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LOCKHART v. McCREE: DEATH QUALIFICATION AS A
DETERMINANT OF THE IMPARTIALITY AND
REPRESENTATIVENESS OF A JURY IN DEATH
PENALTY CASES

In *Lockhart v. McCree*¹ the United States Supreme Court ruled that the exclusion from capital juries of persons who could never vote to impose the death penalty does not unconstitutionally prejudice the verdict as to the defendant's guilt.² The Court, voting six to three,³ held that excluding such persons during jury selection does not infringe upon the defendant's right under the sixth and fourteenth amendments to an impartial jury drawn from a fair cross-section of the community.

In so holding, the Court declined to expand the impartiality and fair cross-section requirements to mandate a balance of attitudes among the individual jurors. Accepting *arguendo* that death qualification produces a jury that is initially more prosecution-minded,⁴ the Court asserted that impartiality guarantees nothing more than twelve jurors able to obey their oaths. The Court also stated that the cross-section requirement was meant to apply only to the list of people from which the jury is drawn, not to the jury itself. Furthermore, the Court maintained that those excluded did not constitute a distinctive or cognizable group for cross-section purposes. Therefore, the states need not change their jury selection procedures for death penalty cases.⁵

¹ 106 S. Ct. 1758 (1986).

² A jury culled of individuals unable to impose capital punishment under any circumstances is referred to as a *death-qualified* jury. The questioning process by which such individuals are identified is known as *death qualification*.

³ Justice Rehnquist wrote the Court's opinion and was joined by Chief Justice Burger and Justices White, Powell, and O'Connor. Justice Blackmun concurred in the result. Justice Marshall dissented, joined by Justices Brennan and Stevens.

⁴ The Court noted several methodological problems with empirical studies employed by McCree. *Lockhart*, 106 S. Ct. at 1762-69. Nonetheless, the majority accepted *arguendo* the scientific validity of the empirical studies. The Court stated, "[W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries." *Id.* at 1764. This Note adopts the same assumption.

⁵ A ruling for McCree would have compelled states in which juries decide sentences to use a completely bifurcated jury system in death penalty cases. One jury, which might include those unable to vote for the death penalty under any circumstances, would vote on whether the defendant was guilty of the capital offense. Then, if the state chose to ask for the death penalty, a second jury, excluding such individuals, would make the sentencing decision. For a discussion of ways to implement a bifurcated system, see *infra* note 161.

As a foundation for analyzing the Court's decision in *Lockhart*, I first discuss in the background section the major cases that develop the constitutional requirements for jury selection. I show how the cross-section requirement originated under the fourteenth amendment in an effort to assure the participation of blacks in the jury system. The scope of the cross-section requirement was broadened in federal court cases to include other groups such as women and Mexican-Americans under the sixth amendment doctrine of impartiality. The sixth amendment was subsequently made applicable to the states by incorporation into the fourteenth amendment. Next I show how the concept of a distinctive group emerged from the cross-section cases without ever having been defined; the resulting ambiguity in the definition was critical in the *Lockhart* decision. The background discussion also considers the balancing of interests between the state and defendants that the court performs when confronted with an infringement of the cross-section requirement. Finally, I discuss the special jury selection requirements that emerged from death penalty cases.

This Note argues that the Court correctly decided *Lockhart* and that the decision preserved an important procedural corollary to the implementation of states' death penalty laws. An examination of the majority's reasoning shows that the Court correctly analyzed the cross-section and impartiality issues. Even had the Court reached different decisions on these threshold issues, however, the balance of interests between the defendant and the state would have compelled the same result. A contrary decision would force the abandonment of long established practices of peremptory challenges and professional exemptions in jury selection. Moreover, the participation in a capital murder trial—even in the guilt phase—of individuals who would never vote for the death penalty could undermine the integrity and viability of a state's death penalty laws.

I. BACKGROUND

In *Duncan v. Louisiana*⁶ the Supreme Court ruled that the sixth amendment to the Constitution applied to the states as well as the federal government.⁷ As a result, every criminal defendant is enti-

⁶ 391 U.S. 145 (1968).

⁷ Congress enacted the Bill of Rights to proscribe the powers of the federal government. These amendments did not bind state governments until the Supreme Court, in a series of decisions, held that various provisions of the Bill of Rights applied to the states through the due process and equal protection clauses of the fourteenth amendment. Thus, after *Duncan*, the sixth amendment applied to the states by incorporation into the fourteenth amendment.

bled to a jury trial,⁸ whether tried in a state⁹ or federal court.¹⁰ The Supreme Court subsequently ruled that certain jury selection procedures developed in federal court cases under the sixth amendment also applied to the states. Even before *Duncan*, however, a long line of precedents based on the due process and equal protection clauses of the fourteenth amendment had developed requirements concerning the use of juries in state courts.

A. The Content of the Right to a Jury Trial

The sixth amendment requires impartial juries.¹¹ The Court has interpreted "impartiality" as having a two-fold meaning. Primarily, individual jurors must possess case-specific impartiality, that is, they must have no personal biases concerning the specific case or parties.¹² Second, the jury must be drawn from a representative cross section of the community.¹³ The Court has referred to this cross-section requirement as "diffused impartiality," applying to the jury in the aggregate rather than any single juror.¹⁴ The Court has reasoned that the jury will more effectively hedge against the arbitrary power of the state if it reflects the full diversity of community experiences and viewpoints.¹⁵

⁸ More accurately, the jury requirement applies to non-petty criminal offenses, which are defined as those carrying sentences longer than six months. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970).

⁹ Prior to *Duncan*, the states were not required to use juries in criminal cases, although many did. The only requirement was that the trials provide due process and equal protection under the fourteenth amendment. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1279 (E.D. Ark.), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985)(en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

¹⁰ Federal trial courts have always used juries in criminal cases. *Grigsby*, 569 F. Supp. at 1280 n.4.

¹¹ "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI (emphasis added).

¹² Properly excluded jurors include: those who know the defendant or the victim, those who have been victims of crime, and those who have relatives involved in police work. *Grigsby v. Mabry*, 758 F.2d 226, 246 n.5 (Gibson, J., dissenting) (8th Cir. 1985) (en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). Insane persons, jurors intimidated by the threat of mob violence, and jurors who have formed a *fixed* opinion from newspaper or other media publicity also must be excluded. *Peters v. Kiff*, 407 U.S. 493, 501 (1972). Prospective jurors may have some impression of the defendant's guilt; however, he or she must lay it aside and render a decision based solely on the evidence. *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

¹³ "Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (emphasis added) (quoting *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

¹⁴ "[T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility." *Id.* at 530-31.

¹⁵ "The purpose of a jury is to guard against the exercise of arbitrary power This prophylactic vehicle is not provided if the jury pool is made up of only special

1. *The History of the Cross-Section Requirement as an Element of Fourteenth Amendment Rights*

Prior to *Duncan* in 1968, the fourteenth amendment served as the sole source of any cross-section requirements for state court juries. Because the purpose of this amendment was to guarantee full citizenship privileges to ethnic and minority groups,¹⁶ the cross-section requirement developed as a vehicle to advance the equal protection interests of these groups. The first decision applying the fourteenth amendment to jury selection held that an all-white jury could not sentence a black man to death so long as a statute prevented blacks from serving as jurors.¹⁷ After that decision, the Court repeatedly overturned criminal verdicts when members of ethnic and minority groups were denied the opportunity to serve as jurors.¹⁸

The Supreme Court subsequently expanded the scope of fourteenth amendment jury requirements in two respects. First, the Court held that the defendant need not belong to an excluded group to object to the composition of the jury.¹⁹ Second, the Court held that the composition of the venire²⁰ must closely reflect that of

segments of the populace or if large, distinctive groups are excluded from the pool." *Id.* at 530.

¹⁶ "In [*Strauder v. West Virginia*, 100 U.S. 303 (1880)], the Court explained that the central concern of the . . . Fourteenth Amendment was to put an end to governmental discrimination on account of race." *Batson v. Kentucky*, 106 S. Ct. 1712, 1716 (1986).

¹⁷ *Strauder*, 100 U.S. 303 (1880).

¹⁸ *See, e.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 629-32 (1972) (increasingly disproportionate reduction in number of blacks eligible for grand jury service at each stage of selection process indicates discrimination and invalidates conviction); *Arnold v. North Carolina*, 376 U.S. 773, 774 (1964) (only one black juror serving on grand juries in 24 years establishes *prima facie* case of discrimination and invalidates conviction); *Hill v. Texas*, 316 U.S. 400, 404 (1942) (failure of commissioners to seek qualified blacks for grand jury service is discriminatory and invalidates conviction); *Smith v. Texas*, 311 U.S. 128 (1940) (systematic exclusion of blacks from grand jury service violates prohibition against discrimination and invalidates conviction).

¹⁹ *Peters v. Kiff*, 407 U.S. 493 (1972) (due process violated when white defendant convicted in criminal trial by jury drawn from panel excluding blacks).

²⁰ In selecting a jury, a court official draws up a list of prospective jurors, selecting names in some random fashion. For example, lists of persons whose names begin with certain letters of the alphabet, or whose birthdays fall in odd or even months, may be chosen from the voting or tax rolls. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1281 (E.D. Ark.), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub. nom* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). The people on this list are known as the *venire*, and the individuals on the list as *veniremen*. The venire is then summoned to the courthouse, and the veniremen or prospective jurors answer questions regarding their qualifications as jurors. Veniremen may be unfit jurors in a particular trial for any of several reasons. *See supra* note 12. Excluding a venireman for one of these reasons is exclusion for cause. Members of certain professions regarded as important to the community may also be exempted from jury service. *See infra* note 184 and accompanying text. The opposing attorneys possess a certain number of

the community as a whole.²¹ Thus, if the percentage of any minority group in the venire is significantly lower than the percentage of that group in the community, the verdict of a jury drawn from that venire may be challenged.

2. Cross-Section Requirements as a Component of Impartiality

In 1975 the Court found in *Taylor v. Louisiana*²² that sixth amendment impartiality included the cross-section requirement²³ when it overturned the conviction of a male defendant tried before an all-male jury. The *Taylor* Court regarded the cross-section requirement as essential to what it considered the purposes of a jury: to prevent the exercise of arbitrary power and to maintain public confidence in the criminal justice system.²⁴

The *Taylor* decision has two significant aspects beyond its basic holding. First, the Court emphasized a perceived need for particular attitudes and viewpoints that women bring to a case and the effect of women and their attitudes on the group dynamics of jury deliberation.²⁵ Second, the Court placed limits on the decision; the language implied that the cross-section requirement applies only to the venire and not to the petit jury.²⁶ The Court stated that

peremptory challenges with which they can exclude prospective jurors not otherwise excluded for cause. Attorneys base such challenges on how they believe the veniremen might affect the verdict. *But see* discussion *infra* notes 44-49 and accompanying text (exclusion of blacks by peremptory challenge solely because of race unconstitutional). The jury that results from this process is called the *petit jury*.

²¹ See *Duren v. Missouri*, 439 U.S. 357, 359-60 (1978) (jury venires less than 15% female unconstitutional); *Castaneda v. Partida*, 430 U.S. 482 (1977) (50% Mexican-American grand jury list not sufficient when county population 79% Mexican-American); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (jury selection system invalidated when 10% of jury wheels female and population 53% female).

²² 419 U.S. 522 (1975).

²³ See *supra* notes 13-14. Before *Taylor*, the Court might have imposed the cross-section requirement as part of the due process clause of the fourteenth amendment. The sixth amendment does not refer to a cross-section requirement, stating only that the jury be "of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. The Court's choice of the sixth amendment as a vehicle to bear the cross-section requirement may have been motivated by the influence of a 13 year-old precedent. In *Hoyt v. Florida*, 368 U.S. 57 (1961), the Court held that a system identical to that in *Taylor* did not deny fourteenth amendment due process of law or equal protection. The Court distinguished *Taylor* from *Hoyt* by stating that *Hoyt* was decided before the incorporation of the sixth amendment in *Duncan*.

²⁴ *Taylor*, 419 U.S. at 530.

²⁵ "The truth is that the two sexes are not fungible . . . [and] the subtle interplay of influence one on the other is among the imponderables. . . . [A] distinct quality is lost if either sex is excluded." *Id.* at 531-32 (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)).

²⁶ The majority concluded, "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population." *Id.* at 538.

although the cross-section requirements did not entitle defendants to a jury of any particular composition, jury selection procedures could not "systematically exclude distinctive groups in the community."²⁷ Unfortunately, the Court failed to define the term "distinctive group," presumably intending in future cases to develop the term's meaning based on the objectives of the cross-section requirement.²⁸

The *Taylor* Court emphasized preventing the exercise of arbitrary power and ensuring public confidence in the criminal justice system,²⁹ perhaps regarding these objectives as a complete list. However, the *Taylor* Court quoted a passage from *Thiel v. Southern Pacific Co.*,³⁰ a case that one can read as stating an additional objective of the cross-section requirement: "[T]he broad representative character of the jury should be maintained, *partly* as assurance of a diffused impartiality *and partly* because sharing in the administration of justice is a phase of civic responsibility."³¹ One may regard the objectives mentioned by the Court as subsumed under "diffused impartiality," which acts as a hedge against arbitrary power, protects the individual rights of defendants, and, in turn, creates confidence in the criminal justice system. The reference to "a phase of civic responsibility" suggests that the definition of a "distinctive group" is grounded partly in a societal interest involving the rights of citizens to serve as jurors. This suggestion generates a problem in assessing whether a group is distinctive, however, because the Court failed to assign relative weights to the defendant's interest in a representative jury and to the interests of the excluded group in full citizenship. *Taylor* does not state whether an exclusionary practice must infringe upon *both* sets of interests to be found unconstitutional or if infringement upon either one alone is sufficient.

In cases such as *Strauder v. West Virginia*³² where the defendant belonged to the excluded group, a natural unity of interest existed between the rights of the defendant and the rights of those ex-

²⁷ *Id.*

²⁸ *See id.* at 530 (juries will not guard against the exercise of arbitrary power if large, distinctive groups excluded from pool; inclusion of identifiable segments essential to public confidence in fairness of criminal justice system).

²⁹ *See supra* text accompanying note 24.

³⁰ 328 U.S. 217 (1946) (hourly-rate wage earners cannot be automatically exempted from jury service).

³¹ *Taylor*, 419 U.S. at 530-31 (emphasis added) (quoting *Thiel*, 328 U.S. at 227 (Frankfurter, J., dissenting)). The "civic responsibility" phrase has always referred less to a burden that needs to be borne than to a privilege of participation. "[E]xclusion of Negroes from jury service injures not only defendants, but also other members of the excluded class: it denies the class of potential jurors the 'privilege of participating equally . . . in the administration of justice.'" *Peters v. Kiff*, 407 U.S. 493, 499 (1972) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

³² 100 U.S. 303 (1880); *see supra* text accompanying note 17.

cluded. *Taylor* and *Peters v. Kiff*³³ established that this unity of interests is not necessary; however, these cases did not make clear whether a defendant could demand the inclusion of some identifiable group when the exclusion had no negative implications for the citizenship rights of that group. Language in *Taylor* and *Peters* support the interpretation that the defendant has a right to the most broadly representative jury possible, and any group whose absence would deprive the jury of particular viewpoints constitutes a distinctive group.³⁴

Nevertheless, groups identified as distinctive in *Taylor* and other decisions³⁵ correspond to suspect or quasi-suspect groups in equal protection cases,³⁶ namely, blacks, women, and Mexican-Americans. This correlation suggests an alternative view that the rights of the

³³ 407 U.S. 493 (1972); see *supra* note 19 and accompanying text.

³⁴ "Taylor, in the case before us, was similarly [referring to *Peters*] entitled to tender and have adjudicated the claim that the exclusion of women from jury service deprived him of the kind of factfinder to which he was constitutionally entitled." *Taylor*, 419 U.S. at 526.

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. . . . Its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters, 407 U.S. at 503-04, *quoted with approval in Taylor*, 419 U.S. at 532 n.12.

³⁵ See *supra* notes 16-18 and accompanying text & note 21.

³⁶ One possible exception is *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), where the Court held that hourly-rate wage earners could not be excluded from jury service. Although the Court referred to an impartial jury drawn from a cross section of the community, the decision does not belong in the mainstream of modern cross-section decisions for two reasons. First, the decision preceded both *Duncan* and *Taylor* by more than 20 years. Because *Duncan* was the first case to hold that "due process" in state courts included sixth amendment guarantees, one cannot assume that the *Thiel* Court considered the cross-section guarantee as the minimum guarantee of due process applicable to the states. A second reason is that the decision was an exercise of the supervisory power over the administration of federal courts. *Id.* at 225. The standards imposed by the Court on the federal system can exceed the constitutional guarantees of the sixth amendment that bind the states.

That the Court did not contemplate the application of the cross-section requirement to the states at the time of *Thiel* is clear from the following passage:

These defendants rely heavily on arguments drawn from [*Glasser v. United States*, 315 U.S. 60 (1942), *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946), and *Ballard v. United States*, 329 U.S. 187 (1946)] But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process.

Fay v. New York, 332 U.S. 261, 287 (1947) (challenge, ultimately denied by court, to selection of a special jury involving lack of proportional representation of laborers and craftsmen in trial of labor union officials). A contemporaneous rejection of the *Thiel*

excluded group are paramount, and defendants are rewarded for bringing discriminatory exclusion to the attention of the federal courts by having their guilty verdicts set aside. In this view, no distinctive group could exist absent some infringement of citizenship rights of those excluded.³⁷

Four years later in *Duren v. Missouri*³⁸ the Court expanded and systematized its holding in *Taylor*. Again, the Court clearly expressed its belief that any significant deviation in the percentage composition of the venire from that of the community at large would support a jury verdict challenge.³⁹ Furthermore, the Court

requirements for the states further weakens the proposition that those requirements should apply to a state court under the sixth amendment.

Not every doctrine enunciated by the Court concerning the sixth amendment cross-section requirement was automatically incorporated by *Duncan*. Indeed, the cross-section requirement was not formally applied to the states until *Taylor*, a case decided seven years after *Duncan*. At least three justices of the Court maintain that the sixth amendment has not been fully incorporated into the fourteenth amendment and that jury practice can differ between state and federal courts. *Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring, joined by Burger, C.J. and Rehnquist, J.).

Their position is supported by the Court's post-*Duncan* treatment of certain sixth amendment guarantees. For example, interpretation of the sixth amendment before *Duncan* clearly required a 12-person jury in serious criminal cases, *Thompson v. Utah*, 170 U.S. 343 (1898), and a unanimous verdict, *Maxwell v. Dow*, 176 U.S. 581, 586 (1900). The *Duncan* Court equivocated on whether the states would be obligated to comply with these interpretations. *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968). When the issues arose in the context of state court cases, however, the Court abandoned both the 12-person requirement, *Williams v. Florida*, 399 U.S. 78 (1970), and the unanimity requirement, *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Williams*, Justice Harlan argued that the incorporation of the sixth amendment had generated a dilemma that required the dilution of sixth amendment guarantees as developed in the federal system in order to allow the states flexibility in ordering their criminal systems. *Williams*, 399 U.S. at 117-33 (Harlan, J., concurring in result). His viewpoint was vigorously disputed, however, by Justice Black. *Id.* at 106-07 (Black, J., concurring). Powell's notion of incomplete incorporation could avoid Harlan's dilemma. In any event, given the Court's treatment of pre-*Duncan* sixth amendment guarantees, one could not confidently predict that *Thiel's* interpretation of the cross-section requirements would apply to the states.

³⁷ Even assuming *Thiel* is good precedent with regard to state trials, the thrust of the argument is essentially unchanged: a defendant's interests alone may be insufficient to create a distinctive group. The *Thiel* decision emphasized the "violence [done] to the democratic nature of the jury system." *Thiel*, 328 U.S. at 223. The Court did not even consider whether prejudice to the petitioner resulted from the exclusion. *Id.* at 225. Clearly, the Court was attempting to uphold societal values in an effort to negate class consciousness in the jury selection process. *Id.* at 224. Although achieving democratic values may be a somewhat broader goal than upholding the rights of minority groups, nothing indicates that a defendant's interest alone can define a distinctive group. See *Anaya v. Hansen*, 781 F.2d 1 (1st Cir. 1986) (neither blue collar workers nor less educated individuals cognizable groups for cross-section purposes); *Barber v. Ponte*, 772 F.2d 982 (1st Cir. 1985) (young adults not distinctive group for cross-section purposes); *United States v. Kleifgen*, 557 F.2d 1293, 1296 (9th Cir. 1977) (young people, poorly educated people, and unemployed people not cognizable classes).

³⁸ 439 U.S. 357 (1978).

³⁹ See *supra* note 21 and accompanying text.

outlined the elements of the *prima facie* case for a cross-section requirement violation. A defendant challenging the jury verdict 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.⁴⁰

As in *Taylor*, the Court left the term "distinctive group" undefined.

3. Decisions Regarding Petit Juries

Two important Supreme Court decisions deal with petit jury requirements. In *Ballew v. Georgia*,⁴¹ the Court held that a five-member jury was too small to satisfy the "purpose and functioning" of the jury.⁴² The Court based its decision on studies concluding that juries of this size might promote inaccurate and possibly biased decisionmaking, cause "untoward differences in verdicts," and prevent juries from truly representing their communities.⁴³

The Court in *Batson v. Kentucky*⁴⁴ held that a prosecutor could not use peremptory challenges to exclude blacks from a petit jury on the mere presumption that black jurors are unable to impartially consider a case against a black defendant.⁴⁵ This decision, handed down at approximately the same time as *Lockhart*,⁴⁶ was based on equal protection guarantees.⁴⁷ The Court applied the same equal protection analysis to both phases of jury selection, stating that the discriminatory exclusion of blacks is unconstitutional whether practiced when selecting the venire⁴⁸ or when selecting the petit jury.⁴⁹

⁴⁰ *Duren*, 439 U.S. at 364.

⁴¹ 435 U.S. 223 (1978).

⁴² *Id.* at 239.

⁴³ *Id.* The Court mentioned three problems regarding the decisionmaking of five-member juries: 1) less effective group deliberation; 2) inaccurate factfinding and incorrect application of the common sense of the community to the facts; and 3) reduced jury size uniformly favors conviction. The Court also noted that a smaller jury is less likely to remember all the important pieces of evidence and overcome the biases of its members. *Id.* at 232-36.

⁴⁴ 106 S. Ct. 1712 (1986).

⁴⁵ *Id.* at 1723.

⁴⁶ *Lockhart* was argued January 13, 1986 and decided May 5, 1986; *Batson* was argued December 12, 1985 and decided April 30, 1986.

⁴⁷ Although the plaintiff framed his petition as a sixth amendment claim, the Court declined to adopt this approach and analyzed the case on the basis of discrimination against those excluded. *Batson*, 106 S. Ct. at 1716 n.4.

⁴⁸ "The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . ." *Id.* at 1717.

⁴⁹ Just as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are

4. *Balancing State Interests*

If a jury selection procedure infringes on the cross-section requirement or the jury's purpose and function, then the Court determines whether the state's interests justify the infringement. When analyzing a cross-section infringement, the Court considers whether "a significant state interest [has been] . . . manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."⁵⁰ When examining a purpose-and-function infringement, the Court determines "whether any state interest counterbalances and justifies the disruption [of the jury function] so as to preserve its constitutionality."⁵¹ The cases reveal that states have difficulty proving a significant state interest mostly because the Court takes a dim view of administrative convenience and attendant cost savings as a justification.⁵²

B. Jury Selection in Death Penalty Cases

The jury selection requirements of case specific and diffused impartiality apply to all criminal prosecutions. Additionally, death penalty cases have generated their own guidelines for jury selection. Prosecutors may exclude from the jury anyone whose objections to capital punishment might prejudice them against the state's case by using statutorily- or judicially-based challenges for cause.⁵³ A small

unqualified to serve as jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black.

Id. at 1723 (citations omitted).

⁵⁰ *Duren v. Missouri*, 439 U.S. 357, 367-68 (1978).

⁵¹ *Ballew v. Georgia*, 435 U.S. 223, 231 (1978).

⁵² In no case have such justifications for an infringement ever swayed the Court. See *Duren*, 439 U.S. at 369 ("[T]he administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials." (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534-35 (1975))); *Ballew*, 435 U.S. at 243-44 (savings in court time and financial costs by reducing jury from six to five persons insufficient justification).

⁵³ The earliest death-penalty statutes imposed death automatically upon conviction of a capital offense. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 TEX. L. REV. 544, 549-52 (1961). Because the jury only determined guilt, states passed statutes disqualifying jurors who had various degrees of objections to the death penalty. *Id.* These statutes were enacted out of fear that such jurors would subvert the law by voting not guilty as a means of defeating the death penalty. Later, however, states began to replace mandatory death penalty laws with discretionary systems that allowed the jury to determine the appropriate punishment. See *Andres v. United States*, 333 U.S. 740, 752-53, 767-770 (1948) (Frankfurter, J., concurring) (listing state statutes replacing mandatory death sentence laws with jury discretion). The death-qualification statutes, however, remained in place. Beginning in 1961, commentators began to argue that there was less justification for death qualification in the context of discretionary systems, and that the process had negative implications for the integrity of the decision to convict. See generally Oberer, *supra*.

line of Supreme Court cases established limits for such challenges and raised new questions concerning the applicability of cross-sectional analysis and the meaning of impartiality.

1. *The Witherspoon Case*

In *Witherspoon v. Illinois*,⁵⁴ the appellant, Witherspoon, challenged an Illinois statute that allowed the exclusion for cause 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."⁵⁵ The prosecutor used the statute to exclude forty-seven of ninety-five veniremen.⁵⁶ The Court held that the resulting jury was too inclined to return a sentence of death⁵⁷ and did not meet the impartiality requirement⁵⁸ with respect to the sentencing decision.⁵⁹ The Court stated that excluding veniremen from juries in death penalty cases for stating generalized scruples regarding the

⁵⁴ 391 U.S. 510 (1968).

⁵⁵ *Id.* at 512 (quoting ILL. REV. STAT. ch. 38, § 743 (1959)).

⁵⁶ *Id.* at 530 n.12 (Douglas, J., concurring in result).

⁵⁷ "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die." *Id.* at 520-21.

⁵⁸ "[I]n its role as arbiter of punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Id.* at 518.

It is unclear what the Court meant in its reference to the sixth amendment. *Duncan* was decided May 20, 1968 and *Witherspoon* on June 3, 1968. Therefore the sixth amendment guarantees normally would have been applicable. However, on June 17, 1968, the Court decided that *Duncan* should not apply to cases in which the trial began prior to May 20, 1968. *DeStefano v. Woods*, 392 U.S. 631, 633, 635 (1968). The *DeStefano* ruling is somewhat anomalous with *Witherspoon* which explicitly gave full retroactive effect to the jury-selection requirements of *Witherspoon*. *Witherspoon*, 391 U.S. at 523 n.22.

Witherspoon arguably introduced some requirement of sixth amendment-type impartiality into the due process clause. The above-quoted passage is the only reference to the sixth amendment in the majority opinion. Other language in the opinion is equally consistent with a due process analysis. *Id.* at 521 n.20, 523. A central line of reasoning in *Witherspoon* consisted of an extension of statements in previous due process cases. *Id.* at 521. Thus, *Witherspoon* arguably was a fourteenth amendment case and the mention of the sixth amendment was an off-handed reference.

Alternatively, the *DeStefano* Court may have intended only to limit the retroactivity of a state's responsibility to provide a jury trial. In the event that a jury was utilized, the Court may have intended the cross-section and impartiality requirements of *Duncan* and *Witherspoon* to become generally applicable. *But see* Johnson v. Louisiana, 406 U.S. 356, 358 (1972) (sixth amendment not applicable where defendant convicted of criminal offense by non-unanimous jury verdict because *Duncan* decided after his trial began).

⁵⁹ The Illinois courts used a partially bifurcated system in death penalty cases. The jury would first make a determination of the defendant's guilt. Then, if the defendant was found guilty, arguments and evidence would be heard regarding the imposition of punishment with the punishment determined in a separate deliberation.

The Court did not find that the jury was unconstitutionally partial in the guilt phase, only in the penalty phase. *Witherspoon*, 391 U.S. at 523 n.21. "Even so, a defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt." *Id.* at 520 n.18.

death penalty was unconstitutional, unless their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt, or the veniremen unequivocally stated that they would never vote to impose the death penalty.⁶⁰ Courts and commentators refer to veniremen who fall into one of these two categories as "*Witherspoon*-excludables."⁶¹

Witherspoon established the categories for including or excluding jurors according to their attitudes regarding the death penalty and laid the foundation for *Lockhart*. The first category of *Witherspoon*-excludables may never participate in jury duty in a capital case because by definition they do not meet the constitutional standard of impartiality. These jurors are called "nullifiers."⁶² The second category generates more controversy. Although these *Witherspoon*-excludables cannot participate in the sentencing phase of capital cases, both courts and commentators have asserted repeatedly that these jurors should be allowed to participate in the determination of guilt.⁶³ A "scrupled" juror has general reservations about the death penalty but acknowledges that death may serve as the appropriate punishment in some cases. The effects of such reservations may differ: the juror may employ a heightened standard of review in the guilt determination phase of the trial, or the juror may vote to impose the death penalty only on the most outrageous set of facts. *Witherspoon* establishes that as long as a scrupled juror can acknowledge some set of circumstances under which the death penalty is appropriate, he or she may not be excluded from the sentencing phase of the trial.⁶⁴

⁶⁰ *Id.* at 520 n.18.

⁶¹ *Lockhart*, 106 S. Ct. at 1761 n.1.

⁶² *Id.* at 1764.

⁶³ It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

Witherspoon, 391 U.S. at 514-15 n.7; see also *Grigsby v. Mabry*, 569 F. Supp. 1273, 1311, 1313 (E.D. Ark.), stay granted, 583 F. Supp. 629 (E.D. Ark. 1983), modified, 758 F.2d 226 (8th Cir. 1985) (en banc), rev'd sub nom. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986); W. WHITE, LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES 123 & n.234 (1984); Gillers, *Proving the Prejudice of Death-Qualified Juries After Adams v. Texas*, 47 U. PITT. L. REV. 219, 225-26 (1985) (asserting that careful voir dire procedure aimed at first class of *Witherspoon*-excludables may solve jury nullification problem, thereby implying that second class competent to judge the guilt issue); White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 399 (1980); Comment, *Capital Juries and the Fair Cross-Section Requirement: Modern Constitutional Reasoning in Jury Selection*, 73 KY. L.J. 1109, 1110 n.7 (1984-85).

⁶⁴ [Veniremen] cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties

Although the *Witherspoon* Court was silent on the issue, there are three conceivable bases for its finding of partiality. First, the Court may have viewed the exclusion of *any* scrupled jurors as a direct infringement⁶⁵ of the cross-section requirement because of the defendant's inherent right to the benefit of such views in jury deliberations. Alternatively, the Court may have considered the wholesale exclusion of more than half the venire as an indirect infringement of the cross-section requirement resulting from the severe loss of community input.⁶⁶ Finally, the Court may have viewed the imbalance in attitudes toward the death penalty as a collective form of partiality, individual qualifications of the jurors notwithstanding.

2. *Subsequent Decisions Under the Witherspoon Doctrine*

In *Adams v. Texas*⁶⁷ the Court refined the standard for exclusion of jurors in death penalty cases. The *Adams* Court examined a statute allowing the exclusion of veniremen from a petit jury unless those veniremen could state that the prospect of a mandatory death penalty would not affect their deliberations on any issue of fact.⁶⁸ In holding the statute unconstitutional, the Court found that to "exclude all jurors who would be in the slightest way affected by the prospect of the death penalty" would deprive the defendant of an impartial jury.⁶⁹ The Court stated that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent *or substantially impair* the performance of his duties as a juror in accordance with his instructions and his

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.

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

⁶⁵ A direct infringement occurs when an attorney sets out to exclude a particular group from the jury and the viewpoints and characteristics of that group are lost in jury deliberations. An indirect infringement may occur, even though no distinctive group is excluded, if the size of the venire is drastically reduced. As the size of the jury panel dwindles, it becomes less and less likely that the venire itself, much less the petit jury, will represent a cross section of the community. See *infra* note 131.

⁶⁶ Arguably, in view of *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), the Court should not even have invoked the sixth amendment in *Witherspoon*. See *supra* note 58. "[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Witherspoon*, 391 U.S. at 519. Justice Douglas openly spoke of a constitutional right to a jury drawn from an impartial cross section of the community. He ignored the fact that the Court had not applied the cross-section requirement to the states at that time. *Id.* at 524 (Douglas, J., concurring).

⁶⁷ 448 U.S. 38 (1980).

⁶⁸ *Id.* at 42.

⁶⁹ *Id.* at 50.

oath."⁷⁰ The *Adams* standard is more easily satisfied than the *Witherspoon* standard for two reasons: 1) no unequivocal statement by the prospective juror is required⁷¹ and 2) a subjective factor is introduced that allows exclusion based on "substantial impairment" of a juror's duties.⁷²

II.

LOCKHART V. MCCREE

The *Witherspoon* Court explicitly left open the question of whether death qualification of juries unconstitutionally prejudices the decision as to a defendant's guilt.⁷³ Social scientists responded with a number of statistical studies concluding that death qualification produces a jury that is more prosecution-minded or guilt-prone than a jury that includes *Witherspoon*-excludables.⁷⁴ Armed with these studies, defendants challenged their capital murder trial verdicts before various courts,⁷⁵ contending that the guilt-prone jury resulting from death qualification denied them their sixth amend-

⁷⁰ *Id.* at 45 (emphasis added).

⁷¹ See *supra* text accompanying note 60.

⁷² The Court in *Wainwright v. Witt* recognized the shift in standards. 469 U.S. 412 (1985). The *Wainwright* Court stated that it preferred the *Adams* standard and that the *Witherspoon* standard was only dicta. *Id.* at 422. The Court further held that the determination of inability to serve on a capital jury should be made by the trial judge and that this determination need not be stated unequivocally in the record, but is entitled to a presumption of correctness. *Id.* at 426-35.

⁷³ See *supra* note 59.

⁷⁴ See *Lockhart*, 106 S. Ct. at 1762-63 nn.4-6 (citing among others Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31 (1984)); Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.—C.L. L. REV. 53 (1970); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); W. Wilson, *Belief in Capital Punishment and Jury Performance* (1964) (unpublished manuscript); H. Zeisel, *Some Data on Juror Attitudes Toward Capital Punishment* (1968) (University of Chicago Law School Monograph).

⁷⁵ See, e.g., *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984) (exclusion in each of three cases of "some" persons because they would not consider returning the death penalty constitutional; exclusion of juror who said she was "not sure" if she could follow law not an abuse of discretion); *Corn v. Zant*, 708 F.2d 549, 564-65 (11th Cir. 1983) (exclusion of single juror who twice responded negatively when asked whether she could impose death penalty did not deny defendant right to trial by impartial and representative jury), *cert. denied*, 467 U.S. 1220 (1984); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981) (exclusion of two veniremen unequivocally opposed to death penalty did not violate defendants' constitutional rights), *modified on other grounds*, 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (exclusion of two veniremen unequivocally opposed to death penalty did not violate defendants' constitutional rights), *cert. denied*, 440 U.S. 976 (1979); *Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976) (exclusion of thirteen of sixty-four veniremen did not deny defendant fair trial; additional empirical evidence presented was inconclusive), *cert. denied*, 429 U.S. 1064 (1977).

ment right to an impartial jury drawn from a cross section of the community. In *Lockhart v. McCree*⁷⁶ the Supreme Court resolved the question left unanswered by *Witherspoon*.

A. The Proceedings

In 1978 Ardia McCree was convicted of capital felony murder in an Arkansas court.⁷⁷ The trial judge removed for cause eight prospective jurors who stated that under no circumstances could they vote to impose the death penalty.⁷⁸ The jury rejected the state's request for a death penalty and instead imposed life imprisonment.

After exhausting his appeals in state courts,⁷⁹ McCree filed a *habeas corpus* petition in federal court⁸⁰ claiming that the death qualification of the jury violated his right to an impartial jury selected from a representative cross section of the community.⁸¹ In essence, *McCree* claimed that a death-qualified jury is more likely to vote for the prosecution during the guilt phase.⁸²

⁷⁶ 106 S. Ct. 1758 (1986).

⁷⁷ *Id.* at 1761.

⁷⁸ *Id.*

⁷⁹ *McCree v. State*, 266 Ark. 465, 585 S.W.2d 938 (1979) (en banc)(conviction affirmed on direct appeal); *McCree v. State*, No. CA 78-227, (Ark. Ct. App. Nov. 17, 1980) (petition for state post-conviction relief denied).

⁸⁰ *Lockhart* at 1760. When a prisoner exhausts the appeals process in the state court system, he may appeal to the federal court in the district in which his trial was held. He must allege that a defect in his trial violated his constitutional rights and that he remains incarcerated in violation of the Constitution or laws or treaties of the United States. If the district court agrees, it issues a writ of *habeas corpus*, instructing the state either to retry the prisoner or free him. The federal court's decision may be appealed, first to the federal circuit court of appeals, and perhaps to the United States Supreme Court. See generally J. KAPLAN & R. WEISBERG, CRIMINAL LAW CASES AND MATERIALS 1104 (1986).

⁸¹ *Lockhart*, 106 S. Ct. at 1761. The balance of *McCree's habeas corpus* claims were rejected. *McCree v. Housewright*, No. PB-C-80-429 (E.D. Ark. Jan. 6, 1982), *aff'd*, 689 F.2d 797 (8th Cir. 1982), *cert. denied*, 460 U.S. 1088 (1983).

⁸² *Lockhart*, 106 S. Ct. at 1770 (Marshall, J., dissenting). The *habeas corpus* petitions of James T. Grigsby and Dewayne Hulsey were consolidated with *McCree's*. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1276-1277 (E.D. Ark.), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

The federal district court had tentatively concluded that Grigsby could not prevail on the cross-section claim but held that the state trial court should allow him an opportunity to make an evidentiary showing to support the claim. *Grigsby v. Mabry*, 483 F. Supp. 1372, 1388 (E.D. Ark.), *modified*, 637 F.2d 525 (8th Cir. 1980), *later proceeding*, *McCree v. Housewright*, 689 F.2d 797 (8th Cir. 1982), *cert. denied sub nom.* *McCree v. Lockhart*, 460 U.S. 1088 (1983). Both sides appealed. The appeals court ordered the district court, instead of the state court, to hold the evidentiary hearing and vacated the finding of the district court on the cross-section claim. *Grigsby v. Mabry*, 637 F.2d 525, 528-29 (8th Cir. 1980), *later proceeding*, *McCree v. Housewright*, 689 F.2d 797 (8th Cir. 1982), *cert. denied sub nom.* *McCree v. Lockhart*, 460 U.S. 1088 (1983). Grigsby's claim was then consolidated with those of Hulsey and *McCree*. *Grigsby*, 569 F. Supp. at 1288-93.

Grigsby died in his cell before the district court opinion was announced. *Grigsby*, 569 F. Supp. at 1276-77. Hulsey was prevented from raising the death-qualification issue

The court found that death-qualified juries are more likely to convict and concluded that McCree was unconstitutionally denied a jury representing a fair cross section of the community.⁸³ It therefore reversed McCree's conviction.⁸⁴ The Eighth Circuit affirmed in a five-to-four vote,⁸⁵ thereby creating a conflict with other federal circuits.⁸⁶ The Supreme Court granted certiorari to resolve the conflict.⁸⁷

B. The Supreme Court Majority Opinion

1. *Cross Section of the Community*

The Court rejected the Eighth Circuit's view of the cross-section requirement, stating that the cross-section requirement applies to venires but not to petit juries.⁸⁸ The majority reiterated *Taylor's* mandate that no fixed composition is required in a petit jury⁸⁹ and pointed out the practical impossibility of providing a truly representative petit jury to each defendant.⁹⁰ The Court noted, "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." ⁹¹

The Court further stated that even if it extended the cross-section requirement to petit juries, death qualification would not infringe on that requirement because *Witherspoon*-excludables do not constitute a distinctive group.⁹² The Court distinguished *Witherspoon*-excludables in two respects from distinctive groups identified in previous cases. First, the Court asserted that the legitimate state interest of having a single jury for both phases of a capital trial supports death qualification and does not skew the composition of capital juries.⁹³ Second, the Court noted that death qualification does not involve an attribute over which a juror has no control.⁹⁴ Thus, the Court contended that death qualification is consistent with the

because his attorney made no objection at the time the veniremen were excluded at trial. *Id.* The court ruled on the death-qualification issue on McCree's behalf. *Id.*

⁸³ *Grigsby*, 569 F. Supp. at 1277.

⁸⁴ *Id.* at 1324.

⁸⁵ *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

⁸⁶ *See supra* note 75.

⁸⁷ *Lockhart v. McCree*, 106 S. Ct. 59 (1985).

⁸⁸ *Lockhart v. McCree*, 106 S. Ct. 1758, 1764-65 (1986).

⁸⁹ *See supra* note 26 and accompanying text.

⁹⁰ *Lockhart*, 106 S. Ct. at 1765; *see infra* note 131.

⁹¹ *Lockhart*, 106 S. Ct. at 1765 (quoting *Pope v. United States*, 372 F.2d 710, 725 (8th Cir. 1967), *vacated on other grounds*, 392 U.S. 651 (1968)).

⁹² *Lockhart*, 106 S. Ct. at 1765.

⁹³ *Id.* at 1766.

⁹⁴ *Id.*

objectives of the cross-section requirement: guarding against the exercise of arbitrary power, preserving confidence in the criminal justice system, and ensuring the rights of disadvantaged groups to serve on juries.⁹⁵

2. *Impartiality*

Assuming *arguendo* that death qualification produces a more conviction-prone jury,⁹⁶ the majority denied that such a jury is partial. The Court maintained that constitutional impartiality requires only that each juror uphold the oath to apply the law conscientiously and find the facts.⁹⁷ It rejected a definition of partiality based on an attitudinal imbalance among jurors⁹⁸ as illogical because McCree conceded that an identical jury resulting from the "luck of the draw" would not violate the constitutional guarantee of impartiality. Furthermore, the Court feared that such a definition would lead to the hopelessly impractical task of balancing juries to reflect diverse lifestyles and viewpoints.⁹⁹

Rather than discuss the difference between the increased guilt-proneness of a death-qualified jury and the unconstitutional partiality that the *Witherspoon* Court found, the Court sought to distinguish *Lockhart* on its facts from *Witherspoon* and *Adams*, thereby restricting *Witherspoon's* precedential value.¹⁰⁰ The Court argued that *Witherspoon* and its progeny apply only to capital sentencing, where the jury has unfettered discretion.¹⁰¹ In contrast, the Court felt that the *Lockhart* jury, in finding facts and determining guilt or innocence, had much less discretion.¹⁰²

3. *The State Interest*

The majority's findings regarding the impartiality and cross-section requirements obviated a thorough analysis of state interests.¹⁰³ Nevertheless, the Court discussed one legitimate state inter-

⁹⁵ *Id.* at 1765.

⁹⁶ *Id.* at 1764-65; *see supra* note 4.

⁹⁷ *Lockhart*, 106 S. Ct. at 1767.

⁹⁸ *Id.* at 1770 ("In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints.").

⁹⁹ *Id.* at 1767.

¹⁰⁰ *Id.* at 1767-68.

¹⁰¹ *Id.* at 1769-70.

¹⁰² *Id.* at 1770.

¹⁰³ *Id.* at 1768. Because the Court's holdings on the threshold issues precluded the need to discuss the state interests more completely, one should not interpret the opinion as an exhaustive treatment of the state's interests. The interest in a single jury for both phases of the trial is not the only interest or even the strongest interest that the Court might have identified. This Note discusses state interests that the Court might

est in order to distinguish *Lockhart* from *Witherspoon* and *Adams*. The *Lockhart* Court regarded the unconstitutional jury selection systems in *Witherspoon* and *Adams* as employing needlessly broad rules of exclusion that lacked any neutral justification,¹⁰⁴ a deliberate attempt by the state to increase the likelihood of imposing the death penalty.¹⁰⁵ In *Lockhart*, by contrast, the exclusions were limited to those that were proper under *Witherspoon* and closely tailored to a legitimate state interest: the maintenance of a single jury able to decide both guilt and sentencing.¹⁰⁶

The Court argued that the legitimacy of this interest rested on three considerations. First, states justifiably desire that a single jury have unity of responsibility for both the guilt and sentencing phases of a trial. Second, a defendant might benefit in the sentencing phase from the jury's residual doubts as to his guilt. Finally, the Court found that requiring a second presentation of significant amounts of evidence unfairly burdens the state.¹⁰⁷

C. The Dissenting Opinion

1. *Witherspoon* Analysis

Justice Marshall, writing for the dissenters, chose to ignore McCree's cross-section claim¹⁰⁸ and instead focused on the contention that death qualification violated McCree's right to an impartial jury. Although he conceded that no individual juror fell short of the standard for impartiality,¹⁰⁹ Justice Marshall argued that the attitudinal imbalance or guilt-prone character of the jury amounted to an unconstitutional advantage for the prosecution under *Witherspoon*.¹¹⁰

2. *Purpose and Function Argument*

Justice Marshall argued alternatively that death qualification contravened the purpose and function of a jury.¹¹¹ He found that social science studies demonstrated that death-qualified juries "are likely to be deficient in the quality of their deliberations, the accuracy of their results, the degree to which they are prone to favor the

have considered if it had found any infringement of the sixth amendment guarantee. See *infra* section III(B).

¹⁰⁴ *Lockhart*, 106 S. Ct. at 1768-69.

¹⁰⁵ *Id.* at 1768.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1768-69.

¹⁰⁸ Justice Marshall dealt with the cross-section claim only in a footnote, arguing that the desired effect of the cross section does not take place within a venire, but only in a petit jury. *Id.* at 1775 n.6 (Marshall, J., dissenting).

¹⁰⁹ "Respondent does not claim that any individual on the jury that convicted him fell short of the constitutional standard for impartiality." *Id.* at 1775.

¹¹⁰ *Id.* at 1775-76.

¹¹¹ *Id.* at 1777-79.

prosecution, and the extent to which they adequately represent minority groups in the community."¹¹² He further noted that the Court previously found these effects unacceptable in *Ballew*.¹¹³

3. State Interest

In considering the legitimacy of the suggested state interest in *Lockhart*, Justice Marshall recast the reasoning of the majority into two rationales: efficient trial management and residual doubts.¹¹⁴ He dismissed the first rationale by focusing on the cost element, and stating that the costs of a completely bifurcated trial are not "prohibitive or even significant."¹¹⁵ He characterized the second justification as "offensive" because he perceived it as disingenuous reasoning by the Court. Justice Marshall considered the state's concern for the defendant specious unless the defendant could waive the potential benefits of residual doubts in exchange for a completely bifurcated trial.¹¹⁶ He noted that states routinely empanel a second jury to assess punishment when a defendant's sentence, but not his conviction, is overturned on appeal.¹¹⁷ Finally, Justice Marshall observed that the Court consistently had refused to grant certiorari in state cases holding that juries could not consider residual doubts in capital sentencing proceedings.¹¹⁸

III. ANALYSIS

In this section I discuss five aspects of the *Lockhart* opinion. First, I examine the validity of the Court's conclusion that death qualification does not infringe the defendant's right to an impartial jury drawn from a cross section of the community. Then I consider the minority argument that death qualification detrimentally affects the purpose and function of the jury, an argument to which the Court did not respond. Third, I consider the full range of state interests that would have been relevant had the Court reached the balancing test. Fourth, I describe the probable effects of *Lockhart* in

¹¹² *Id.* at 1778.

¹¹³ *Id.* at 1779 (citing *Ballew v. Georgia*, 435 U.S. 223 (1978) (five person jury too small to fulfill purpose and function of jury)).

¹¹⁴ "The only two reasons that the Court invokes to justify the State's use of a single jury are efficient trial management and concern that a defendant at his sentencing proceedings may be able to profit from 'residual doubts' troubling jurors who have sat through the guilt phase of his trial." *Id.* at 1780-81.

¹¹⁵ *Id.* at 1781.

¹¹⁶ *Id.* at 1781-82.

¹¹⁷ *Id.* at 1781.

¹¹⁸ *Id.*

capital murder trials. Finally, I evaluate the implications of the decision for future death penalty cases.

A. Preliminary Questions of Impartiality and Function

1. *Impartiality*

Whether death qualification introduces any jury partiality depends on the definition employed. In the majority's view, "an impartial *jury* consists of nothing more than '*jurors* who will conscientiously apply the law and find the facts.'"¹¹⁹ The majority¹²⁰ and the dissent¹²¹ acknowledged that every juror in *Lockhart* was so qualified. Therefore, no possibility of unconstitutional partiality existed in *Lockhart* if one focuses only on individual jurors.¹²²

McCree, however, urged a definition of impartiality that considers the tendencies of a jury in the aggregate.¹²³ In this view, the whole becomes less than the sum of its parts when individuals having certain attitudes are purged from the jury and are not present to balance the attitudes of those remaining. At least one reading of *Witherspoon* tends to support such a view of impartiality; if the Court was not anticipating the incorporation of the cross-section requirement, it might have found the *Witherspoon* jury unconstitutionally partial because of an attitudinal imbalance.¹²⁴ Under this view of impartiality, the assumption of guilt-proneness made by the *Lockhart* Court would compel a conclusion that the jury selection procedure introduced some degree of partiality.

The majority noted that if the lack of certain attitudes leads to partiality, then the absence of those attitudes resulting from "luck of the draw" also should be unconstitutional.¹²⁵ One can argue, however, that the unconstitutionality arises not from random imbalance but from state action that alters the random partiality in a manner that advantages the state.¹²⁶ As Justice Marshall pointed out, the

¹¹⁹ *Lockhart*, 106 S. Ct. at 1767 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985) (emphasis added by Court)).

¹²⁰ *Id.*

¹²¹ See *id.* at 1775 (Marshall, J., dissenting).

¹²² See *supra* note 12 for a list of traditional, previously recognized bases for partiality in a juror.

¹²³ *Lockhart*, 106 S. Ct. at 1775 (Marshall, J., dissenting).

¹²⁴ See *supra* notes 65-66 and accompanying text.

¹²⁵ *Lockhart*, 106 S. Ct. at 1767. It is not obvious that a court has the latitude to allow any partiality in any criminal prosecution, regardless of whether it occurs intentionally or by accident. Although the state would have a legitimate interest in avoiding an intricate task of balancing attitudes in a jury, this interest is not necessarily persuasive. As Justice Black said in his famous dissent dealing with first amendment rights, "I do not subscribe to [the balancing doctrine] for I believe . . . that the men who drafted our Bill of Rights did all the 'balancing' that was to be done . . ." *Konigsberg v. State Bar*, 366 U.S. 36, 61 (1961).

¹²⁶ This is a plausible reading of what the *Witherspoon* Court meant when it accused

same twelve jurors might have been randomly drawn in *Witherspoon*; it was the state action in excluding forty-seven of ninety-five veniremen that generated the potential problem.¹²⁷

2. Cross Section of the Community

The *Lockhart* Court correctly found that the right to a fair cross section of the community applies only to a venire, and not a petit jury. Although requirements for the venire clearly influence the makeup and workings of petit juries,¹²⁸ other considerations demonstrate that the cross-section requirement should not apply to a petit jury. First, the language of *Duren v. Missouri*¹²⁹ indicates that the cross-section requirement only applies to jury venires. To prove a cross-section violation, a defendant must show "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."¹³⁰ Second, from a statistical standpoint, a twelve-person jury cannot possibly reflect the same distribution of characteristics as the population from which it is drawn.¹³¹ Finally, exclusions for cause, exemptions from jury duty, and peremptory challenges at voir dire inevitably disrupt any semblance of a cross section that might result

the state of "stack[ing] the deck against the petitioner." *Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968).

¹²⁷ *Lockhart*, 106 S. Ct. at 1775-76 (Marshall, J., dissenting).

¹²⁸ "The right to have a particular group represented on venires is of absolutely no value if every member of that group will automatically be excluded from service as soon as he is found to be a member of that group." *Id.* at 1775 n.6.

¹²⁹ 439 U.S. 357 (1978).

¹³⁰ *Id.* at 364 (emphasis added); see *supra* notes 26-27 and accompanying text.

¹³¹ In statistical parlance, the people living in a given community in which the crime is committed would be known as a population. The various descriptive characteristics of these people, such as age, income level, and varying degrees of skepticism or receptivity to a given idea, would be distributed in some pattern about the mean value for each characteristic. Both the venire and the petit jury represent samples drawn from the population.

Although the Court fails to explicitly define the term "cross section," a statistically meaningful interpretation is that the distribution of values for each characteristic in the sample resembles that of the overall population. Assume that a given characteristic, income level for example, is normally distributed in the population. One can determine the sample size required to predict within a given statistical confidence level that the sample's mean income will be within a given dollar figure of the mean income of the population.

from the random selection of a petit jury.¹³² Moreover, because application of the cross-section requirement to the venire fulfills the requirement's purposes, no reason exists to extend the cross-section requirement to the petit jury. The inclusion of large distinctive groups in the venire satisfies the objective of hedging against the arbitrary power of the state.¹³³ The prosecutor must prepare a case for presentation to a broadly representative jury because he cannot control completely the selection process or assume any predisposition on the part of the jury. The application of the cross-section requirement to the venire also adequately upholds egalitarian values of full citizenship.¹³⁴ Fulfilling these two objectives should maintain

The following equation shows this relationship:

$$n = \frac{(Z(c/2))^2 \sigma^2}{L^2}$$

where:

n = sample size

Z(c/2) = distance from the mean for a standard normal distribution curve that includes some fraction "c" of the total probability (also represents statistical confidence level)

σ = standard deviation of the population, a measure of the variability about the mean of the variable in question

L = maximum desired interval between population and sample means

See generally T. DYCKMAN & L. THOMAS, FUNDAMENTAL STATISTICS FOR BUSINESS AND ECONOMICS 352-55 (1977).

Suppose the mean income level for the county is \$15,000 with a standard deviation of \$4,500. Using a normal distribution, this would mean that 99% of the incomes in the county would fall between \$1,500 and \$28,500. To be 90% certain that the mean income of the sample would be within \$1,500 (10%) of the mean income of the county (a rather modest expectation) requires a sample of approximately 25 persons. This is determined by the following calculation:

$$C = .90, Z(c/2) = Z(0.45) = 1.645, L = 1500,$$

$$\sigma = 4500$$

$$n = \frac{(1.645)^2 (4500)^2}{(1500)^2} = 24.3 \text{ or } 25$$

Clearly, the required sample size for any statistically meaningful notion of cross-section could not be achieved in a twelve member petit jury, although it could be achieved in the venire. Of course, considerations such as the level of skepticism to an idea are more relevant to a jury's deliberation than income levels, and there is no reason to believe that these will be normally distributed in the population.

Thus the notion that juries represent the community is valid only when the process is viewed over several trials. However, from a statistical standpoint, diffused impartiality exists in the venires, and case-specific impartiality results from the legal process of exclusion to obtain a petit jury.

¹³² See *infra* notes 171-85 and accompanying text.

¹³³ See *supra* text accompanying note 24.

¹³⁴ See *supra* notes 16-18 and accompanying text.

public confidence in the criminal justice system.¹³⁵

Thus, death qualification does not infringe on the cross-section requirement because the Court properly limited the applicability of the requirement to venirees. However, if the Court had extended the cross-section requirement to petit juries, one could argue that *Witherspoon*-excludables constitute a distinctive group and that death qualification would infringe on the expanded cross-section requirement. The *Taylor* Court stated that cross-section requirements are supported by a combination of a defendant's rights to dispersed impartiality and societal interests in full citizenship.¹³⁶ The *Lockhart* Court obviously focused on citizenship interests to limit the possibilities for defining a distinctive group. It listed "civic responsibility" as a full-fledged objective of the cross-section requirement.¹³⁷ The majority argued that groups defined solely by shared attitudes differ from the distinctive groups that the Court had recognized in the past.¹³⁸ The chief difference between *Witherspoon*-excludables and traditional distinctive groups is that exclusion of the former implies no general infringement of citizenship rights or democratic values.¹³⁹

The policy decision that the Court made with respect to distinctive groups is legitimate, but not self-evident or inevitable. The Court might just as reasonably have emphasized defendants' interests more strongly by finding that *Witherspoon*-excludables are a distinctive group.

Several factors support such a determination. First, the characteristics of the group excluded by death qualification comports with two objectives underlying the cross-section requirement.¹⁴⁰ The inclusion of a group that is skeptical toward the prosecution's case

¹³⁵ See *infra* note 137.

¹³⁶ See *supra* note 14.

¹³⁷ The Court listed the objectives of the cross-section requirement as 1) guarding against the exercise of arbitrary power and ensuring that the common sense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor; 2) preserving public confidence in the fairness of the criminal justice system; and 3) implementing our belief that sharing in the administration of justice is a phase of civic responsibility. *Lockhart*, 106 S. Ct. at 1765. Justice Rehnquist's list elevated the *Taylor* dicta concerning "civic responsibility" to the level of a third factor in determining the existence of distinctive groups. *Taylor* explicitly lists only two functions of a jury, which are implicated in the cross-section requirement. See *supra* text accompanying note 24.

¹³⁸ *Lockhart*, 106 S. Ct. at 1765-66; see *supra* notes 16-18 & 21 and accompanying text.

¹³⁹ Justice Rehnquist emphasized this point when he stated that death qualification is not exclusion based on an immutable characteristic or unrelated to the ability of these individuals to serve. He noted that death qualification does not prevent *Witherspoon*-excludables from serving as jurors in other criminal cases. *Lockhart*, 106 S. Ct. at 1765-66.

¹⁴⁰ *Id.* at 1765; see *supra* note 137. These are the two original requirements established by the Court in *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); see *supra* text accompanying note 24.

more effectively hedges against an overzealous prosecutor or the exercise of arbitrary power.¹⁴¹ Also, exclusion of such a group undermines the public confidence in the criminal justice system if people perceive that such exclusion creates an unfair advantage for the state.¹⁴²

Second, one purpose of the cross-section requirement has always been to ensure that certain attitude patterns are not excluded from a jury. Indeed, both the *Taylor*¹⁴³ and *Duren*¹⁴⁴ Courts sought to ensure the inclusion of women's attitude patterns. Although cases involving exclusion of women, blacks, and Mexican-Americans had equal protection overtones, most of these cases also involved claims of the defendant's right to a representative jury.¹⁴⁵ The main benefit that a defendant gains by the inclusion of any group in the jury is the resulting difference in attitude toward the defendant and toward the prosecution's case.

Finally, the empirical studies before the Court contended that death qualification falls disproportionately on blacks and women.¹⁴⁶ If true,¹⁴⁷ death qualification infringes on the right of these groups

¹⁴¹ "Death-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions." *Lockhart*, 106 S. Ct. at 1772 (Marshall, J., dissenting).

¹⁴² The majority admitted that exclusion on the basis of some immutable characteristic gives rise to an appearance of unfairness, implying that death qualification would not create an impression of unfairness because it is directly related to a juror's ability to serve. *Id.* at 1766. If death qualification were seen as a device for "stacking the deck" against defendants, however, an appearance of unfairness could still result. The inclusion of *Witherspoon*-excludables could also undermine public confidence in the criminal justice system, however, if it is perceived as a device for undermining death penalty laws favored by a large segment of the population. See *infra* notes 187-96 and accompanying text.

¹⁴³ *Taylor*, 419 U.S. at 531-32.

¹⁴⁴ *Duren v. Missouri*, 439 U.S. 357, 372 (unnumbered footnote) (1978) (Rehnquist, J., dissenting) (summarizing Court's position).

¹⁴⁵ See cases cited *supra* notes 16-19 & 21. In all of the cited cases, defendants sought to overturn their convictions based on the composition of their juries. Injunctive relief is also available to the excluded parties. See, e.g., *Carter v. Jury Commission*, 396 U.S. 320 (1970).

¹⁴⁶ *Lockhart*, 106 S. Ct. at 1779 (Marshall, J., dissenting); see also *Grigsby v. Mabry*, 569 F. Supp. 1273, 1279 n.3, 1283 (E.D. Ark.), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

¹⁴⁷ The Court did not accept this contention as part of its assumption, see *supra* note 4, so it might require proof by empirical evidence. However, the assertion is consistent with the general attitude patterns of these groups regarding the death penalty. As of 1985, women favored the death penalty by a margin of 67% to 24%; men favored it by a margin of 78% to 16%. The discrepancy between blacks and whites is even more pronounced. Blacks favored the death penalty by a margin of only 57% to 35%, as compared to whites who favored it 75% to 18%. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1985 178 (1986) [hereinafter SOURCEBOOK].

to participate in the jury process and the right of capital defendants to have the views of these groups represented on the jury. These groups might fulfill the distinctive group requirement the Court considered absent.

3. *Purpose and Function*

The dissent argued that the statistical studies on death qualification presented in *Lockhart*¹⁴⁸ raise many of the same concerns raised by a reduction in jury size:¹⁴⁹ inaccurate decisionmaking, inconsistent verdicts, and ineffective representation of the community.¹⁵⁰ The question is whether the negative impacts of death qualification on jury deliberation are as significant as those caused by a five-person jury.

The analogy between reductions in jury size and death qualification has serious difficulties. First, the *Lockhart* Court only assumed the statistical conclusion regarding the conviction-proneness of death-qualified juries.¹⁵¹ The Court would need to examine the methodological and statistical bases of this contention. Second, the *Ballew* Court's analysis regarding the unconstitutionality of a five-person jury does not apply in other situations.¹⁵² The *Ballew* Court neither weighted the factors enumerated nor provided any scheme for assessing those factors in any other factual situations. In holding

¹⁴⁸ *Lockhart*, 106 S. Ct. at 1770 (Marshall, J., dissenting).

¹⁴⁹ See *Ballew v. Georgia*, 435 U.S. 223 (1978).

¹⁵⁰ *Lockhart*, 106 S. Ct. at 1778-79 (Marshall, J., dissenting); see *supra* text accompanying notes 111-13.

¹⁵¹ See *supra* note 4. The statistical conclusions pertaining to Marshall's *Ballew* analysis do not appear in every study cited by McCree. The conclusions Marshall employed are peripheral findings raised in one or two studies. *Lockhart*, 106 S. Ct. at 1778 (Marshall, J., dissenting). Although all the studies conclude that death-qualified juries are more guilt-prone, only the Fitzgerald & Ellsworth and Cowan, Thompson & Ellsworth studies, *supra* note 74, explore the question of juror biases resulting from the cluster of attitudes noted by Marshall. Only the Cowan, Thompson & Ellsworth study deals with the recall of evidence and the rigor with which the evidence is tested. Cowan, Thompson & Ellsworth, *supra* note 74, at 75-76. Only two studies provide evidence of the disproportionate impact on blacks and women. See White, *supra* note 63, at 387-89 (cited by Marshall as support for this contention). Such limited evidence is hardly conclusive.

¹⁵² Justice Blackmun, the author of the plurality opinion in *Ballew*, concurred without comment in the *Lockhart* result. *Lockhart*, 106 S. Ct. at 1770. Presumably, if the *Ballew* analysis properly applied to this case Blackmun would have been discussed it. Furthermore, in the eight years since the *Ballew* decision, the analytical framework of *Ballew* was employed only once before Marshall's dissent in *Lockhart*. This was in the very closely related case of *Brown v. Louisiana*, 447 U.S. 323, 331 (1980), which involved a non-unanimous verdict of a six man jury. The essential logic of the *Brown* decision is that the sixth man added nothing to remove the taint described in *Ballew*, because the sixth man disagreed with the other five. The Court cited the *Ballew* case only 12 times before *Lockhart*, mostly for its holding regarding scienter. Such a pattern does not reveal an intent by the Court to use *Ballew* as a general precedent with widespread implications.

unconstitutional the combined effect of all the factors present, the *Ballew* Court drew a necessary line.¹⁵³ Although *Ballew* produced a correct result, the analysis employed there does not extend beyond the narrow factual context of the case.¹⁵⁴

The general conclusion drawn from *Ballew* is that only the most extreme practices of jury formulation interfere with the jury's purpose and function. Prior to *Ballew*, the Court allowed the states to reduce the size of the jury to six persons;¹⁵⁵ this decrease certainly affects the representativeness of the jury and its group dynamics. However, only when Georgia attempted a further reduction did the Court decide that the cumulative effects on the jury were unconstitutional.¹⁵⁶ In the most recent death-qualification cases, the number of jurors excluded has been relatively small compared to the venire size.¹⁵⁷ Therefore, the effects of death qualification are too insignificant to render it unconstitutional under the *Ballew* Court's analysis.

B. The State's Interest

1. *The Majority Argument*

The Court confined its analysis to the state interest in obtaining a single jury that can impartially decide both guilt and penalty in a capital case.¹⁵⁸ This interest encompasses administrative advantages, unity of responsibility in a jury, and the possible benefit of residual doubts.¹⁵⁹ These reasons arguably do not provide the substantial state interest necessary to justify an infringement of a constitutional right. If the Court had ruled for McCree, the state would have been compelled to conduct the guilt determination and the penalty phase of some death penalty trials with two distinct groups of jurors. Arguments based on administrative difficulties are unpersuasive¹⁶⁰ because no one has shown that such a bifurcated system is

¹⁵³ "[T]he line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved." *Ballew*, 435 U.S. at 245-46 (Powell, J., concurring in the judgment).

¹⁵⁴ "[I]t would be foolish to assume that the [*Ballew*] majority's mode of analysis, undoubtedly shaped to some extent by the special characteristics of the issue before it, can be easily applied to other situations in which proof of an empirical proposition may have constitutional significance." W. WHITE, *supra* note 63, at 113.

¹⁵⁵ *Williams v. Florida*, 399 U.S. 78 (1970).

¹⁵⁶ *Ballew v. Georgia*, 435 U.S. 223 (1978).

¹⁵⁷ See *supra* note 75.

¹⁵⁸ *Lockhart*, 106 S. Ct. at 1766.

¹⁵⁹ *Id.* at 1768-69.

¹⁶⁰ If the state had to present all or substantially all the evidence to a second jury, however, an interesting possibility arises. Could the second jury decide that the defendant was not guilty and therefore refuse to impose any sentence? If so, what happens then? Is a third jury empaneled for the purpose of passing sentence, or is the entire trial repeated?

either unworkable or unduly costly.¹⁶¹

The Court accepted the state's argument that a single jury should have responsibility for both the guilt and the penalty phases because the two questions are interwoven.¹⁶² The Court also felt that a division of responsibility between two groups would dilute accountability and disadvantage the accused.¹⁶³ Some jurors may be more guilt-prone if another group is responsible for the sentencing.¹⁶⁴ However, the countervailing tendencies of the *Witherspoon*-excludables, who are less guilt-prone, would also be present. The combination of these factors would have an uncertain net effect on a defendant's position when compared with the present unitary system.

The Court also argued that during sentencing a defendant might benefit from the jurors' "residual doubts" concerning his guilt, even though those jurors have pronounced him guilty.¹⁶⁵ This benefit disappears if a new jury imposes the penalty. The prosecution, however, must prove each element of its case beyond a reasonable doubt,¹⁶⁶ and it is difficult to say whether the residue of unreasonable doubts ever accumulates into a refusal to impose capital punishment. Even acknowledging the possibility of residual doubts, the state could reduce the importance of residual doubts in a bifurcated system.¹⁶⁷ For example, the number of individuals common to both juries and the completeness of the evidence presented to the penalty jury would affect the impact on the defendant.

2. Commonly Accepted Jury Selection Procedures

The state has a stronger interest in upholding the policies and

¹⁶¹ The Eighth Circuit suggested that the Court could qualify an alternate juror for each *Witherspoon*-excludable juror. Both jury and alternates would sit in the trial during the guilt phase. If the defendant is convicted of a capital offense, the alternates would merely replace the *Witherspoon*-excludables in the penalty determination. See Grigsby v. Mabry, 758 F.2d 226, 243 (8th Cir. 1985) (en banc), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). Other possibilities for avoiding duplication of effort include empaneling a second death-qualified jury at the start of every trial, *Lockhart*, 106 S. Ct. at 1781 (Marshall, J., dissenting); stipulated summaries of prior evidence, *id.*; and videotaping the guilt phase of the proceeding and showing material portions of this videotape to the new penalty jury, W. WHITE, *supra* note 63, at 124.

¹⁶² *Lockhart*, 106 S. Ct. at 1768.

¹⁶³ See Grigsby v. Mabry, 758 F.2d at 247 (Gibson, J., dissenting).

¹⁶⁴ "When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty." *Id.*

¹⁶⁵ *Lockhart*, 106 S. Ct. at 1769.

¹⁶⁶ *In re Winship*, 397 U.S. 358 (1970).

¹⁶⁷ The alternate juror method discussed *supra* note 161 would not hinder the effects of residual doubts.

objectives of ordinary jury selection procedures in criminal trials. Holding death qualification unconstitutional would threaten the use of both peremptory challenges and occupational exemptions. Peremptory challenges, occupational exemptions from jury duty, and death qualification all change the otherwise random composition of the petit jury. Under the analytical framework of the *Lockhart* dissent, this alteration could amount to unconstitutional state action if the excluded group possessed a demonstrable coherence of attitudes.¹⁶⁸ Under the dissent's cross-section analysis, this coherence of attitudes could define a distinctive group protected from exclusion. Under the dissent's impartiality analysis, the Court could find unconstitutional jury partiality if the attitudes of those excluded or excused were more favorable to the defendant than those of the resulting jury.

A prosecutor's peremptory challenges,¹⁶⁹ in the very nature of the practice, would alter the attitude pattern of the jury in favor of the prosecution.¹⁷⁰ There is no material difference between removing a *Witherspoon*-excludable for cause or by peremptory challenge.¹⁷¹ Either way, the prosecutor removes a juror that may be

¹⁶⁸ *Lockhart*, 106 S. Ct. at 1778-79 (Marshall, J., dissenting).

¹⁶⁹ "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

¹⁷⁰ "The peremptory [challenge] is employed by each party to eliminate those individuals most likely to be hostile whose prejudice cannot be proved to the judge's satisfaction." Note, *Peremptory Challenges and the Meaning of Jury Representation*, 89 YALE L.J. 1177, 1180 (1980).

¹⁷¹ To get some feel for the number of peremptories needed to purge completely a 12-person jury of *Witherspoon*-excludables, assume (based on the data in *infra* note 193) that *Witherspoon*-excludables constitute about 15% of the venire. The prosecutor wants a jury of 12 with no *Witherspoon*-excludables. If a *Witherspoon*-excludable is selected, the prosecutor may exercise a peremptory. The exact calculation of the probability of obtaining a jury with no *Witherspoon*-excludables by using a given number of peremptories is mathematically complex. A reasonable approximation may be obtained, however, by considering a randomly selected group of 16 veniremen, from which a 12-person jury is to be chosen. The probability (p) that the group of 16 contains a given number of *Witherspoon*-excludables is readily calculable.

Given n trials of a process which can have only one of two outcomes, the probability of exactly x successes is given by

$$b(x; n, p) = \frac{n!}{x!(n-x)!} p^x (1-p)^{n-x}$$

where:

n = number of trials

x = number of successes

p = probability of a success on a single trial.

See T. DYCKMAN & L. THOMAS, *supra* note 131, at 243. Thus, the probability of obtaining a jury containing a given number of *Witherspoon*-excludables (WE's) is as follows:

unsympathetic to the prosecution's case.¹⁷² The logic of the *Lockhart* dissent could lead to the elimination of peremptory challenges in capital murder trials. However, peremptory challenges have a time-honored place in trial practice¹⁷³ and actually further jury impartiality.¹⁷⁴ Their elimination in pursuit of another form of impartiality involves a tradeoff that is difficult to assess.

Occupational exemptions¹⁷⁵ similarly may alter collective attitude patterns in a jury, depending upon the statistical correlation of

p (zero WE's)	= .0742	p (three WE's)	= .2285
p (one WE)	= .2097	p (four WE's)	= .1311
p (two WE's)	= .2774		

and p (four or fewer WE's) = .9209 (the sum of all the above figures).

Thus, even four peremptories will give a prosecutor better than a 90% chance of obtaining a death-qualified-equivalent jury, given the current distribution of attitudes in the general population. This is not a significant burden on the prosecution's peremptories. Under federal rules, followed in some states, each side has 20 peremptories in capital cases. FED. R. CRIM. P. 24(b).

¹⁷² Any effort to allow the peremptories, but restrict their use to exclude *Witherspoon*-excludables, would be futile. Prospective jurors must be questioned about their attitudes toward the death penalty to determine if they are nullifiers. Once the attitude of a venireman towards the death penalty is revealed, a prosecutor could find another facially neutral reason to exclude the juror. *Batson v. Kentucky*, 106 S. Ct. 1712, 1728 (1986) (Marshall, J., concurring).

¹⁷³ For a discussion of the history of peremptory challenges from their earliest beginnings in English law, see *Swain v. Alabama*, 380 U.S. 202, 212-20 (1965).

¹⁷⁴ Peremptory challenges legitimately facilitate the efforts of both sides to achieve the constitutional guarantee of impartiality in a jury. Its justifications are threefold. First, it allows an attorney to act on an impression or conviction that a juror is biased which arises from looks, gestures, or something else in the demeanor of the venireman. *Id.* at 220. These impressions usually would not fall within legally cognizable grounds for cause. Without peremptory challenges, a defendant would have no choice but to accept a juror who had been scowling at him if his attorney's questions could not discover a basis for cause. Second, the very process of questioning a juror to discover cause can generate resentment in that juror, which is readily perceived but not easily proven. *Id.* Third, Chief Justice Burger quoted with approval the following statement:

The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes. . . . [I]t is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases. But to allow this knowledge to be expressed in the evaluative terms necessary for challenges for cause would undercut our desire for a society in which all people are judged as individuals and in which each is held reasonable. . . . [W]e have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say but know is true more often than not.

Batson, 106 S. Ct. at 1735-36 (Burger, C.J., dissenting) (quoting *Babcock, Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 553-54 (1975)).

¹⁷⁵ The system used by the State of Missouri in *Duren* is one example. "[T]he following are exempted from jury service upon request: persons over age 65, medical doctors, clergy, teachers, . . . 'any person whose absence from his regular place of employment would, in the judgment of the court, tend materially and adversely to affect the public safety, health, welfare or interest'" *Duren v. Missouri*, 439 U.S. 357, 361 n.10 (1978) (quoting MO. REV. STAT. § 494.031 (Supp. 1978) regulating jury selection).

attitudes within professions. The *Duren* Court found automatic exemptions for women unacceptable because women possess viewpoints and attitudes that could not be excluded from a jury.¹⁷⁶ In *Lockhart* the defendant argued that opposition to the death penalty correlated to many other attitudes favorable to his case that could not be excluded from a jury by the process of death qualification.¹⁷⁷ A statistical demonstration that employment in certain professions correlated with attitudes favorable to a defendant¹⁷⁸ would make an automatic exemption for such professions as unconstitutional as the exemption for women in *Duren*.

Although the *Duren* Court indicated that occupational exemptions would survive constitutional scrutiny,¹⁷⁹ it also stated that the

¹⁷⁶ The Court noted that only two states had maintained an automatic exemption for women and stated that such systematic exclusion violated the fair cross-section requirement. *Id.* at 359-60.

¹⁷⁷ See *supra* note 141. "McCree contends that, by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage at his trial." *Lockhart*, 106 S. Ct. at 1775 (Marshall, J., dissenting).

¹⁷⁸ Sympathy with a defendant's case may be correlated with educational level or profession. Most college-educated professionals can obtain professional exemptions. The following passage illustrates some of the correlations between professions and juror attitudes that defense attorneys might allege:

An area most reliably interpreted is that of a man's work. Businessmen, particularly shop owners and bankers, invariably good defense jurors in civil cases, in the criminal courts often show prosecution bias, especially in instances of crime against property. People in "liberal arts" fields such as teaching, or in the helping professions (nurses, social workers), are usually willing to look past the hard facts and into mitigating circumstances associated with them, and thus may be well-attuned to defense arguments.

An overriding consideration, however, when evaluating prospective jurors by occupation, is the vocational identities of key witnesses and litigants themselves. Workers in the same field usually "talk the same language"; a "hard hat" juror is likely to be attuned and sympathetic to a "hard hat" witness, and a geneticist to another geneticist, regardless of which side his testimony may fall.

Individuals whose occupations involve fine, detailed work, and who, in the criminal court, respond better to the orderly laying down, piece by piece, of the prosecutor's evidence than to the defense attorney's broad brush work, will also tend to focus on the inevitable flaws in the plaintiff's case, rather than see it in the overview. Accountants and "engineering types" particularly will be preoccupied with cognitive detail and are proportionately insensitive to the human/emotional factors. Retired military men have a strong authority/law-and-order bias, identify with the state in criminal cases, and can be relied upon in personal injury litigation to be strict, ungenerous and impatient with free-wheeling, emotional plaintiff attorneys. Athletes also tend to lack sympathy for the fragile plaintiff. Cabbies, by contrast, are generally good plaintiff jurors, although they have an abiding dislike of pedestrians, injured or not.

Blinder, *Picking Juries*, 1 TRIAL DIPL. J. 8, 9 (1978). See generally M. BLINDER, PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW (2d ed. 1982).

¹⁷⁹ "[M]ost occupational and other reasonable exemptions [are not of sufficient magnitude and distinctiveness to violate the cross-section requirement]. We also repeat the

omission of a group of sufficient size and distinctiveness could violate the Constitution.¹⁸⁰ Justice Rehnquist argued in dissent that the juxtaposition of these two statements posed a dilemma for district attorneys wishing to avoid reversal and predicted it would lead to the abandonment of occupational exemptions.¹⁸¹ If the *Lockhart* Court had defined attitudes as a measure of distinctiveness,¹⁸² then Justice Rehnquist's fears might have materialized.¹⁸³

Occupational exemptions protect a community's interest and minimize the burdens of jury duty to private citizens.¹⁸⁴ There is a temptation to minimize the importance of the cost of jury duty to private citizens when compared to the interest a defendant has at stake in a capital murder trial. If forcing jury duty on a professional person yields a hostile and sullen juror, however, jury impartiality may be compromised.¹⁸⁵

observation made in *Taylor* that it is unlikely that reasonable exemptions, such as those based on special hardship, incapacity or *community needs*, 'would pose substantial threats that the remaining pool of jurors would not be representative of the community.'" *Duren*, 439 U.S. at 370 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975)) (emphasis added); see also *Taylor*, 419 U.S. at 534 ("The States are free to grant exemptions from jury service . . . to those engaged in particular occupations the uninterrupted performance of which is critical to the community's welfare." (citing *Rawlins v. Georgia*, 201 U.S. 638 (1906))).

¹⁸⁰ *Duren*, 439 U.S. at 370.

¹⁸¹ *Id.* at 377 (Rehnquist, J., dissenting).

¹⁸² See *supra* text accompanying note 112.

¹⁸³ See *Sweet v. United States*, 449 A.2d 315 (D.C. 1982) (cross-section challenge on the issue of occupational exemptions). In *Sweet*, the court found that there was underrepresentation of six occupations due to the systematic exclusion of persons in those occupations from jury service. The court held that the distinctive group prong was not met, however, because the evidence failed to show a cohesiveness of attitude or a community of interests not represented by others in society. An array of statistical studies establishing an occupational "cohesiveness of attitude" insufficiently represented by others, see *supra* note 178, presumably could satisfy the distinctive group prong had *Lockhart* been decided differently.

¹⁸⁴ The purposes of occupational exemptions are at least two-fold. The *Taylor* Court referred to the first purpose: there are certain professions "the uninterrupted performance of which is critical to the community's welfare." *Taylor*, 419 U.S. at 534; see *supra* note 179. The second is expressed in a federal statute that sets the standard for occupational exemptions in the federal district courts. 28 U.S.C. § 1863(b)(5) (1982). The statute requires a finding by the district court that jury service by the occupational or other group would entail "undue hardship or extreme inconvenience to the members thereof . . ." *Id.* The House report on the act lists doctors, ministers, sole proprietors of businesses, and mothers with young children as probably satisfying this requirement. H.R. REP. NO. 1076, 90th Cong., 2d Sess. 11, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 1792, 1800. In *United States v. Goodlow*, 597 F.2d 159 (9th Cir. 1979), the court extended the exemption to teachers, attorneys, pharmacists, nurses, and dentists on the basis that "members of all of these occupational groups may have difficulty finding adequate temporary substitutes when they leave their work or their practices, or may incur extra work or financial losses even if substitutes are obtained." *Id.* at 161.

¹⁸⁵ Presumably the "undue hardship or extreme inconvenience" criteria, see *supra* note 184, would require evaluation on an individual basis. It is unlikely that kidney transplant specialists would be compelled to serve as jurors, even in the special situation

On the other hand, the elimination of peremptory challenges and professional exemptions perhaps could be limited to capital murder cases, where the full voice of the community is especially needed. Some members of the Court advocate the abolition of peremptory challenges altogether.¹⁸⁶ In addition, some merit exists in the notion that everyone should shoulder the civic responsibility of jury duty regardless of their occupation.

3. *Preserving the Integrity of State Law*

The strongest interest that a state could offer is maintaining the integrity and viability of its death penalty laws. The Court in both *Adams* and *Wainwright* held that the state may pursue this interest by requiring jurors to apply the law as charged by the court.¹⁸⁷ The Court has stated that excluding a juror is permissible if his or her views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."¹⁸⁸

To apply the law as charged, a juror must be able to vote guilty in a case that may result in the imposition of the death penalty. A person who so adamantly opposes the death penalty that he or she could not vote to impose it under any circumstances usually has made a moral determination that it is morally wrong for the state to put a person to death.¹⁸⁹ Such a person would have to lay aside such a moral imperative and participate in a process that could re-

of a capital murder trial. Rather, the court would have to make rulings that individual doctors or sole proprietors were not so important that they could not be spared from their ordinary pursuits. Such a ruling will certainly upset some people because it conflicts with their own self-perception. Whether the resentment that results is directed at the state or the defendant, there is a danger that it would affect the impartiality of the juror. The resentment would increase in proportion to a person's own sense of self-importance, which may be greater in a professional person than in an hourly wage worker.

¹⁸⁶ "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely." *Batson v. Kentucky*, 106 S. Ct. 1712, 1726 (1986) (Marshall, J., concurring); see also *Swain v. Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting) ("Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.").

¹⁸⁷ "The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Wainwright v. Witt*, 105 S. Ct. 844, 850 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

¹⁸⁸ *Id.*

¹⁸⁹ "Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul-searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral." *Witherspoon v. Illinois*, 391 U.S. 510, 537 (1968) (Black, J., dissenting).

sult in a person's death.¹⁹⁰ If the evidence showed guilt beyond a reasonable doubt, a *Witherspoon*-excludable would face two highly undesirable alternatives. If he votes not guilty and hangs the jury, he must go against his oath and his own sense of truth. Yet, if he votes guilty, the resulting process could lead to the imposition of the death penalty, which he considers abhorrent. The fact that someone else might impose the death penalty does not change the fact that a *Witherspoon*-excludable would first have to vote guilty.¹⁹¹ If the juror votes not guilty, his views have prevented the performance of his duties in accordance with the instructions. At a minimum, the dilemma substantially impairs the juror's ability to perform his duties.¹⁹²

¹⁹⁰ See *supra* note 63.

¹⁹¹ *Spinkellink v. Wainwright*, 578 F.2d 582, 595 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). A purist might argue that anyone who faced such a moral dilemma would admit that he could not judge guilt impartially and remove himself from the jury. There are two flaws with this argument. First, the argument may prove too much. Available empirical studies may not reliably indicate how many people could insist on never imposing the death penalty and yet could be impartial in a guilt determination made "in the shadow of the gallows." This group might be very small or conceivably nonexistent. See Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 11 n.42 (1970) (of 65 subjects "strongly opposed" to capital punishment, only 49.2% expressed disapproval of hypothetical juror behaving as nullifier when nullifier convinced defendant was guilty). If nullifiers automatically eliminate themselves at voir dire, then *Lockhart* will have little effect on jury composition.

Second, the argument ignores the tendency of human beings to underestimate the magnitude of such a dilemma until faced with it. Essentially, one must decide at some point that a venireman's representations of impartiality are suspect. For this reason, the court will not allow relatives or friends of the defendant to sit on juries, despite the fact that some of them might be capable of impartiality. Similarly, the state's interest in an impartial jury and the evenhanded application of its death penalty laws, see *infra* notes 192-96 and accompanying text, is too fundamental to risk by the inclusion of *Witherspoon*-excludables. *Spinkellink*, 578 F.2d at 596.

¹⁹² A basic tension exists between the view of the jury as an expression of the conscience of the community, see *Witherspoon*, 391 U.S. at 519 (Douglas, J., concurring), and the view of the jury as an enforcer of the law. This tension goes to the heart of the *Lockhart* debate. See Note, *Excluding Death Penalty Opponents from Capital Juries: Witt, Witherspoon and the Impartial Juror*, 34 U. KAN. L. REV. 149, 170-71 (1985). Some authors imply that the function of representing community values should be preferred, even to the point of defeating the law which is to be applied. See, e.g., W. WHITE, *supra* note 63, at 145 n.224. In this view, one of the legitimate functions of the jury is to inject an element of lawlessness as a means of superimposing the full conscience of the community on the law, perhaps as a means of effecting change in the law.

The opposing view emphasizes the jury's duty to enforce the law as it exists. "A verdict on the evidence, however, is all an accused can claim; he is not entitled to a setup that will give a chance of escape after he is properly proven guilty. Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury." Fay v. New York, 332 U.S. 261, 288-89 (1947).

This tension is reflected in the case law concerning non-death-penalty cases. See, e.g., *Miles v. United States*, 103 U.S. 304, 310 (1880) (person with conscientious belief that polygamy rightful may be challenged for cause in polygamy trial); *Reynolds v. United States*, 98 U.S. 145, 147, 157 (1878) (same). But see *King v. State*, 287 Md. 530,

Acceptance of the dissent's position would inject a higher degree of arbitrariness into capital murder trials. If *Witherspoon*-excludables obstructed the guilt phase of capital murder trials, determining a defendant's guilt and imposing the death penalty could become a random process.¹⁹³ Such a development would destroy the Court's previous efforts to reduce arbitrariness in the imposition of death sentences.¹⁹⁴

The dissent's position allows a *Witherspoon*-excludable to impede the implementation of the state's death penalty law.¹⁹⁵ Such laws represent a legislative choice that no one person should have the ability to override. The death penalty has little value if the state cannot obtain a verdict of guilty. Therefore, *Lockhart* necessarily preserves the death penalty as a viable alternative and upholds the state's policy decision concerning capital punishment. The Court has decided that states have the prerogative of making such policy decisions.¹⁹⁶ Therefore, it should not make collateral decisions that might make these policy decisions inoperative.

C. The Effects of *Lockhart*

An inquiry into the effects of *Lockhart* is best conducted against the backdrop of a model describing the distribution of attitudes toward the death penalty in the general population. For example, a study by Professor Jurow¹⁹⁷ categorized people according to their views of the death penalty and estimated the percentage of the population in each category. These categories were: 1) those who would vote for the death penalty automatically (2%); 2) those who generally favor the death penalty (5%); 3) those indifferent toward

535-37, 414 A.2d 909, 912-13 (1980) (court erroneously excluded veniremen favoring decriminalization of marijuana in marijuana-related trial).

¹⁹³ The *Grigsby* district court found that the *Witherspoon*-excludables amounted to 11% to 17% of the venire. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1285 (E.D. Ark.), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983), *modified*, 758 F.2d 226 (8th Cir. 1985) (en banc), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986). Using 15% as a representative figure, there is approximately a 14.2% chance of selecting a 12-man jury that has no *Witherspoon*-excludables. See *supra* note 171. Such figures carry the potential that "the imposition of the death penalty would be turned into a lottery, with the defendant's winning ticket to be found at *voir dire*." *Grigsby v. Mabry*, 637 F.2d 525, 530 (8th Cir. 1980) (Gibson, J., dissenting), *rev'd sub nom.* *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

¹⁹⁴ See *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (White, J., concurring) (social justification for death penalty legislation loses much of its force when, because of statutory discretion vested in juries, the death penalty is so infrequently imposed that it is no credible deterrent).

¹⁹⁵ "In effect, one man on a jury who disagreed with [the state's] views concerning the death penalty would be allowed to impose his will upon the rest of the citizenry regardless of the guilt of the defendant." *Grigsby v. Mabry*, 637 F.2d at 530.

¹⁹⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁹⁷ Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

the death penalty (63%); 4) those who generally oppose the death penalty (20%); and 5) those who would vote for life imprisonment automatically (10%).¹⁹⁸ *Witherspoon* attempted to restore the participation of the fourth group, which had been curtailed by statutory exclusions for cause, in the sentencing decision.

At the time of *Witherspoon*, the distribution of attitudes regarding the death penalty was markedly different from the pattern revealed in Professor Jurow's study.¹⁹⁹ A per se rule excluding all scrupled jurors had such a severe effect that it had implications for the cross-section requirement by virtue of the sheer number of jurors excluded. The *Lockhart* Court accommodated the massive shift in public opinion by limiting the effects of *Witherspoon*.²⁰⁰

As a result of *Lockhart*, the *Witherspoon* doctrine has little effect on the attitudinal composition of capital juries. *Lockhart* reaffirmed statutory exclusions for those who would automatically vote for life imprisonment (Group Five), preserving peremptory challenges that the prosecutor otherwise would have used to exclude these individuals. Consequently, prosecutors can peremptorily exclude more individuals who generally oppose the death penalty (Group Four).²⁰¹ Furthermore, the *Wainwright* substantial impairment standard²⁰² also may lead to exclusion of Group Four individuals for cause. Trial court judges might resolve ambiguities in voir dire testimony by excluding veniremen as Group Five persons when they really belong in Group Four.²⁰³ When these two factors combine, it is un-

¹⁹⁸ This model is not exact, and there are probably overlaps between and gradations within each category. Nevertheless, it is a useful device for discussion. In 1985, respondents to a Gallup Poll gave the following indications as to when they thought the death penalty should be allowed:

<i>All Murder Cases</i>	<i>Under Certain Circumstance</i>	<i>No Death Penalty</i>
27%	57%	12%

SOURCEBOOK, *supra* note 147, at 181. Although the categories do not exactly correspond to the Jurow study, they are close enough to show that no massive shift in the categories has occurred since 1971. In fact, the categories with a strong preference for the death penalty have grown larger.

¹⁹⁹ In 1966, only 42% of those polled favored capital punishment while 47% opposed it. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.16 (1968). Since then, the death penalty has steadily increased in public favor. In 1985, 72% favored the death penalty, while only 20% opposed it. SOURCEBOOK, *supra* note 147, at 175, 178.

²⁰⁰ See *infra* section III(D) for a discussion of how further attitude shifts might be reflected in future court decisions.

²⁰¹ See Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982). Professor Winick concludes from a study of jury selection in Florida's Fourth Judicial Circuit that the use of prosecutorial peremptories results in a substantial underrepresentation of scrupled jurors. *Id.* at 35-39.

²⁰² See *supra* note 72 and accompanying text.

²⁰³ "It thus 'seems likely that *Witt* will lead to more conviction-prone panels' since

clear how many Group Four jurors will actually be included in petit juries. Thus, while *Witherspoon* remains good law, actual practice may negate its effect on jury selection.²⁰⁴

Exclusion, however, also occurs at the other end of the attitude spectrum. *Witherspoon* serves to exclude jurors for cause who would automatically vote to impose the death penalty (Group One).²⁰⁵ In addition, defendants probably will use peremptory challenges to exclude many persons who generally favor the death penalty (Group Two). Therefore, jury composition in death penalty cases largely will consist of Group Three individuals, those indifferent to the death penalty, with some additional persons from Groups Two and Four.²⁰⁶

D. Implications for Future Litigation

Lockhart probably closes the issue of death qualification until a significant shift in public opinion occurs that could instigate new litigation based on one of two legal doctrines. First, if a large segment of the population turned against capital punishment, and death qualification excluded a significant portion of the venire, the Court could draw on *Witherspoon* and *Ballew* to formulate a doctrine of scope- or size-effect. Because *Witherspoon* remains good precedent, it must stand for the proposition that any exclusionary practice resulting in a severe reduction in the venire size can negate the presumption that the jury is drawn from a fair cross section of the community.²⁰⁷ Although the venire might represent a cross section

'scrupled jurors—those who generally oppose the death penalty but do not express an unequivocal refusal to impose it—usually share the pro-defendant perspective of excludable jurors.'" *Lockhart*, 106 S. Ct. at 1774 (Marshall, J., dissenting) (quoting Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21, 63 (1986)); see also Comment, *Wainwright v. Witt and Death-Qualified Juries: A Changed Standard But an Unchanged Result*, 71 IOWA L. REV. 1187 (1986) (arguing that *Wainwright* weakened constitutional limits on exclusion of scrupled veniremembers).

²⁰⁴ *Witherspoon* applies only to the sentencing phase, 391 U.S. at 522 & n.22, but because most states with capital punishment laws use a unified jury, the *Witherspoon* exclusion also affects guilt determinations. Similarly, any exclusion prohibited by *Witherspoon* is reflected in the dynamics of the guilt determination.

²⁰⁵ See *Witherspoon*, 391 U.S. at 536 (Black, J., dissenting) (juror who admits he has scruples against not inflicting death sentence should be excluded); *Adams v. Texas*, 448 U.S. 38, 55 (1980) (Rehnquist, J., dissenting) (same).

²⁰⁶ In one of the cases examined in the Juror studies, Group Four individuals actually had a higher propensity to convict than Group Three individuals. See Lindsay, *Prosecutorial Abuse of Peremptory Challenges In Death Penalty Litigation; Some Constitutional and Ethical Considerations*, 8 CAMPBELL L. REV. 71, 87 (1985) (graphical analysis of Juror data).

²⁰⁷ As discussed above, three possible bases exist for the *Witherspoon* Court's finding of partiality. See *supra* notes 65-66 and accompanying text. *Lockhart* refutes the possibility that partiality may be based on an imbalance of attitudes in the petit jury, see *Lockhart*, 106 S. Ct. at 1770, or on an infringement of the cross-section requirement due to the exclusion of a limited number of persons holding certain attitudes, see *id.* at 1766.

before jury selection, the exaggerated effect of exclusions at the selection stage would make the cross-section guarantee ineffectual.²⁰⁸

Such a view is consistent with the *Ballew* holding: practices that have some negative impact on the workings of a jury will pass constitutional muster only if the effects of those practices are not extreme. In *Ballew* the significant factor was size; in a future death-qualification case, the significant factor might be the excluded percentage of the venire. In *Witherspoon* nearly half the venire was culled.²⁰⁹ Similarly, if death qualification began to exclude such a high percentage of the venire, the Court might have to reconsider its position.

Second, the Court could formulate a new doctrine for death penalty cases based on an expansion of the due process clause. If *Lockhart* and *Batson* are to remain consistent, the reach of the fourteenth amendment must exceed the sixth amendment guarantee of impartiality when equal protection is implicated. Because the *Batson* venire included blacks, and no juror was individually partial, the trial fulfilled the requirements of sixth amendment impartiality as defined in *Lockhart*. Yet, the *Batson* Court held that equal protection prohibited the use of the prosecutor's peremptory challenges to affect the racial composition of the petit jury. Similarly, the Court remains free to decide that fifth and fourteenth amendment due process requires that a defendant in a capital case have access to the entire attitude spectrum of the community, even though the sixth amendment guarantee of an impartial jury drawn from a fair cross section of the community does not so require. The Court is unlikely to engage in such maneuvering, however, unless it is fairly certain that public opinion necessitates a change.

A third possibility exists that could generate new death-qualification litigation in the lower courts, but is unlikely to overturn the result of the *Lockhart* decision. If death qualification begins to have a severe, disproportionate effect on women or minority groups, opponents of death qualification could argue it violates equal protection. *Duren* established that large divergences between the percentage of such groups in the population and their representation in venires is unconstitutional.²¹⁰ Although cross-section analy-

²⁰⁸ Justice Powell's logic in *Batson v. Kentucky*, 106 S. Ct. 1712, 1723 (1986), see *supra* notes 44-49 and accompanying text, might help bridge the gap between venire and petit jury in such a scenario. It would be a mistake to assume that Powell's argument would easily transfer, however, because *Batson* was an equal protection case, unburdened with the venire/petit jury distinction that dominates cross-section cases. Death qualification does not reflect on the ability of *Witherspoon*-excludables to serve as jurors generally and is not based on a stereotype but on an admission by the venireman.

²⁰⁹ See *supra* text accompanying note 56.

²¹⁰ See *supra* note 21 and accompanying text; see also *Castenada v. Partida*, 430 U.S. 482 (1977).

sis is currently confined to venire, a broad exclusionary practice that virtually eliminates a suspect or quasi-suspect group for cause could generate an equal protection challenge. *Batson* demonstrates that the Court will look beyond the venire to the petit jury when equal protection is implicated. Under equal protection analysis, however, prima facie challenges are rebuttable by proving absence of intent to discriminate.²¹¹ Death qualification is neutral on its face and supported by several nondiscriminatory state interests. Especially after *Lockhart*, it would be very easy to show nondiscriminatory intent.

CONCLUSION

In *Lockhart v. McCree* the defendant contended that death qualification resulted in a jury that was both partial and unrepresentative of a fair cross section of the community. He urged that the absence of jurors unalterably opposed to capital punishment created a guilt-prone jury that was too partial to satisfy the sixth amendment. Such a definition of impartiality is unworkable in the context of current practices of jury selection, and the Court properly rejected it. Furthermore, it is illogical to apply a cross-section requirement to a petit jury that cannot consistently represent a fair cross section of the community because of its size and manner of selection.

Moreover, the state has adequate justification for any added degree of attitudinal imbalance and/or unrepresentativeness introduced by death qualification. A single jury capable of resolving both the guilt and penalty phases of a trial may have advantages to a defendant. The practices of allowing peremptory challenges and occupational exemptions have legitimate state purposes that would have been endangered by a contrary decision. More important, the exclusion of persons adamantly opposed to the death penalty is necessary to preserve the state's policy decision to enact a death penalty law.

The use of peremptory challenges by both defendants and prosecutors will tend to result in a jury that has no pronounced attitudes concerning the death penalty. It is not clear that the defendant is significantly disadvantaged by the selection of such a jury. In fact, this jury constitutes the most neutral jury obtainable. Future litigation in the area of death qualification will depend on a shift in public sentiment. If death qualification begins to exclude so many

²¹¹ *Duren v. Missouri*, 439 U.S. 357, 371 (1978) (Rehnquist, J., dissenting) (interpreting Court's position). See also *McClesky v. Kemp*, 107 S. Ct. 1756 (1987) (statistical evidence that death penalty imposed most often when black defendant murders white victim does not violate equal protection clause; defendant must show decisionmakers acted with discriminatory intent in his case).

jurors that death-qualified juries do not reflect a cross section of a community, the Court could alter its position.

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