstrate that the lower federal and state courts are experiencing little difficulty in the application of the *Witherspoon* doctrine. In *Commonwealth v. Wilson*,[63] appellant's challenge of his conviction of murder in the first degree was rejected. The court noted that appellant could not rely on *Witherspoon* because the jury had recommended mercy, but that even if it had not done so, he would still lack grounds for asserting denial of his constitutional right to a jury impartial on the issue of punishment. At his trial, no juror was challenged for cause for stating that he had scruples against capital punishment. "The District Attorney always went on to ask whether the juror could in no case impose the death penalty. Only if the juror stated that he never could vote for a death penalty was he challenged for cause."[64] Such a *voir dire* proceeding would seem to be wholly consistent with the requirements of the *Witherspoon* decision.

In the federal courts, the sentence of death was invalidated in the Fifth Circuit case of *Spencer v. Beto*[65] because all objectors to the death penalty were excluded from the jury. In *Brent v. White*[66] and *Powers v. Houck*,[67] also of the Fifth Circuit, the causes were remanded to their respective state courts for determination of the effect of the newly decided *Witherspoon* case. All three of these cases illustrate the command of the Supreme Court that the *Witherspoon* decision be "fully retroactive."[68]

In the final analysis, the future of the *Witherspoon* doctrine does not rest wholly with the courts. To some extent it will be possible to avoid its requirements by the employment of peremptory challenges against jurors opposed to capital punishment. However, this device should not prove to be particularly efficacious in view of the fact that peremptory challenges are limited in number and opposition to the death penalty has a very substantial base of support among the American people.[69]

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jury, irrespective of whether capital punishment is imposed. The reason for this is that "[s]ystematic exclusion of any recognizable, identifiable group within the community from which a jury venire is drawn violates the equal protection clause, irrespective of a showing of prejudice." *Id.* at 308.

While the Crawford case represents a genuine breakthrough, its value as precedent for future appeals is diminished by the fact that the Supreme Court in *Witherspoon* had the Crawford decision available to it and gave it only passing reference by way of a footnote. Witherspoon, 391 U.S. at 521-22, n. 22. In addition, the theoretical bases of the decision are confused by the fact that no judge joined in signing the "majority" opinion and by the further fact that there are five other opinions in the case.

62. October, 1968.

63. 431 Pa. 21, 244 A.2d 734 (1968).

64. *Id.* at —, 244 A.2d at 739.

65. No. 25548 (5th Cir. July 18, 1968).

66. No. 25496 (5th Cir. July 18, 1968).

67. No. 24946 (5th Cir. August 5, 1968).

68. Witherspoon, 391 U.S. at 523, n. 22.

69. Public opinion polls are consistent in reporting approximately half of the American

A more potent line of attack lies in legislative revision. As pointed out by Justice White in his dissenting opinion,[70] the states can achieve approximately the same results as before by the substitution of majority-vote decisions as to punishment for the requirement of jury unanimity. An even more effective change would be the removal of all power as to sentencing from the jury, leaving it to the trial judge. Finally, if a state desires to achieve certainty in the imposition of capital punishment, it can be made mandatory upon the conviction of specified crimes.

It is, however, unlikely that such revisions will find their way into the penal codes of the states, for the historical tide has carried American criminal law away from them. The progressive direction of reform would seem to lie in the adoption of the bifurcated trial system in capital cases. Under this two-stage procedure, the issues of guilt and punishment are wholly segregated. At the first trial, all jurors who are otherwise qualified may be seated without regard to their views on capital punishment. Indeed, it is not even necessary to propound the traditional questions concerning scruples against capital punishment, as the prosecution will suffer no prejudice on the issue of the defendant's guilt even from the seating of genuine conscientious objectors. Only at the second stage of the proceedings, where an entirely new jury is empanelled, would it be necessary to conduct a *voir dire* inquiry into the veniremen's beliefs in regard to capital punishment, and only those absolutely opposed to it need be dismissed for cause. This bifurcation of issues has an important by-product: it permits the defendant to introduce evidence at the sentencing trial in mitigation of punishment without sacrificing his fifth amendment privilege not to take the stand at the trial of guilt or innocence.

The bifurcated trial in capital cases has been successfully utilized in several states, including California, New York and Pennsylvania. It appears promising as a fair and workable solution to several of the problems which have long attended the use of the challenge for cause against jurors opposed to capital punishment.[71]

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people opposed to capital punishment. *See* Brief for Petitioner at Appendix 3, Witherspoon v. Illinois, 391 U.S. 510 (1968).

70. Witherspoon, 391 U.S. at 542, n. 2 (dissenting opinion of Justice White).

71. Its primary advantage, of course, is that it avoids the problem of whether death-qualified juries are in fact partial to the prosecution on the issue of guilt. The contention that they are prejudiced is likely to be the basis of numerous appeals in the future in those cases where the defendant was not sentenced to death. *See* note 52 *supra* and accompanying text.