CONSTITUTIONAL LAW - JURIES - EXCLUSION FOR OBJECTIONS TO DEATH PENALTY. Witherspoon v. Illinois, 391 U.S. 510 (1968)

> In trials for murder, it shall be cause for challenge if any juror who shall, on being examined, state that he has conscientious scruples against capital punishment or that he is opposed to the same.[1]

So read the section of the Illinois Criminal Code which gave rise to the United States Supreme Court's ruling in Witherspoon v. State[2] that defendant was unconstitutionally sentenced to death. The Court reasoned that this statute armed the prosecutor with power to "stack the deck" against defendant; it enabled the wholesale impanelling of a one-sided jury which was "uncommonly willing to condemn a man to die." This decision revolutionizes the procedures for jury selection in capital cases, and its impact is already evident in some recent cases.[3]

The facts do not give rise to an uncommon situation. On the night of April 29, 1959, the petitioner, William C. Witherspoon, while attempting to avoid arrest, allegedly shot and killed a police officer.

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1. Ill. Rev. Stat. 1959, c. 38, Sec. 743. This section has now been revised by Ill. Rev. Stat. 1967, c. 38, Sec. 115-4(d) to read: "Each party may challenge jurors for cause." People v. Hobbs, 35 Ill. 263, 220 N.E.2d 469 (1966), cert. denied 386 U.S. 1024 (1967) has interpreted this revised statute to include a challenge for cause of prospective jurors who have conscientious scruples against capital punishment.

2. 391 U.S. 510 (1968).

3. See note 27 infra.

Shortly thereafter he was arrested. He was identified by the dying officer and later orally confessed to the killing.

At the voir dire[4] the prosecutor exercised forty-seven challenges for cause against prospective jurors who voiced their opposition to the death penalty. While forty-four of these prospective veniremen revealed that they had conscientious or religious scruples against capital punishment, only five explicitly stated that under no circumstances would they be able to render a sentence of death. The three remaining prospective jurors merely "disbelieved" in capital punishment. No objection to this impaneling procedure was made by assigned defense counsel, nor was any attempt made to show that the remaining jurors were otherwise incompetent. The jury found defendant guilty of first degree murder and returned a sentence of death.

After more than nine years of unsuccessful attempts to upset this conviction, defendant for the first time offered the argument that he was denied his constitutional right to an impartial jury. He contended, inter alia, that the jury should be representative of a cross-section of the community.[5] He argued that as an accused, he should be entitled to a balanced jury, one consisting of opponents as well as proponents

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4. For a good analysis and historical development of the voir dire examination, see Sir Patrick Devlin, Trial by Jury, pp. 17-37 (1956).

5. Irvin V. Dowd, 366 U.S. 717 (1961); Turner v. State of Louisiana, 379 U.S. 466 (1965). See also Duncan v. State of Louisiana, 391 U.S. 145 (1968).

of capital punishment.

The United States Supreme Court accepted his contention, in part. While upholding the conviction of first degree murder it ruled that the same jury which constitutionally convicted the petitioner, unconstitutionally sentenced him. The Court reasoned that the jury had a two-fold function, determining guilt or innocence, and also setting the sentence.[6] Since no competent data had been adduced to establish that jurors not opposing the death penalty tend to favor the prosecution in determining guilt, the conviction was affirmed.[7] However, the Court pointed out, as it is "self evident" that this jury constitutes a "tribunal organized to return a verdict of death," the sentence was reversed.[8] The ultimate question of life and death should lay on the conscience of the community: the jury should perform the vital function of maintaining

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6. Illinois does not employ the use of a bifurcation system. Unless the jury is waived or a plea of guilty entered, the same jury which determines guilt, may, in capital cases, return a sentence of death death. Ill. Rev. Stat. c. 38, Sec.1-7(c) (1) (1966 Supp.). Cf. N.J. Stat. Sec. 2A:113-4 (1953).

7. The Court, however, parenthetically remarked, "Even so, a defendant convicted of such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to guilt." 391 U.S. at 520, footnote 18.

8. Nowhere in the majority opinion has any basis, statistical or otherwise, been proffered to establish this point. But see Mr. Justice Black's dissent in Bumper v. State of North Carolina, 391 U.S. 543 (1968).

a link between contemporary community values and the penal system. Since there are many conflicting feelings and beliefs today concerning capital punishment,[9] defendant was denied the ameliorating factor of being sentenced by a cross-section of the community. The systematic elimination from the prospective jury of a relevant segment of contemporary community values necessarily denied the petitioner his constitutional right to an impartially selected jury.[10]

Witherspoon specifically held it unconstitutional to exclude prospective jurors simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[11] It also proscribed the exclusion of jurors simply because they indicated that there would be some cases in which they would refuse to recommend capital punishment. The only grounds that would constitutionally validate a challenge for cause in capital cases would be if the juror admits that he would "automatically" vote against the imposition of the death penalty.[12] It must be shown that such prospective jurors were

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9. According to one poll cited by the majority opinion, in 1966 approximately 42% of the American public favored capital punishment for convicted murderers, while 47% opposed it and 11% were undecided. Polls, International Review on Public Opinion, Vol. II, No. 3, at p. 84 (1967), cited at 391 U.S. at 520, footnote 16.

10. But Cf. Frazier v. United States, 335 U. S. 497 (1948).

11. Contra. Logan v. United States, 144 U. S. 263 (1892).

12. Can one have conscientious scruples and still be able to render an impartial decision? State v. Juliano, 103 N.J.L. 663, 138 Atl. 575 (E. & A. 1927) answers in the negative.

"irrevocably committed" to such a final disposition. All other opposition (conscientious, religious or otherwise) does not constitute valid grounds for a juror's dismissal. The most that could be demanded of a venireman in this regard is his willingness to "consider" all of the penalties provided by that State's laws.[13]

It has long been recognized that juries should be as impartial as is practically possible.[14] The American tradition of trial by jury necessarily contemplates an impartial jury drawn from a cross-section of the community.[15] But juror competency is an individual rather than a class or group matter. Any positive or decided opinion regarding crucial issues gives rise to a challenge for cause.[16] It is no answer to say

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13. Inherent in this opinion is the belief that if one is not opposed to capital punishment one favors it, and accordingly is eager to impose a sentence of death. But this does not necessarily follow. Being unopposed is not synonymous with favoring. Turberville, infra. Those who favor capital punishment are rightfully excluded for cause. Stroud v. United States, 251 U.S. 15 (1919), on petition for rehearing 251 U.S. 380, 381 (1920).

14. U.S. Const. Amend. VI; "In essence, the right to a jury trial guarantees to a criminally accused a fair trial by a panel of impartial, 'indifferent' jurors .... It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 ...." Irving v. Dowd, supra note 5 at 722.

15. Smith v. State of Texas, 311 U.S. 128 (1940); Glassner v. United States, 315 U.S. 60 (1942).

16. A person who manifests a conscientious or religious belief that polygamy is rightful may constitutionally be challenged for cause on a trial for polygamy. Reynolds v. United States, 98 U.S. 145 (1878).

that a prospective juror represents one stratem of society in this regard.[17] Trial by a fair tribunal is a rudimentary requirement of due process and fairness requires an absence of actual or implied bias.[18] But the problem is not in the theory but in its application. What is necessary to constitute bias? In examination upon voir dire how far may counsel inquire into a prospective juror's attitudes?[19] Does mere objection to capital punishment render a prospective venireman incompetent or is something more needed?

To say the least, these questions, and more, have been the area of much dispute. While the majority of courts have not produced strikingly dissimilar results there are, nevertheless, areas of variation and inconsistency.[20] Potentially the composition of a jury in capital cases could even vary from jurisdiction to jurisdiction.[21] Witherspoon dispels the propriety of these holdings. It rules as a matter of constitu-

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17. Pope v. United States, 372 F.2d 710 (8th Cir. 1967); Turberville, infra. See also Thiel v. Southern Pacific Co., 328 U.S. 217 (1946).

18. Dennis v. United States, 339 U.S. 162 (1950).

19. See Generally Orfield, Trial Jurors In Federal Criminal Cases, 29 F.R.D. 43, 71 (1962).

20. 5 Anderson, Wharton's Criminal Law and Procedure, 119-122 Sec. 1990 (12th ed. 1957); annot. 48 A.L.R.2d 560.

21. Compare State v. Garrington, 11 S.D. 178, 76 N.W. 326 (1898) and State v. Lee, 91 Iowa 499, 60 N.W. 119 (1894) with William v. State, 222 Ga. 208, 149 S.E.2d 449 (1966), cert. denied 385 U.S. 887 (1966) and Commonwealth v. Ladetto, 349 Mass. 237, 207 N.E.2d 536 (1965).

tional law that all prospective jurors, regardless of the gravity of their opinions respecting the death penalty, are competent jurors, provided they are not "automatically" predisposed to voting a particular way. This affords the accused the benefit of any feelings of mercy in the community.

The author feels that, however laudable and compelling as Witherspoon may seem, it goes too far. Most jurisdictions couch the challenge for cause in capital cases in terms of conscientious or religious scruples.[22] The touchstone of such scruples is something more than mere opposition to capital punishment;[23] it is a formulated opinion whose nature and strength are such as in law necessarily raise a presumption of partiality.[24] It must be more than mere belief or disbelief; it must be a "settled conviction."[25] While one who merely opposes capital punishment may be able to render an impartial decision, who is to guarantee that one with religious or conscientious scruples can or will do likewise? This necessarily involves a foray into the psychological con-

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22. State v. Leland, 190 Or. 598, 227 P.2d 785 (1951), aff'd 343 U.S. 790 (1952), reh. denied 344 U.S. 848 (1952).

23. Turberville v. United States, 112 U.S. App. D. C. 400, 303 F.2d 411 (1962), cert. denied 370 U.S. 946 (1962).

24. Cf. Reynolds v. United States, supra, note 16.

25. See People v. Hobbs, supra, note 1.

siderations which do not admit of proof.[26]

Already some recent cases have shown difficulty applying the mandate of Witherspoon[27] and it is not to be doubted that similar problems will reoccur. The State, given power to prescribe death as a possible penalty,[28] must be assured that it can exercise that power fairly and adequately. No one has a right to be tried by a jury representative of a theoretical cross-section of community values,[29] but only an an impartial jury, impartially drawn from a practical cross-section of the community.[30] The two concepts are quite distinct. To confuse them is to upset the scale of impartiality so vital to the integrity of the jury system.

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26. Scruples against the death penalty are usually the result of deep religious or profound philosophical commitments. To assume that such a person could obey his oath as juror and come to an impartial decision would necessarily mean that such a person would have to violate his conscience. However, to assume that such a person would follow his conscience and come to a biased decision would necessarily mean a violation of his oath. Cf. State v. Favorito, 115 N.J.L. 197, 178 Atl. 765 (E. & A. 1935).

27. On voir dire, one prospective juror was asked whether he was "unable in any case to vote for a verdict carrying with it capital punishment." He finally answered, "I can't definitely say I could or I couldn't." Held he was properly excused for cause. State v. Mathis, 52 N.J. 238, 248, 245 A.2d 20, 26 (1968). See also State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968).

28. Wilkerson v. State of Utah, 99 U.S. 130 (1878).

29. Swain v. State of Alabama, 380 U.S. 202 (1965).

30. United States v. Puff, 211 F.2d 171 (2d Cir. 1954), cert. den. 347 U.S. 963 (1954), reh. denied 347 U.S. 1022 (1954), 348 U.S. 853 (1955).

Does Witherspoon inhibit the ability of a State to invoke death as a possible penalty?[31] Disregarding our personal views regarding the morality or efficacy of capital punishment, this is a dangerous precedent if it requires venireman prejudiced against one of the critical issues in a trial to be represented on a jury. It is one thing to advocate that the jury be as fully representative of community values "as far as possible," and quite another to require representation of the prejudiced.

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31. Accord State v. Juliano, Supra, note 12.