1985

Capital Juries and the Fair Cross-Section Requirement: Modern Constitutional Reasoning in Jury Selection

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INTRODUCTION

On October 29, 1984, the Supreme Court of the United States denied certiorari to Karu Gene White,1 convicted of three counts of murder and sentenced to die as a result of a botched robbery in rural Breathitt County, Kentucky.2 This Comment proposes to demonstrate that the affirmance of White’s conviction and sentence perpetuates a fundamental—and unconstitutional—defect in the procedure employed in jury selection for capital murder trials. As will be demonstrated, because of the exclusion of potential jurors who adamantly oppose the death penalty, capital murder defendants in Kentucky and throughout the country are denied their constitutional right to a jury drawn from a fair cross-section of the community.3

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3 Prof. Walter E. Oberer traced the origin of this exclusionary practice to a time when conviction of certain offenses made capital punishment automatic: “Since the sole function of the jury was the determination of guilt—the penalty flowing from an affirmative finding as a matter of law—it was deemed of vital consequence that the jurors be qualified on the death penalty.” Oberer, Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545, 550 (1961).

This author contends that, since this procedure is no longer used in Kentucky or many other states, violations of the fair cross-section requirement are more easily cured. For other state practices regarding exclusion of prospective jurors adamantly opposed to the death penalty, see Annot., 39 A.L.R.3d 550 (1971).
Although the primary contention in *Witherspoon v. Illinois* was that exclusion of all such conscientious objectors to the death penalty creates a jury prone to conviction, "[t]he constitutional question is whether the jury must be ‘impartially drawn from a cross-section of the community,’ or whether it can be drawn with systematic and intentional exclusion of some qualified groups." The "qualified group" that is excluded in violation of the fair cross-section requirement is the subset of death penalty objectors who could render an impartial decision as to guilt or innocence.

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4 391 U.S. 510 (1968). In *Witherspoon*, the Court held that there was not sufficient evidence to support Witherspoon’s contention, nor could the Court take judicial notice "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Id.* at 518. See also *Bumper v. North Carolina*, 391 U.S. 543 (1968). In *Bumper*, the defendant argued that a jury which excluded all those opposed to capital punishment as well as those who had conscientious scruples against the death penalty resulted in a jury biased as to the defendant’s guilt. The Court again held that there was insufficient evidence to support such a claim. *See id.* at 545.

5 *See 391 U.S. at 516.*

6 *Id.* at 524 (Douglas, J., concurring) (quoting *Fay v. New York*, 332 U.S. 261, 296 (1947) (Murphy, J., dissenting)). In *Fay*, the Court reviewed the use of New York’s "blue ribbon" jury panel, a panel picked by jury commissioners after personal interviews. The Court upheld the system, although the record established that of 2,911 names on the panel, only 30 were women. *See 332 U.S. at 273 n.14.*

7 The range of attitudes held by prospective jurors may be represented by the following table, taken from *Berry, Death Qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L.J. 1, 2 (1982).

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<td>Will always vote for death penalty</td>
<td>Favors death penalty but will not vote to impose it in every case.</td>
<td>Neither favors nor opposes death penalty.</td>
<td>Opposes or has doubts about penalty but will not vote against it in every case.</td>
<td>Will always vote for life imprisonment instead of death penalty</td>
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A) those who could not be impartial as to guilt or innocence, due to the possibility of the death penalty;
B) those who could be impartial as to guilt or innocence.

Group 5 will be known as the "Witherspoon excludables," those removed from juries because of their opposition to the death penalty. 5(B) may be further classified as "guilt phase includables." This subset is at the heart of this controversy. Because they profess an ability to be impartial at the guilt/innocence phase of a trial, the author contends they are "qualified" and cannot constitutionally be excluded from jury service.
Attempting to answer the constitutional question posed above in regard to this "impartial objector" group, this Comment addresses: (I) the historical development of this fair cross-section requirement from an equal protection issue to a sixth amendment concept; (II) the burden imposed upon a defendant in an attempt to establish a prima facie violation of this right to a representative jury; (III) the recent litigation involving allegations of underrepresentation of the groups presently excluded from jury service; and finally (IV) the reaction of the Kentucky Supreme Court to this recent constitutional reasoning.

I. HISTORICAL DEVELOPMENT OF THE FAIR CROSS-SECTION REQUIREMENT

A. The Foundational Support of the Fourteenth Amendment

The genesis of the challenge to a jury from which conscientious objectors to the death penalty have been excluded lies in other constitutional theories and not in the sixth amendment's fair cross-section requirement as currently argued. When *Strand v. West Virginia* was decided more than a century ago, the United States Supreme Court relied upon the equal protection clause of the fourteenth amendment to reverse the conviction of a black man tried and convicted of murder by an all-white jury.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.


U.S. CONST. amend. VI reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

100 U.S. 303 (1879).

See id. at 310, 312.
Exclusion of blacks from jury service obviated the amendment's purpose of "securing to a race recently emancipated . . . all the civil rights that the superior race enjoy[s]." More than half a century later, in an attempt to extend fourteenth amendment protection, the Court held in Smith v. Texas that exclusion of blacks from juries violated equal protection by preventing juries from being "truly representative of the community."

The Court propagated this understated principle one year later in Glasser v. United States. In Glasser, the defendant alleged that his right to a jury selected from a fair cross-section of the community was violated by the practice of adding women to jury rolls solely from lists furnished by the Illinois League of Women Voters. The Court denied Glasser relief on the ground

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11 Id. at 306.
14 During this lapse of time, the Supreme Court usually relied upon procedural barriers in denying relief to those challenging jury selection. See Gibson v. Mississippi, 162 U.S. 565 (1896); In re Wood, 140 U.S. 278 (1891); Virginia v. Rives, 100 U.S. 313 (1879). See also Ziegler, Young Adults as a Cognizable Group in Jury Selection, 76 Mich. L. Rev. 1045, 1050 n.30 (1977-78).
15 Generally narrowing the protections of the fourteenth amendment's equal protection clause, The Strauder Court stated:
   We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this.
   100 U.S. at 310.
16 311 U.S. 128 (1940).
17 Id. at 130.
18 315 U.S. 60 (1941).
19 The defendant alleged that the women on the lists had attended pro-prosecution classes and lectures and that as a result he did not have "a trial by a jury free from bias, prejudice, and prior instructions." Id. at 84.

The Court indirectly observed the interconnection between the cross-section issue and the impartiality issue. See generally Oberer, supra note 3 (a discussion of the fair cross-section requirement's effect on the impartial jury). The Court reasoned: "No matter how high-principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations, from training or otherwise, acquire a bias in favor of the prosecution." 315 U.S. at 86.

The Court recognized that by selecting women for jury service solely from that list of allegedly biased women supplied by the Illinois League of Women Voters, a segment of the "community"—or a subset of all women voters—would be excluded, the result being an unrepresentative jury. A logical analogy can be made between that type of exclusion and the kind resulting from the Witherspoon standard. The resulting jury under Witherspoon is a select group of jurors taken from the State's list which includes only those potential jurors unopposed to the death penalty. Obviously, a segment of society is unrepresented, and the jury, one of the State's "organizations," may be biased in favor of the prosecution.
that he had not proved his allegations. Mr. Justice Murphy, however, speaking for the majority, opined that "the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community."22

B. The Classification of the Fair Cross-Section Requirement as a Sixth Amendment Concept

Language regarding the "representativeness" of the jury was consistently used in cases challenging jury composition, regardless of the underlying rationale of the Supreme Court's review and decision. For example, Glasser v. United States was reviewed under the Court's supervisory power over federal courts. The Court, however, did not expressly recognize the actual origin of this concept of the jury as a cross-section of the community until the 1975 decision of Taylor v. Louisiana. Taylor, con-

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20 See 315 U.S. at 87. Glasser had filed only an affidavit making general allegations. The Court specifically stated that it would have ordered a new trial had he proved the allegations. See id. The Court's discourse on the issue, however, was surprisingly in-depth in light of its evasion of such topics in the past. See note 14 supra.

21 Mr. Justice Murphy had become one of the Court's leaders in advancing the fair cross-section requirement. See Daughtrey, Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana, 43 Tenn. L. Rev. 1, 21-22 (1975-76). His death in 1949, combined with the death of his supporter, Mr. Justice Rutledge, in the same year, may be one reason for the Court's subsequent evasion of the topic. Id. at 27 n.106.

22 315 U.S. at 86.


24 419 U.S. 522 (1975). Before this decision, the Court had evaded the cross-section issue since the 1940s, much in the same way it had done after the turn of the century. See note 14 supra. For a discussion of the possible theories underlying the Court's inactivity, see Daughtrey, supra note 21, at 27 n.107.
ników of aggravated kidnapping, challenged a Louisiana statute
providing that a woman could not be selected for jury service
until she had filed a written declaration of her willingness to
serve as a juror. The Court fully embraced the fair cross-
section requirement as an element of the sixth amendment,
thereby imposing this principle on state trials. Sustaining Tay-
lor’s challenge, the Court noted: “The unmistakable import of
this Court’s opinions, at least since 1940, . . . and not repudiated
by intervening decisions, is that the selection of a petit jury from
a representative cross-section of the community is an essential
component of the Sixth Amendment right to a jury trial.”

By finally classifying this right as a sixth amendment concept,
the Supreme Court, in effect, magnified the protection the
amendment affords. As a sixth amendment guarantee, “[t]he
right to a proper jury cannot be overcome on merely rational
grounds.” Before the state must defend its jury selection pro-
cedure and the propriety of the resulting jury, however, the
defendant must establish a violation of the right to a represent-
ative jury.

II. THE PRIMA FACIE TEST OF DUREN V. MISSOURI

In Duren v. Missouri, the United States Supreme Court
held that to establish a prima facie violation of the fair cross-
section requirement, the defendant must show

1) that the group alleged to be excluded is a “distinctive”
group in the community; 2) that the representation of this

25 See 419 U.S. at 524.
26 “A woman shall not be selected for jury service unless she has previously filled
with the clerk of court of such parish [sic] in which she resides a written declaration
of her desire to be subject to jury service.” LA. CODE CRIM. PROC. art. 402 (West 1967)
(repealed 1975).
27 See 419 U.S. at 530.
28 The Supreme Court had already established that the sixth amendment was
binding upon the states by virtue of the fourteenth amendment. See Duncan v. Louisiana,
29 See 419 U.S. at 537. “We are also persuaded that the fair-cross-section require-
ment is violated by the systematic exclusion of women, who in the judicial district
involved have amounted to 53% of the citizens eligible for jury service.” Id. at 531.
30 419 U.S. at 528.
31 Id. at 534. But see Hoyt v. Florida, 368 U.S. 57 (1961) (statute similar to
Louisiana statute in Taylor upheld).
group in venires\textsuperscript{34} from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.\textsuperscript{35}

Though this test supposedly applies to all challenges of jury representativeness,\textsuperscript{36} a defendant challenging a death-qualified jury assumes a greater burden than other defendants in relation to the first and second prongs of the Duren test. As a result of the apparent lack of identifiable traits, beliefs or immutable characteristics common to those opposing the death penalty,\textsuperscript{37} defendants must employ empirical data to show that the group is "a distinctive group in the community."\textsuperscript{38}

Assuming a defendant establishes that the excluded group is "distinctive," it must be shown that the representativeness of the group "in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community."\textsuperscript{39} Literally, this prohibits a successful challenge to a jury composed under Witherspoon standards, because the exclusion is obtained during voir dire, after the venire has already been chosen.\textsuperscript{40}

Ironically, this procedure for excluding prospective jurors during voir dire automatically fulfills the requirement that the underrepresentation be a result of "systematic exclusion" of the

\textsuperscript{34} Venire is defined as "[t]he list of jurors summoned to serve as jurors for a particular term." BLACK'S LAW DICTIONARY 1395 (5th ed. 1979).

\textsuperscript{35} 439 U.S. at 364.

\textsuperscript{36} The process challenged in Duren allowed any woman to receive, upon request, automatic exemption from jury service. Id. at 361.

\textsuperscript{37} See notes 69-71 infra.

\textsuperscript{38} While statistics are important in all defendants' challenges to jury composition, the Duren test practically demands such measures to show that the representation of the excluded group is not reasonable in relation to the number of such persons in the community.

In some circumstances, statistical data must be used to establish that the group is "distinctive," in accordance with the first prong of the Duren test. Such is the case with "Witherspoon excludables." See text accompanying notes 37-38 supra.

\textsuperscript{39} 439 U.S. at 364.

\textsuperscript{40} This distinction is a result of the Witherspoon decision that jurors opposed to the death penalty may be challenged for cause during voir dire. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968). For a discussion of the use of preemptory challenges and the constitutional implications in this context, see Winick, Prosecutoral Preemptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH. L. REV. 1 (1982-83).
group. However, to contend that the Supreme Court purposefully intended to restrict the range of jury selection challenges to venires only is to ignore the ultimate objective advanced by composing juries representative of the community. That argument "flies in the face of the policies underlying the cross-section requirement and, if accepted, would provide a device for avoiding the effect thereof." Moreover, the Supreme Court in Ballew v. Georgia\(^4\) circumvented its own language and applied the representative standards directly to the jury as empaneled. In Ballew, the Court sustained a challenge to the use of five person juries in misdemeanor cases, reasoning that the size "prevents juries from truly representing their communities."\(^3\) That language tends to support the theory that the Court did not intend for Duren to be limited to venires.\(^4\)

\(^4\) Grigsby v. Mabry, 569 F. Supp. 1273, 1285 (E.D. Ark. 1983). The Grigsby court made the statement in response to the respondent's suggestion that the cross-section requirement applied only to "venires and not to actual juries." \(^3\) Id. See also Winick, supra note 40, at 62 (discussing the underlying theories of the fair cross-section requirement).


\(^3\) Id. at 239.

\(^4\) But see Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), modified, 671 F.2d 858 (1982), cert. denied, 459 U.S. 882 (1982). In Smith, a convicted murderer contended that death penalty-opposed jurors comprise a distinctive group whose systematic exclusion infringes upon the sixth amendment right to a jury representing a fair cross-section of the community.

The court of appeals stated that any data offered as evidence as to the distinctiveness of the group would be irrelevant because Duren was decided in regard to venires, not juries. \(^3\) Id. at 583 n.26. This illogical dicta may be explained by the court's general misunderstanding regarding the rationale of the fair cross-section requirement. In disposing of Smith's challenge, the court reasoned that any time a group is legitimately disqualified from jury service, the attempt to compose a jury representative of the community is impeded:

One would not suppose, for example, that defendant Jones who was on trial for murder in Jones County, 85% of which is populated by members of the Jones family, is entitled to a jury on which members of the Jones family serve, even though a jury from which Jones family members are excluded would not reflect a fair cross-section of the community.

\(^3\) Id. at 582.

The court failed to recognize that the Jones family members would be disqualified from jury service because of their relationship to the defendant. The group excluded under Witherspoon exhibits no such obvious relationship. The group is, in fact, qualified because its members are capable of rendering an impartial decision as to a defendant's guilt regardless of death penalty attitudes.
III. RECENT LITIGATION OF THE CROSS-SECTION REQUIREMENT: EVIDENCE ERODES Witherspoon

Circumstances have changed drastically since the Supreme Court ruled that petitioner Witherspoon's data was "too tentative and fragmentary" to hold, as Justice Douglas concluded, that exclusion of jurors opposed to capital punishment "results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment." Grigsby v. Mabry provides a comprehensive analysis of the post-Witherspoon data concerning the exclusion of those opposed to the death penalty. In Grigsby, three petitioners convicted of capital murder argued that juries qualified under Witherspoon standards were neither representative of the community nor impartial as to the issue of guilt or innocence.

The petitioner based his challenge on a tremendous amount of empirical data, and expert testimony designed to establish

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45 See Witherspoon v. Illinois, 391 U.S. at 517.
47 391 U.S. at 528.
48 569 F. Supp. 1273 (E.D. Ark. 1983). The history of the Grigsby case is interesting because of the indecision and ambiguity with which this issue is viewed. Four days before the state court trial, defense counsel for Grigsby filed a motion for a ruling that potential jurors opposed to the death penalty not be challenged for cause during the guilt-innocence phase of the trial. Grigsby v. Mabry, 483 F. Supp. 1372, 1375-76 (E.D. Ark. 1980). That motion was denied and Grigsby was convicted and sentenced to life imprisonment. Id. at 1376. The Supreme Court of Arkansas affirmed. Id. Having exhausted his state remedies, Grigsby appealed to the United States District Court for the Eastern District of Arkansas. Chief Judge Eisle ruled that Grigsby had established a prima facie violation of the fair cross-section requirement but denied him relief on the grounds that Witherspoon had not been overruled and that the Eighth Circuit Court of Appeals would probably uphold Witherspoon. See id. at 1384-85. Chief Judge Eisle did order that an evidentiary hearing be conducted by the Franklin County Circuit Court regarding Grigsby's allegation that he had been denied an impartial jury. See id. at 1391.

On appeal by the state, the court of appeals affirmed, but directed that the evidentiary hearing be held in Chief Judge Eisle's court. See Grigsby v. Mabry, 637 F.2d 525, 529 (8th Cir. 1980). Whether or not this was implicit approval to Chief Judge Eisle's dicta in the first decision remains uncertain.
49 See 569 F. Supp. at 1277.
50 See id. at 1288-1305. Analysis of such empirical evidence is necessary when examining the exclusion of a group of prospective jurors apparently united only by their opposition to the death penalty. When examining the exclusion of a group such as blacks, on the other hand, an analytical approach is not necessarily required to establish
the excluded group as "distinctive." As concluded in Grigsby, the available data proves overwhelmingly that the group excluded from juries in death penalty cases is a distinctive group, its members sharing many attitudes and ideals.52

The evidence established, among other things, that a direct relationship exists between a prospective juror's attitudes concerning the death penalty and his opinions on other critical legal principles. For example, one who "strongly favors" or "favors" or is merely "opposed" to the death penalty differs attitudinally from one who "strongly opposed" the death penalty by being more likely (a) to disregard the presumption of innocence, (b) to criticize the exercise of one's fifth amendment right to remain silent, (c) to believe that courts are too concerned with protecting the rights of criminals and (d) to believe that the insanity defense is a loophole.54

The dispositive data in Grigsby, however, concerned the exclusion of blacks and women which results from excluding those potential jurors who are opposed to the death penalty.55

The evidence established, for example, that only 5.8 percent of blacks strongly favor the death penalty while 30.4 percent are opposed, as compared to 20.4 percent of whites who are strongly in favor of capital punishment while 9.9 percent are opposed.56

the group's distinctiveness. The removal of a racial group from juries results in the exclusion for no good cause of an obviously distinctive segment of society. Whether or not blacks share distinct attitudes is theoretically irrelevant. See id. at 1279. When a group such as the "Witherspoon excludables" is under scrutiny, however, it is the defendant's burden to show that there are distinctive attitudes within the group that would be unrepresented on the jury if the group is excluded.

51 "The evidence introduced here makes it abundantly clear that juries death-qualified under Witherspoon standards are not as representative of the community as they could, and should, be. . . ." Id. at 1321.
53 See note 7 supra.
54 569 F. Supp. at 1293.
55 Blacks and women constitute significant and distinctive groups of jury-eligible citizens within Arkansas and the Nation. Death qualification results in their systematic disproportionate removal from juries which try the guilt-innocence of persons accused of capital crimes, without adequate justification, in violation of the accused's right to a representative jury comprised of a fair cross-section of the community.
569 F. Supp. at 1294.
Convinced that the excluded jurors comprised a distinctive group, the Grigsby court examined the state's justification for the unconstitutional violation. Though recognizing legitimate state interests, the court held that no such interests may justify constitutional violations when a defendant's life is at stake.

A federal district court in North Carolina reached a similar conclusion regarding the fair cross-section requirement in capital cases in Keeten v. Garrison. Relying on some of the same evidence compiled in Grigsby, the court concluded that the systematic and deliberate exclusion from the guilt phase of trials of those opposed to the death penalty yet capable of an impartial verdict as to guilt or innocence violates a defendant's right to a representative jury.

The California Supreme Court rejected this challenge to death-qualified juries after examining the evidence in People v. Fields. The defendant Fields contended that the exclusion of

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57 See 569 F. Supp. at 1313. See also notes 33-35 supra and accompanying text (discussion of the two other prongs in the prima facie test of Duren).
58 See 569 F. Supp. at 1319. The court accepted that the state does have the right to death-qualified jurors who will participate in the penalty phase of a trial, thereby upholding the state's interest in obtaining a capital sentence in appropriate cases. Id. The court also recognized the state's right to exclude at the guilt determination phase of capital trials those prospective jurors who could not make an impartial decision as to guilt or innocence due to their opposition to the death penalty. Id.
59 The court rejected the state's argument that impaneling two juries, one for the guilt phase and one for the sentencing phase, would create an undue burden on the state:

Procedures could be developed so that the penalty-phase jury could be impaneled promptly after the conclusion of the guilt-determination trial so that witnesses would not become unavailable or other evidence lost. All of the actors in the drama would be the same except the jurors, so no significant additional preparation time would be required.

Id. at 1320.
60 Compare 569 F. Supp. at 1294-1309, with 578 F. Supp. at 1171-77.
61 See 578 F. Supp. at 1167.
62 673 P.2d 680 (Cal. 1983), cert. denied, 105 S. Ct. 267 (1984). California courts have long held that exclusion of jurors opposed to the death penalty does not deny defendants a fair and impartial jury. See Hovey v. Superior Court, 616 P.2d 1301 (Cal. 1980). In Hovey, the California court reviewed numerous studies, and concluded that since both ends of the spectrum could be removed for cause—both those who would automatically impose the death penalty and those who would never impose the death penalty—the evidence was insufficient to establish that the defendant did not have a nonneutral jury. Id. at 1346. See also People v. Gonzales, 426 P.2d 929 (Cal. 1967); People v. Thomas, 423 P.2d 233 (Cal. 1967) cert. denied, 389 U.S. 868 (1967); People v. Smith, 409 P.2d 222 (Cal. 1966) cert. denied, 388 U.S. 913 (1967). The court had,
persons who admit during voir dire that they would automatically vote against the death penalty results in a jury unrepresentative of the community.64

The court concluded, however, that the excluded group, "a class divided in all else, including even their reasons for refusing to consider the death penalty—is not a cognizable class."65 The majority reasoned that the group cannot be classified as distinctive because, in general, the members shared no common background and experience giving rise to the distinctive attitudes defining the group.66

The California court's theoretical rather than practical analysis of the exclusion seems unjustified.67 After all, the effects

however, avoided the cross-section issue when raised by capital defendants. The court decided to resolve the issue in Fields, noting that since Duren had been set forth "[n]o decision of this court, and no controlling precedent from the Supreme Court, has addressed the exclusion of 'guilt phase includables' jurors under this analytical structure." 673 P.2d at 689. See also Rector v. State, 659 S.W.2d 168 (Ark. 1983), cert. denied, 104 S. Ct. 2370 (1984). The extent to which the Rector court reviewed the available evidence is exhibited by the following quote:

We may ask, why should the most cowardly and contemptible of criminals, merely by reason of the viciousness of their crimes, be favored in jury selection to a greater degree than any other accused person or any litigant in a civil case? The studies opposing death-qualified juries present no answer to that inquiry.

Id. at 173.

64 673 P.2d at 683. While the seriousness of Field's alleged crimes probably did not affect the court's decision, a case of less egregious offenses may have been more appropriate for the disposition of this issue. Even though Fields had only been out of prison for three weeks, he was eventually convicted of the following offenses: "The robbery murder of Rosemary C. . . . ; the robbery of Clarence G.; the kidnapping for robbery and forced oral copulation of Cynthia S.; the kidnapping for robbery and robbery of Gwendolyn B., as well as rape, forcible oral copulation, and assault with a deadly weapon on Gwendolyn; the kidnapping, robbery, forcible oral copulation, and rape of Colleen C." Id. at 683. The case against Fields was considerably bolstered when his mother appeared at the preliminary hearing wearing Colleen C.'s blouse. See id. at 686.

65 Id. at 692.

66 See id. at 691-92. The court relied partially on standards set forth in Rubio v. Superior Court, 593 P.2d 595 (Cal. 1979). Rubio, a case involving the exclusion of felons and ex-felons from juries, premised its test for distinctive groups on whether or not there were shared attitudes among the members of the group due to a common background or life experience: "It is not enough to find a characteristic possessed by some persons in the community but not by others; the characteristic must also impart to its possessors a common social or psychological outlook on human events." Id. at 598. The Rubio court also required the defendant to show that the perspective of the excluded group could not be adequately represented by other members of the jury. See id. at 599.

67 Under this view, an organization such as the League of Women Voters probably could not constitute a distinctive group.
attitudes may have at the time of trial is the critical issue in examining jury composition. Prospective jurors questioned during voir dire are asked whether or not their opinions of the death penalty will affect their capability to perform as required by law, not why or whether their backgrounds are comparable to those sharing similar opinions.\(^{68}\)

Furthermore, if the Supreme Court of California requires a common background giving rise to the distinctive attitudes shared by the group excluded from juries, the evidence addressed in *Grigsby* and *Keeten* should fulfill that requirement.\(^{69}\) As Chief Justice Bird noted in a dissenting opinion in *Fields*, the majority must have "simply ignored"\(^{70}\) those studies, especially those establishing that "‘guilt phase includables’ tend to differ from the rest of the jury pool in many matters in addition to their unwillingness to vote for a death sentence.”\(^{71}\)

### IV. Kentucky Supreme Court Reaction to the Proscription of Witherspoon

As it did in *White v. Commonwealth*,\(^{72}\) the Kentucky Supreme Court has "simply ignored" the cross-section issue raised by the exclusion of capital punishment objectors, not only as to empirical data, but as to the constitutional issue itself. The court should be familiar with the argument, however, because it was presented in the Supreme Court brief for capital murder defendant Karu Gene White. In that brief, White contended that "the exclusion of those jurors who were not ‘death-qualified’ violated appellant’s rights to a representative, impartial jury drawn from


\(^{66}\) The court dismissed the contrary decisions in *Grigsby* and *Keeten*: "Both decisions assume that a cognizable class does not require a common background and experience giving rise to a distinctive, self-conscious group, but requires only shared views and attitudes on related issues of social and legal policy—a position we reject.” 673 P.2d at 692.

\(^{70}\) See id. at 711 (Bird, C.J., dissenting).

\(^{71}\) Id. at 713. Chief Justice Bird stated: “Values this strongly felt are likely to be an integral part of an individual’s basic system of beliefs and overall outlook. It is not very likely that such values will exist in random isolation, like a preference for strawberry ice cream . . ." Id.

a cross-section of the community.'" While an in-depth analysis of available empirical data was not presented to the court, the brief did cite *Hovey v. Superior Court*, which contains detailed data analysis. The Commonwealth argued in response to White's brief that even though new studies have been completed since *Witherspoon v. Illinois*, "no Court has found appellant's data so compelling as to require that jurors not be excluded under a *Witherspoon* test." The court was apparently persuaded by the Commonwealth's argument, stating simply that "[a] number of arguments are made by White on the application of the test in *Witherspoon v. Illinois*. We have examined all those instances and are of the opinion the trial court acted properly in each instance." The representativeness of the jury was never mentioned.

This disregard of the issue by the Supreme Court of Kentucky is perhaps the most prohibitive roadblock to a successful challenge of the death-qualified jury in Kentucky. A second roadblock is the position the Kentucky Supreme Court maintains in relation to the exclusion of any group and the potential violation of the fair cross-section requirement resulting from

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73 Brief for Appellant at 250, White v. Commonwealth, 671 S.W.2d 241. The same argument was made for Todd Ice. See Brief for Appellant at 215-18, Ice v. Commonwealth, 667 S.W.2d 671 (Ky. 1984), cert. denied, 105 S. Ct. 192 (1984).

74 The brief stated that the failure to discuss the studies at length was due to a "good faith attempt to comply with this Court's page limitation." Brief for Appellant at 253 n.10, 671 S.W.2d 241. It may be inferred, however, that this is actually a result of defense counsel's impression that lengthy discussion would be of little help in persuading the Supreme Court.

75 616 P.2d 1301 (Cal. 1980).

76 The *Hovey* court noted that "[r]oughly two dozen studies, experiments and surveys were introduced at or were the subject of expert testimony during the evidentiary hearing below." Id. at 1314. The court discussed over 10 different surveys at length, and analyzed the data presented. See id. at 1315-1345. Numerous tables were reproduced in the opinion, as well as determinations of the statistical significance of the differences found. Id.

77 391 U.S. 510 (1968).

78 Brief for Appellee at 92, White v. Commonwealth, 671 S.W.2d 241. This reply was identical to the one given in the Todd Ice brief: "[N]o court has found appellant's data to be so compelling as to require that jurors not be excluded under a *Witherspoon* test." Brief for appellee at 210, Ice v. Commonwealth, 667 S.W.2d 671.

79 671 S.W.2d at 245 (footnote omitted). The Kentucky Supreme Court also ignored the issue in its *Ice* opinion. See 667 S.W.2d at 676. The Court's focus was that *Witherspoon* did not permit a prosecutor to specifically inquire whether a juror could impose the death penalty in the case before the jury. Id.
that exclusion. In *Ford v. Commonwealth*,\(^6\) for example, Ford was convicted of murder and sentenced to life imprisonment.\(^8\) On appeal he contended that women, young adults and college students were underrepresented on the grand and petit juries that convicted him.\(^8\) As to young adults and college students, the Court found no special characteristics, interests or cohesive traits that merit their classification as distinctive groups.\(^8\) The Court reached the same conclusion regarding young adults in *McQueen v. Commonwealth*.\(^8\)

As to the challenge that women were underrepresented, the *Ford* Court acknowledged that women do constitute a distinctive group,\(^8\) satisfying the first prong of the *Duren* test.\(^8\) The Court held, however, that statistical data regarding the second and third requirements of the *Duren* test were not sufficient to establish a prima facie case of underrepresentation.\(^8\) The opinion noted that Ford failed "to prove underrepresentation at all, much less for a significant period of time; and . . . demonstrated no selection procedure which is susceptible to abuse or is not racially neutral, all of which factors are required by *Casteneda v. Partida*."\(^8\)

The Court's reliance on any requirements of that case is strained for two reasons: first, *Casteneda* dealt with grand, not

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\(^6\) 665 S.W.2d 304 (Ky. 1983).
\(^7\) *Id.* at 306.
\(^8\) *See id.* at 306, 308. Ford also contended that he was "improperly denied funds for the employment of an additional expert statistician." *Id.* at 308-09. The Court held that the denial was not improper, and stated: "We know of no statute or principle which would authorize expenditures of public funds to conduct a witch hunt." *Id.* at 309.

\(^9\) *See id.* at 308. Though some commentators contend young adults are a distinct group, the majority reach the same conclusion as the Court in *Ford*. *See generally Zeigler, supra* note 14, at 1067. It should be noted that the Court's language in concluding that young adults and college students are not distinctive groups is certainly not discouraging, especially in comparison to the California Supreme Court. *See notes 63-71 supra* and accompanying text. From the language used in *Ford*, the Kentucky Supreme Court does not appear to require a common background, but only cohesive traits or interests. *See 665 S.W.2d* at 308.

\(^10\) 669 S.W.2d 519 (Ky. 1984), *cert. denied*, 105 S. Ct. 269 (1984). In *McQueen*, the Court also found no error in refusing McQueen's request for funds to secure the services of an expert statistician to show that death qualified juries are more prone to conviction. *See id.* at 521-22.

\(^11\) *See 665 S.W.2d* at 308.

\(^12\) 665 S.W.2d 304 (Ky. 1983).

\(^13\) For a discussion of the *Duren* test see *notes 33-38 supra* and accompanying text.

\(^14\) *See 665 S.W.2d* at 308.

\(^15\) *Id.* (citing *Casteneda v. Partida*, 430 U.S. 482 (1977)).
petit, juries; and second, Casteneda was silent on the sixth amendment. The United States Supreme Court recognized the distinction between the equal protection rationale underlying Casteneda and the sixth amendment fair cross-section argument. The Court explained the difference in Duren, decided two years after Casteneda. The evidence presented to reveal an equal protection violation showed a significant discrepancy between the size of the group allegedly excluded and the number of members of the group actually called to serve as jurors. That evidence must also indicate discriminatory purpose, “another essential element of the constitutional violation [equal protection].” In sixth amendment fair cross-section cases, however, “systematic disproportion itself demonstrates an infringement of the defendant’s interest in a jury chosen from a fair community cross section. The only remaining question is whether there is adequate justification for this infringement.”

CONCLUSION

Empirical data now seems to prove that challenging for cause jurors opposed to the death penalty creates a jury unrepresentative of the community. Justice Brennan has, in fact, stated that an evidentiary hearing on this issue is necessary. Because of the uncertainty involved with United States Supreme Court review, however, it is imperative that the Kentucky Supreme Court examine the evidence and weigh it against the relevant state interests.

The remedial issue is perhaps the most difficult on which to speculate. The most viable alternative would appear to be the use of a bifurcated trial procedure in which death penalty attitude is the basis for exclusion only at the penalty phase. Since Kentucky rules already provide for a bifurcated trial process,

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89 See 430 U.S. at 483, 493.
91 Id. at 368 n.26.
92 Id.
93 Id.
95 See Grigsby v. Mabry, 569 F. Supp. 1273, 1323 (1983); Berry, supra note 7, at 38.
96 By statute, Kentucky provides that in a case in which the death penalty may be imposed, the jury must first determine the guilt or innocence of the defendant. If found guilty, the jury then hears further evidence on aggravating and mitigating circumstances and makes a sentence recommendation. Ky. Rev. Stat. § 532.025 (Baldwin 1984).
perhaps the use of alternate jurors would be possible.97 Whatever the solution, the Kentucky Supreme Court must first address the problem.

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