THE UNCONSTITUTIONALITY OF DEATH QUALIFYING A JURY PRIOR TO THE DETERMINATION OF GUILT: THE FAIR-CROSS-SECTION REQUIREMENT IN CAPITAL CASES

JOSEPH A. COLUSSI*

INTRODUCTION

In the wake of the Supreme Court's landmark decision in *Witherspoon v. Illinois*, many varied attacks have been levied against the traditional practice of permitting a jury, whose membership has been culled of hardened opponents of the death penalty, to determine the guilt of a person charged with a capital offense. The focus of the earliest attacks was directed at the propensities of prospective jurors. The *Witherspoon* Court had suggested that a successful attack of the death qualifying process

*Law Clerk, Chambers of the Honorable Scott O. Wright, United States District Court for the Western District of Missouri. B.A., Hanover College, Hanover, Indiana, 1978; J.D., Indiana University, Bloomington, Indiana, 1981.

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1. 391 U.S. 510 (1968). The Court held in *Witherspoon* that a sentence of death could not be carried out when the jury, which recommended the sentence, was chosen by excluding venire-persons for cause simply because they voiced generalized objections to the death penalty or expressed conscientious or religious scruples against its imposition. *Id.* at 522 n.21.

The Court reversed the petitioner’s death sentence, deeming it to be “self-evident,” *id.* at 518, that if a state eliminates prospective jurors for cause on the basis of their generalized objections to the death penalty, *id.* at 522, then the resulting jury “cannot speak for the community,” *id.* at 520, and is “uncommonly willing to condemn a man to die.” *Id.* at 521. But the Court did not reverse Witherspoon’s murder conviction. The empirical studies tendered on his behalf were “too tentative and fragmentary” to establish that the broad exclusion of those exhibiting scruples against capital punishment “results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction.” *Id.* at 517-18.


3. This practice is often referred to as the “death qualifying” of a jury in a capital case. Throughout this article, I refer to the process as the “death qualifying process.”

4. The Court in *Witherspoon* intimated that the question of whether a death qualified jury is more prone to convict was an open one. It noted that a capital defendant “in some future case might still attempt to establish that [a] jury [which has been death qualified] was less than neutral with respect to guilt.” 391 U.S. at
could be mounted where the accused could demonstrate on the basis of empirical data that a death qualified jury was less than impartial with respect to guilt.\(^5\) This approach has been uniformly unsuccessful.\(^6\)

An alternate basis for challenging the death qualifying process arose in 1975 when the Court decided *Taylor v. Louisiana*.\(^7\) In *Taylor*, the Court held that a criminal defendant is deprived of his right to have his guilt tried by a jury drawn from a fair cross-section of the community when a distinct group is systematically excluded from the jury selection process.\(^8\) If the *Taylor* "systematic exclusion" test is applied to the pre-trial voir dire examination of

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5. 391 U.S. at 520 n.18. Even Justice White, in his dissenting opinion, stated that he too would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in the penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt. Id. at 541 n.1.


8. Id. at 525-27.

While the right to be tried by a jury drawn from a representative cross-section of the community has roots extending at least as far back as 1879, see Strauder v. West Virginia, 100 U.S. 303, 308 (1879), no single constitutional provision has been deemed to embody it. Prior to *Taylor*, the Court had assessed the jury selection process under either of two standards. See Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of The Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1119 (1966). One fair-cross-section standard was articulated in cases which involved jury selection procedures that appeared to have a racially discriminatory impact, see, e.g., Smith v. Texas, 311 U.S. 128 (1940), or which involved the Court's supervisory power over the federal courts. E.g., Ballard v. United States, 329 U.S. 187 (1946); Theil v. Southern Pac. Co., 328 U.S. 217 (1946). These cases suggested that the government bore an affirmative obligation to ensure that the venire reflected a fair cross-section of the community. In *Fay v. New York*, 332 U.S. 261, 272
prospective jurors in a capital case, then the practice of death qualifying a jury seemingly results in a violation of the fair-cross-section requirement. The Supreme Court, however, has never adequately attempted to reconcile a capital defendant's fair-cross-section rights with the states' recognized interest in impaneling a jury capable of imposing a sentence of death.\textsuperscript{9}

The thesis of this article is that the fair-cross-section principles enunciated in \textit{Taylor} and in \textit{Duren v. Missouri}\textsuperscript{10} better serve as a basis for review of the constitutionality of the death qualifying process in a capital case. In Part I, I briefly summarize and criticize the unsatisfactory nature of challenging a death qualified jury on the ground that it is biased in favor of conviction. I argue in Part II that the fair-cross-section principles established in \textit{Taylor} and \textit{Duren} were foreshadowed in \textit{Witherspoon}, and that the application of these principles demonstrates that states are presently engaged in the unjustified systematic exclusion of a distinct group

(1947), however, the Court declared that the obligation was not constitutionally mandated.

Since the sixth amendment was inapplicable to the states prior to 1968, \textit{see} Duncan v. Louisiana, 391 U.S. 145 (1968), the Court also fashioned a second standard based on an equal protection analysis. \textit{See}, e.g., Bubanks v. Louisiana, 356 U.S. 584 (1958), Hernandez v. Texas, 347 U.S. 447 (1954); Smith v. Texas, 311 U.S. 128 (1940). The equal protection analysis led to confusion because the defendant could not show actual prejudice unless he was a member of the excluded group. In 1972, the Court did allow a defendant to challenge the venire as unrepresentative even though he was not a member of the excluded group and could not prove purposeful discrimination. Peters v. Kiff, 407 U.S. 493 (1972) (plurality opinion). The \textit{Taylor} court's due process analysis laid to rest the problems that arose under the equal protection analysis. \textit{See} notes 49-50 and accompanying text infra.

\textsuperscript{10} 439 U.S. 357 (1979).

An alternative analysis, not considered in this article, which is similar to the analysis applied in \textit{Witherspoon}, appears in \textit{Ballew v. Georgia}, 435 U.S. 223 (1978). In \textit{Ballew}, the Court held that a criminal conviction rendered by a five-person jury violated the sixth and fourteenth amendments. Under this analysis, the "purpose and functioning of the jury in a criminal trial" is impaired to a significant degree by the procedure permitting a conviction to be founded on the verdict of a five-member jury. \textit{Id}. at 239. If the requisite showing of impairment is made, the Court then considers whether any "state interest counterbalances and justifies the disruption so as to preserve [the] constitutionality" of the challenged procedure. \textit{Id}. at 231. The \textit{Ballew} Court relied extensively on relevant scholarly and empirical studies. \textit{Id}. at 231-39, 244-45. It concluded:

the assembled data raised substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

\textit{Id}. at 239 (emphasis added).
of persons from a capital defendant's trial on the issue of guilt. Finally, in Part III, I recognize a state's legitimate interest in impanelling a jury that is capable of imposing capital punishment and propose two alternative trial practices which reconcile a capital defendant's fair-cross-section rights with a state's legitimate interests.

I

In Witherspoon v. Illinois, the petitioner contended that the traditional practice of excluding those persons who harbored conscientious scruples against capital punishment from deciding both the guilt and punishment issues in a capital murder case was unconstitutional. He claimed that this type of a jury, unlike one chosen at random from a representative cross-section of the community, is necessarily biased in favor of the prosecution. In substantiation of his claim that a death qualified jury is more prone to convict than one more representative of the general populace, he presented two surveys and an unpublished study. No empirical evidence was offered in support of his other proposition that a death qualified jury is biased in favor of capital punishment. The Court dismissed the conviction bias contention, holding that the experimental evidence before it was "too tentative and fragmentary." But the Court, ironically, reversed the petitioner's sen-

12. In the past, the death penalty was either mandatory on conviction for a capital offense, or left to the discretion of the trial court. See generally Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. PA. L. Rev. 1099 (1953). Prospective jurors who exhibited scruples against capital punishment were excluded from the jury on the ground that they might tend toward voting "not guilty" as their only method of asserting opposition to the death penalty. E.g., Williams v. State, 32 Miss. 389, 392 (1856). The practice of excluding capital punishment objectors was firmly established by 1850 and remained virtually unquestioned until the middle 1950's. By then, however, most state criminal statutes had been changed to give the jury discretion to choose between capital punishment and life imprisonment. See Knowlton, supra, at 1100-03. Nevertheless, courts continued to adhere to the traditional practice of excluding jurors who opposed the death penalty from deciding both the guilt and punishment questions. Id. at 1105-07.
13. 391 U.S. at 516-17.
14. Id.
15. Id. at 517 n.10.
16. Id.
17. Id. at 518.
18. Id. at 517-18. The ramifications of eliminating jurors who oppose capital punishment from deciding both the guilt and punishment questions were squarely confronted by Professor Oberer in 1961. See Oberer, Does Disqualification of Jurors for Scruples against Capital Punishment Constitute Denial of a Fair Trial on Issue of Guilt?, 39 Tex. L. Rev. 545 (1961). Oberer contended that the effect of the exclusionary practice was to deny an impartial jury on the issue of guilt or innocence. He wrote, "[a] jury qualified on the death penalty will necessarily have been culled of
tence of death, holding that it is "self-evident" that the jury "fell woefully short of the impartiality" to which the petitioner was entitled under the sixth and fourteenth amendments. 19

The ambiguous holdings of the Court in Witherspoon have been the subject of numerous attacks. 20 Its analysis has been especially problematic with respect to which constitutional doctrines it implied. When the Court concluded that it could not determine on the record before it whether the elimination of those prospective jurors who opposed capital punishment resulted in an unrepresentative jury on the issue of guilt or substantially increased the likelihood of conviction, it left the impression that a death qualified jury could be challenged on either of two grounds. 21 First, its reference to an "unrepresentative jury" implied that the right to have one's guilt tried by a jury drawn from a representative cross-section of the community provided an independent and adequate basis for attacking the composition of a death qualified jury. Since the same could be provided for with respect to the latter reference to the "increased risk of conviction," a death qualified jury could be challenged as less than impartial with respect to guilt. 22

the most humane of its prospective members." Id. at 549. He then posed the following question: "Why should the capital defendant be denied a jury on the guilt issue as favorable as that accorded the non-capital defendant?" Id. at 552 (emphasis added).

In his dissenting opinion in Witherspoon, the late Justice Douglas argued that the exclusion of jurors who tenaciously opposed capital punishment would bias the guilt determining process. 391 U.S. 510, 523 (1968) (Douglas, J., dissenting). He concluded that the "prejudice 'is so subtle, so intangible, that it escapes the ordinary methods of proof.'" Id. at 531.

19. Id. at 518. The Court reasoned that when a state grants discretion to twelve citizens to decide life or death, the decision must reflect the conscience of the community. When a sizeable segment which opposes the penalty is eliminated from the penalty decision, the community conscience is inadequately represented. Despite this very broad reasoning, the Court held that a state may exclude prospective jurors who

[make] it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or

(2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Id. at 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478, 482 (1970); Adams v. Texas, 448 U.S. 38, 43-44 (1980).

20. See note 26 and accompanying text infra.

21. See 391 U.S. at 518.

22. Though the precise constitutional basis for its holdings is not entirely certain, see, e.g., 391 U.S. at 538 (Black, J., dissenting), the constitutional principles most likely applied were those of due process as sifted through the filter of sixth amendment values. This interpretation is supported by the Court's conclusion that the infliction of a death sentence would deprive the petitioner "of his life without due process of law." Id. at 523. It is further substantiated by the Court's reliance on two earlier cases. Id. at 518 (citing Irvin v. Dowd, 366 U.S. 717 (1961) and Turner v. Louisiana, 379 U.S. 466 (1965). Though these two cases were decided when states
Though Justice Douglas had argued in his dissenting opinion that the proper focus of the analysis should be on the cross-section requirement because a violation of the requirement necessarily resulted in a jury which was not impartial, subsequent defendants in capital cases, their attorneys, some scholars, and most courts have chosen to analyze the death qualification problem with respect to whether the resultant jury was biased in favor of conviction.

Even though the Court in *Witherspoon* rejected the exiguous experimental evidence proferred by the petitioner, it did indicate that it would be receptive to further empirical data. Seldom has an invitation been more fervently accepted. In the years immediately following the *Witherspoon* opinion, numerous new social science studies, surveys, and experiments were offered to lower courts by capital defendants in the expectation that the courts would be compelled to find a death qualified jury less than neutral with respect to guilt. That expectation has been regularly dashed by

were not obligated to provide a trial by jury in a criminal case, the Court held that once the state provided for a trial, the nature of the jury trial must conform to fourteenth amendment commands. 366 U.S. at 722-23; 379 U.S. at 471-73. Among these commands was the right to "a fair trial by a panel of impartial, 'indifferent' jurors." 366 U.S. at 722.

23. 391 U.S. at 524 (Douglas, J., dissenting). In his opinion, he stated that the proper inquiries should be addressed to "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 . . . ." *Id.* (citations omitted). He noted that "'[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'" *Id.* at 524 n.1 (citing Smith v. Texas, 311 U.S. 128, 130 (1940)). *See also* Ballard v. United States, 329 U.S. 187, 191 (1946); Theil v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Glasser v. United States, 315 U.S. 60, 85-86 (1942).

24. *See generally* note 6 *supra* and note 26 *infra*.

25. 391 U.S. at 517-18.


courts which have considered the evidence. Though several courts have admitted that the data does raise some serious questions about the impartiality of a death qualified jury, none has been wholly receptive to the additional evidence.

The approach taken by the California Supreme Court in *Hovey v. Superior Court* exemplifies the extent to which a court might go in order to avoid concluding that a death qualified jury is less than impartial with respect to guilt. In *Hovey*, the California court ventured an exhaustive and critical review of all the major literature available on the question of juror bias. Despite the wealth of research, the court concluded that the present state of the experimental evidence is not sufficiently reliable. But in order to pro-

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27. See note 6 supra.


29. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). The petitioner was accused of murder and kidnapping. He brought a writ of mandamus to require the trial court to limit the “for cause” exclusion of prospective jurors. The California Supreme Court granted the petitioner partial relief, holding first that a prospective juror who can be impartial in his determination of guilt can nonetheless be removed for cause from serving at the guilt phase because of his unequivocal opposition to the infliction of a death penalty and, finally, that the portion of the voir dire examination which is concerned with the issue of capital punishment must be conducted individually and in sequestration. *Id.*

30. 28 Cal. 3d at 19-99, 616 P.2d at 1309-46, 168 Cal. Rptr. 136-74.

31. 28 Cal. 3d at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173-74. On the basis of what
tect the claimant from a jury biased in favor of a sentence of death, the court ironically held, on the basis of a single unpublished study,\textsuperscript{32} that the voir dire examination of prospective jurors must be conducted individually and in sequestration when the issue of capital punishment surfaces.\textsuperscript{33} The court's concern with minimizing the deleterious effects of a prospective juror's exposure to the death qualifying process is a tacit admission that the death qualifying process affects the impartiality of the jury ultimately impaneled.\textsuperscript{34}

As a majority of the Supreme Court did in \textit{Witherspoon}, the \textit{Hovey} court made bad law in order to avoid coming to terms with the propriety of imposing a sentence of death.\textsuperscript{35} The inability of courts to satisfactorily resolve the problem of impartiality in a capital case accentuates the need to reassess the \textit{Witherspoon} holding and to determine whether the representative cross-section doctrine serves as a sounder basis for challenging the death qualification process.

\textsuperscript{32} 28 Cal. 3d at 75 n.125, 616 P.2d at 1351 n.125, 168 Cal. Rptr. at 178 n.125 (citing Haney, \textit{The Biasing Effects of the Death Qualification Process} ((1979 prepub. draft) unpublished paper).

\textsuperscript{33} 28 Cal. 3d at 81, 616 P.2d at 1354, 168 Cal. Rptr. at 181.

\textsuperscript{34} 28 Cal. 2d at 81, 616 P.2d at 1354, 168 Cal. Rptr. at 182. The court stated that Haney's findings indicated that the traditional practice of conducting the voir dire examination in open court on the penalty issue created certain "side effects" that shaped the prospective jurors' attitudes toward capital punishment. 28 Cal. 3d at 81, 616 P.2d at 1353, 168 Cal. Rptr. at 180. The court found that the most practical and effective procedure available to minimize the undesirable effects of the death qualification process was individualized and sequestered voir dire on the issue of capital punishment. 28 Cal. 3d at 81, 616 P.2d at 1353, 168 Cal. Rptr. at 181.

Though the Court had dismissed roughly two dozen studies on the conviction proneness issue as unreliable, 28 Cal. 3d at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173-74, it nonetheless asserted, with respect to the sequestration issue, that courts should be concerned if certain procedures encourage "[t]endencies, no matter how slight, to the selection of jurors by any method other than a process which will insure a trial by a representative group." 28 Cal. 3d at 79, 616 P.2d at 1353, 168 Cal. Rptr. at 180 (citation omitted).

\textsuperscript{35} Justice White suggested in his dissenting opinion in \textit{Witherspoon} that the majority's decision to reverse the petitioner's sentence was motivated by its strong dislike for the death penalty. 391 U.S. at 542 (White, J., dissenting).
Justice Douglas, in his dissenting opinion in *Witherspoon*, argued that the proper frame of analysis ought to be whether a jury in a capital case should be "impartially drawn from a cross-section of the community." From this analysis, the late Justice concluded that systematic or intentional exclusion of some qualified groups violated a capital defendant's right to be tried by an impartial jury drawn from a cross-section of the community. Unlike the majority's position, which required a capital defendant to show that a death qualified jury tended to favor conviction, the analysis of the dissent would not have required a capital defendant to demonstrate that he had been specifically prejudiced by the systematic exclusion. Though the Douglas cross-section analysis did not gather much support in *Witherspoon* or those cases decided soon after *Witherspoon*, the Court eventually adopted the analysis seven years later in *Taylor v. Louisiana*.

Before their repeal, the Louisiana Constitution and Code of Criminal Procedure provided that a woman would not be selected for jury service unless she had previously filed a "written declaration of her desire to be subject to jury service." The Court in *Taylor* reversed the claimant's conviction for aggravated kidnapping, holding that those provisions of Louisiana law unconstitutionally permitted the state to systematically exclude a distinct group from the jury selection process. The Court recognized a constitutional right on the part of every criminal defendant to have his guilt tried

36. 391 U.S. at 524 (Douglas, J., dissenting).
37. *Id.* at 524-29 (Douglas, J., dissenting). Though the late Justice had framed the inquiry in terms of a "systematic exclusion," cf. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (terms later adopted by the majority of the Court), he merged his discussion of the fair-cross-section requirement with the issue of juror bias. Referring to the fair cross-section of the community, he stated that "[t]he conscience of the community is subject to many variables, one of which is the attitude toward the death sentence. If a particular community were overwhelmingly opposed to capital punishment, it would not be able to exercise a discretion to impose or not to impose the death sentence." 391 U.S. at 528. Particularized attitudes were later considered irrelevant by the Court. *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979). In neither *Taylor nor Duren* was the Court concerned with whether non-excluded jurors held attitudes similar to those of the excluded jurors. *Id.*
38. 391 U.S. at 516-18.
39. *Id.* at 531 (Douglas, J., dissenting).
40. *See* e.g., *Boulden v. Holman*, 394 U.S. 478 (1969). *See also note 6 supra.*
42. *Id.* at 523-24 n.1 & n.2.
43. *Id.* at 530-32.
by a jury drawn from a fair cross-section of the community. The presence of a fair cross-section of the community in the venire from which twelve jurors are eventually selected was deemed essential to the sixth and fourteenth amendment right to an impartial jury in a criminal prosecution.

The Court's decision in Taylor did not restrict the legitimate interests of a state in prescribing relevant qualifications for prospective jurors and in providing reasonable exemptions for particular persons in the community. Any reason offered by the state in justification of the exclusion of a distinctive group, however, must reflect weighty grounds. Merely rational grounds could never suffice. In addition, the Court stated that it had no intention to trample on the traditional practice of providing each litigant with a certain limited number of peremptory challenges. The Court, however, strongly implied that an accused would never be obligated to show that the exclusion of a distinctive group specifically prejudiced him, because any unjustified exclusion deprives a criminal defendant of the kind of fact-finder to which he is constitutionally entitled.

Because the Court implied in Taylor that an accused is never

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44. Id. at 530. See also note 8 and accompanying text supra.
45. 419 U.S. at 530. The Court distinguished Hoyt v. Florida, 368 U.S. 57 (1961) as an equal protection case dealing with separate issues. 419 U.S. at 533-34. In dissent, Justice Rehnquist objected to the majority's cavalier treatment of the Hoyt decision, because he believed that Hoyt and Taylor raised the same problem. 419 U.S. at 539 (Rehnquist, J., dissenting). The Taylor majority had stated that Hoyt did not involve a challenge to the sixth amendment right to a trial by a jury drawn from a fair cross-section of the community. Id. at 534. Thus, the issues involved in Hoyt and Taylor were different since the respective defendants sought protection under two separate constitutional standards.
46. Id. at 537-38. The Court stated that the "fair-cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community." Id. at 538.
47. Id. at 534.
48. Id.
49. Id. at 534-35. See also Witherspoon v. Illinois, 391 U.S. 510, 530 (1968) (Douglas, J., dissenting).
50. 419 U.S. at 526. Though a criminal defendant was once required to demonstrate "purposeful discrimination" in the selection of a venire under the Court's equal protection line of cases, see, e.g., Hoyt v. Florida, 368 U.S. 57, 68-69 (1961), a showing of "purposeful discrimination" is no longer required as a result of the Taylor and Duren decisions. Under the equal protection analysis, "purposeful discrimination" characterized the intent to exclude from or discriminate against a cognizable class in the jury selection process. See Zeigler, Young Adults as a Cognizable Group in Jury Selection, 76 Mich. L. Rev. 1045, 1057 (1978). As a result of the Taylor decision, a defendant must demonstrate that the venire does not reflect a fair cross-section of the community. The purpose or intent to discriminate is never an issue.
required to demonstrate specific prejudice, the burden of justifying any systematic exclusion seemingly rested with the state. This realignment of burdens manifests a clear departure from the approach adopted by the Court in *Witherspoon*. In *Witherspoon*, the petitioner was not only required to show that a distinct group was systematically excluded from the jury selection process, but that he was specifically prejudiced by their exclusion. Since the petitioner in *Witherspoon* had failed to adequately establish that his death qualified jury was more prone to convict than one more representative of the community, he failed to demonstrate specific prejudice.\(^5\)

Though the *Taylor* decision left some uncertainty as to whether the state was actually to be burdened with justifying the exclusion of a distinct group, that uncertainty was dispelled four years later by the Court's decision in *Duren v. Missouri*.\(^5\)

According to the *Duren* Court, a prima facie violation of the fair-cross-section requirement occurs when a criminal defendant establishes that the persons allegedly excluded from the jury selection process constitute a distinct group in the community, that the representation of this group is not fair and reasonable in relation to the number of those persons in the community, and that the underrepresentation was caused by the systematic exclusion of the group during the selection process.\(^5\) The Court further held that in the face of a prima facie violation, a state may justify a fair-cross-section violation by proving that the attainment of a fair cross-section is incompatible with a significant state interest.\(^5\) The *Duren* opinion, therefore, crystallized the manner in which the burdens of proof are to be aligned in any criminal case.

The circumstances of both *Taylor* and *Duren*, however, involved criminal defendants who had not been accused of capital offenses.\(^5\) Soon after the *Taylor* decision was handed down, many defendants accused of capital offenses joined fair-cross-section challenges with conviction bias challenges to death qualified juries.\(^5\) The fair-cross-section attack on the death qualifying pro-

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51. 391 U.S. at 517-18.
53. *Id.* at 364. The petitioner had been convicted of murder and robbery. He contended that his right to be tried by a jury chosen from a fair cross-section of the community had been denied because provisions of Missouri law granted women, on their request, an automatic exemption from jury duty. *Id.* at 360 n.8. Under the challenged jury selection system, women could claim their statutory right to be exempt from jury duty by expressly requesting an exemption before being sworn as a juror. *Id.*
54. *Id.* at 367-68.
55. See notes 7, 53 and accompanying text *supra*.
cess has not, however, been the recipient of much judicial ink.

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The most cursory, and consequently unsatisfactory, Supreme Court analysis of the question of whether the death qualifying process in a capital case constitutes a violation of the fair-cross-section requirement appears in *Lockett v. Ohio*. In *Lockett*, the Court summarily responded to the claimant's assertion that the State of Ohio had unjustifiably excluded a distinct group from the jury selection process with the single statement that nothing in its *Taylor* opinion suggests that the right to a representative jury includes the right to be tried by jurors who were excluded on the basis of their attitudes toward capital punishment. It is not clear from this brusque analysis whether the Court believed that states are exempt only in capital cases, as a subset of all criminal cases, from the requirements of *Taylor* or whether states have a sufficiently weighty reason in justification of a prima facie fair-cross-section violation. It is clear, however, that most courts do not consider the Court's analysis and holding on the fair-cross-section issue in *Lockett* as binding authority.

The impact of the fair-cross-section requirement on the death qualifying process has been recently considered by a series of state courts and lower federal courts. The depth of the analy-


57. 438 U.S. 586 (1978). Ms. Lockett had been convicted of aggravated murder and aggravated robbery, and was sentenced to death. The Court held in part that the exclusion of prospective jurors who indicated that they could not be trusted to abide by the existing law due to their convictions concerning the death penalty was proper. *Id.* at 595-97.

58. *Id.* at 596-97. In her brief filed in the Supreme Court, the petitioner cited *Taylor* as support for the proposition that the trial court had improperly excluded those jurors who had not made it unmistakably clear that they could not find guilt. She avowed that the trial court had failed to narrowly circumscribe the scope of the *Witherspoon* excludables. Petitioner's Brief for Certiorari at 91-97, *Lockett v. Ohio*, 438 U.S. 586 (1978). She did not assert that the death qualifying process was unconstitutional whenever instituted before the issue of guilt is determined. Thus, the Court was not presented with the question of whether a fair-cross-section violation arises when a jury is death qualified prior to the determination of guilt. It did not consider the problem in light of the *Prima facie* test established one year later in *Duren v. Missouri*, 439 U.S. 357 (1979).


ses in these cases, however, has been only slightly greater than the one contained in *Lockett*. A sampling of several contemporary decisions typifies the confused and unsatisfactory manner in which the cross-section issue is being resolved in capital cases. In *Grigsby v. Mabry*,62 which is presently being litigated within the habeas corpus jurisdiction of the Eighth Circuit, a federal district court in Arkansas has attempted to reconcile the Supreme Court's seemingly inconsistent positions in *Witherspoon* and *Taylor*. In its discussion of the petitioner's fair-cross-section rights, the district court advanced its analysis from the premise that the issue of "conviction bias" is distinct from the issue of a "fair cross-section."63 From that premise, the court focused on the question of whether the petitioner had established a prima facie violation. Though the court distinguished the two modes of analysis available to it and posed the proper inquiry, it nonetheless intermingled considerations of jury bias when it applied the prima facie test. The court found that an "identifiable group" had been systematically excluded, but held that no prima facie violation had occurred because it was unable to conclude that the attitudes of persons excluded had not been represented by those persons not excluded from the jury selection process.64

This analysis turned on the court's firm belief that those jurors who had only mild scruples with respect to capital punishment might adequately represent the attitudes of those persons who had

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61. See *e.g.*, *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981); *Spinkellink v. Wainwright*, 575 F.2d 582 (5th Cir. 1978); *Grigsby v. Mabry*, 483 F. Supp. 1372 (E.D. Ark. 1980), modified and remanded, 637 F.2d 525 (8th Cir. 1980). The petitioner filed a petition for writ of habeas corpus in the district court. The district court found, in part, that the petitioner's fair-cross-section right was not violated where prospective jurors who could not, in good conscience, impose the death penalty were excluded from the petitioner's trial on the issue of guilt. 483 F. Supp. at 1385. The circuit court ordered the district court to hear evidence on the petitioner's conviction bias claim but reserved judgment on the fair-cross-section claim. 637 F.2d at 527-28.


63. Id. at 1385 (citing *United States v. Olson*, 473 F.2d 686 (8th Cir. 1973)).

64. Id. at 1385 (citing *Duren* prima facie violation analysis when it held that the group consisting of those "adamantly opposed" to the death penalty were not "distinctive" from those "mildly opposed" to the penalty. *Id.* at 1385.
been excluded on account of their unalterable opposition to capital punishment. Though the Taylor and Duren decisions had placed the burden of justifying an exclusion on the state and had relieved the defendant of the burden of showing specific prejudice, the district court, in questionable reliance on Eighth Circuit authority, returned the burden of showing specific prejudice to the accused. Nothing in the Taylor or Duren opinions, however, suggested that the claimants in those cases were required to demonstrate that the attitudes of the excluded women were not adequately represented by the predominantly male venire in order to prove a fair cross-section violation.

In Smith v. Balkcom, the Fifth Circuit held that a prima facie violation might be present in a capital case, but that significant state interests always justified the violation. Though its conclusion was incorrect, the court properly separated its analysis of the "jury bias" and "cross-section" issues. The court's seemingly distinct analyses may be questioned, however, in light of its statement that

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65. Id.
66. Id. at 1382 (citing United States v. Olson, 473 F.2d 686 (8th Cir. 1973)). In Olson, the circuit court was concerned with the question of whether persons aged eighteen to twenty compose an identifiable group which cannot be systematically excluded from jury service without rendering juries nonrepresentative of community attitudes. 473 F.2d at 687. The court required the claimant to show that the attitudes of this group were not adequately represented by persons several years older. Id. at 688. The Olson decision predated Taylor and Duren and did not fashion the fair-cross-section analysis in the same manner as those Supreme Court cases, and it is unclear why the district court relied so heavily on its reasoning.
67. 660 F.2d 573 (5th Cir. 1981).
68. Id. Other courts have separately analyzed the distinct issues of "jury bias" and "unfair cross-section." In State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), the capital defendant claimed that Witherspoon-excludables were "a distinct, opinion-shaped group and their exclusion produces a prosecution prone jury skewed against Negroes and the lower economic classes." Id. at 810. The court did not discuss the impact of Taylor and Duren on Witherspoon, and summarily concluded that the Witherspoon decision foreclosed any fair-cross-section challenge to a death qualified jury. Id. at 810. See also Bowen v. State, 244 Ga. 495, 250 S.E.2d 855 (1979); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977), cert. denied, 436 U.S. 950 (1978). But see State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), (Exum, J., dissenting).

In People v. Hamilton, 100 Ill. App. 3d 942, 427 N.E.2d 388 (1981), the court assumed that a prima facie violation might have occurred, but concluded that the exclusion of prospective jurors who would automatically vote against the death penalty was necessary in order to preserve an "impartial" jury. Id. at —, 427 N.E.2d at 394. If the group was not excluded, the court stated that the state might be saddled with a jury biased in favor of the accused. Id. Presumably, a jury biased in favor of conviction is truly impartial, while a jury biased in favor of acquittal is not. The court drew this reasoning from Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). The logic of Spinkellink has been duly criticized by other courts. See Grigsby v. Mabry, 483 F. Supp. 1372, 1387 n.19 (E.D. Ark. 1980); Hovey v. Superior Court, 28 Cal. 3d 1, 19 n.41, 616 P.2d 1301, 1309 n.41, 168 Cal. Rptr. 128, 136 n.41 (1980).

Finally, in People v. Pacheco, 116 Cal. App. 3d 617, 172 Cal. Rptr. 269 (1981), the court rejected the claimant's fair-cross-section claim on the ground that he had
“[a] cross-section of the fair and impartial is more desirable than a fair cross-section of the prejudiced and biased.”69 This statement, appearing in the section of the opinion in which the court was considering a prima facie violation of the fair cross-section requirement, was prompted by the court’s earlier discussion of the conviction propensities of a death qualified jury.70 In the earlier discussion, the court rejected the petitioner’s experimental evidence, holding that the state had a right to death qualify a jury in order to obviate the prospect of a jury prone to acquit.71

As the Grigsby and Balkcom cases make clear, the impact of the fair-cross-section requirement in capital cases has not been clearly or fully explored. As the Supreme Court of California noted in dicta in its Hovey decision, the impact of Taylor and Duren in capital cases is open to dispute.72 But before any discussion can be advanced about that impact of Taylor and Duren on a capital case, a capital defendant must be able to demonstrate a prima facie violation of the fair-cross-section requirement.

C

In any capital case in which death qualified jurors are excluded from the guilt phase of the trial, a capital defendant can always demonstrate that a prima facie violation has taken place. With respect to the first part of the Duren prima facie test,73 the Supreme Court acknowledged in Witherspoon that persons who oppose the death penalty were not only sufficiently numerous and distinct in American society, but constituted nearly one-half of the population at the time the Witherspoon litigation commenced.74 Though more recent studies suggest that less than one-half of the persons in the United States oppose the death penalty,75 no court

failed to identify a “constitutionally recognizable” group. Id. at —, 172 Cal. Rptr. at 276.

69. 660 F.2d at 583.
70. Id. at 578-79.
71. Id. at 579. See note 68 and accompanying text supra, where it was suggested that the court viewed a jury prone to acquit less impartial than a jury prone to convict.
72. 28 Cal. 3d at 17 n.38, 616 P.2d at 1308-09 n.38, 168 Cal. Rptr. at 135 n.38.
73. 439 U.S. at 364. See note 53 and accompanying text supra.
74. 391 U.S. at 520 n.16. Other courts have assumed that those who may be excluded from a capital case on Witherspoon grounds constitute a distinct group. See, e.g., Spinkellink v. Wainwright, 578 F.2d 582, 597 (5th Cir. 1978). But see Smith v. Balkcom, 660 F.2d 573, 583 n.26 (5th Cir. 1981). See also Grigsby v. Mabry, 483 F. Supp. 1372, 1382 (E.D. Ark. 1980); State v. Mercer, 618 S.W.2d 1, 7 (Mo. 1981); People v. Hamilton, 10 Ill. App. 3d 942, —, 427 N.E.2d 388, 394 (1981).
75. See The Harris Survey, Louis Harris & Associates, Inc., June 11, 1971. Table 314 indicated that at least 16% of those polled would be excluded under the Witherspoon standards. The poll is reported and analyzed in White, The Constitutional
has ever held that those who object to capital punishment do not represent a distinct segment in the population. Even the Supreme Court in Lockett seemed to presume that those persons who are excluded during the death qualifying process of a capital case are a distinct group.76 A capital defendant, therefore, does not face any significant difficulty in establishing that those unalterably opposed to the death penalty are a "distinctive group" in the community.

Any practice which permits the trial court to exclude from the venire every prospective juror who states that he would automatically vote against the death penalty or that he could not be impartial in the guilt determination phase, necessarily results in the underrepresentation of a distinctive group at the trial on the issue of guilt.77 Since courts continue to adhere to this traditional practice of excluding jurors who oppose the death penalty from deciding both the guilt and punishment questions, they are the

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76. See 438 U.S. at 596-97.

77. Under the second element of the Duren prima facie test, a defendant must demonstrate that the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of those persons in the community. 439 U.S. at 364. See note 53 and accompanying text supra.

In State v. Ortiz, 88 N.M. 370, —, 540 P.2d 850, 852-53 (1975), the court rejected a claimant's fair-cross-section challenge on the ground that the traditional practice of excluding jurors for cause in a capital case was constitutionally distinct from the practices overturned in Taylor, since the exclusions occurred at different times in the jury selection process. The New Mexico Court's distinction is infirm. In Taylor, and later in Duren, the Supreme Court was only concerned with the selection of the venire itself. The Court had only to point to the large discrepancies between the number of women which appeared in the venires and the number of women in the community to find the element of unreasonable underrepresentation. There was no need for further analysis in either case.
instrumentalities responsible for skewing the representative nature of the jury. This practice has a greater impact on the representative quality of the resulting jury than did the practices found unconstitutional in Taylor and Duren. Unlike the practice overturned in Duren, for example, which allowed women to use their discretion in choosing to be available for jury duty, in capital cases the death qualifying of the venire results in the exclusion of every prospective juror who is unalterably opposed to the death penalty. Consequently, the resulting representation of this group at the trial on the issue of guilt is necessarily unfair and unreasonable when compared to the number of those persons represented in society.

Finally, a capital defendant must show that the underrepresentation of the group is due to systematic exclusion in the course of the jury selection process. The Supreme Court has never found that the systematic exclusion must occur at a particular point in the jury selection process. In Taylor, the systematic exclusion occurred when the state selected persons from the voter registration lists. Every woman was excluded at that point. In Duren, the systematic exclusion occurred when the state constructed its jury wheel. Though the women in Duren were randomly selected from the voter registration lists, they could exercise their statutory right and preempt their being placed on the jury wheel. The systematic exclusion of jurors in capital cases generally occurs when the trial court sustains a challenge for cause. In the past, a challenge for cause has been considered the proper method for excluding all prospective jurors who harbor unmistakably firm opinions about the death penalty. This includes those who state that their views in favor of the death penalty will influence their deliberation on the issue of guilt. Though it may be permissible for the litigants to strike a prospective juror by means of a peremptory challenge, the systematic exclusion cannot be the result of the trial court's intervention in the jury selec-

78. In a capital case, the venire contains at the outset a presumably representative number of persons who could not vote to impose the death sentence. The state is allowed to exercise unlimited challenges for cause to reduce that number to zero. The effect, therefore, is the same as if those persons had been denied access to the venire in the first place. It is the effective mode of exclusion, not the time of its application, which is constitutionally significant.
80. 419 U.S. at 524-26.
81. 439 U.S. at 365-66.
83. Id.
tion process. To the extent that the trial court is responsible for the systematic exclusion of a distinct group, the capital defendant has satisfied the final part of the *Duren* prima facie test.84

Even though a capital defendant successfully establishes all three elements of a prima facie violation of the fair-cross-section requirement, the state may justify a violation by showing that the attainment of a fair cross-section is incompatible with a significant state interest.85 There are two significant state interests which are usually advanced by a state in a fair-cross-section challenge. The primary interest of the state, as recognized in *Witherspoon* and reaffirmed in *Adams v. Texas*, is in a jury which is capable of imposing capital punishment at the penalty stage of a capital trial.86 A second interest, which is typified by the trial practice of every state, is in having a single jury try the issues of guilt and sentence. Though *Witherspoon* seemingly gave the states broad discretion in pursuing these two interests, the limits of that discretion have been framed by the intervening *Taylor* and *Duren* decisions. Given a prima facie violation, these two interests are reconcilable with a capital defendant's right to have his guilt or innocence tried by a jury drawn from a fair cross-section of his community.

III

The Supreme Court recognized in *Witherspoon* that a state has a legitimate interest in impanelling a set of jurors who are capable of returning a sentence of death.87 In addition to that interest, state legislatures have exhibited a strong preference in favor of having a single jury try the issue of guilt and penalty.88 Given these two important interests, I propose, in this final part, two alternative jury selection procedures which, in reconciling the seemingly inconsistent holdings in *Witherspoon* and *Taylor*, preserve a state's interest in seating a jury capable of deciding the penalty

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issue in favor of capital punishment and, at the same time, preserve a capital defendant's right to have his guilt tried by a jury drawn from a fair cross-section of the community. The first procedure provides for alternate jurors, who have been death qualified, to replace death penalty opponents in the penalty deliberations after the issue of guilt has been determined, while the second provides for the impanelling of two juries.

A

In its Witherspoon opinion, the Supreme Court condemned the Illinois state trial court practice of systematically excluding from the jury selection process all those prospective jurors who state that they harbored conscientious scruples with respect to capital punishment. According to the Court, the Illinois trial court had sanctioned the exclusion of a group broader than necessary to insure that the jury impaneled could obey its oath on the sentencing issue. The Court limited the excludable group to those persons who unequivocally stated that they would always vote against capital punishment or that their attitudes toward the death sentence prevented them from impartially determining guilt. Any person who merely exhibited "mild" scruples with respect to capital punishment fell outside that group and could not be eliminated from the jury selection process for cause.

The Witherspoon Court intended to protect the state's legitimate interest in retaining prospective jurors who could impose a sentence of death. The Court did not hold in Witherspoon or in Adams that a state is entitled to qualify a jury for the penalty determination prior to determination of guilt. It might be argued that the Court tacitly recognized this entitlement in Witherspoon and Adams, since in each case the Court affirmed the petitioner's conviction by a jury which determined both the guilt and penalty issues, but in neither of these cases did the Court address the fair-cross-section requirement. It had not been raised by either

89. 391 U.S. at 520.
90. Id. at 520-21.
91. Id. at 522-23 n.21.
92. Justice Exum asserted in his dissenting opinion in State v. Avery that "[t]he state no less than the defendant has a significant interest in obtaining a jury composed of persons who can sufficiently put aside personal biases to follow and apply the applicable law." 299 N.C. at —, 261 S.E.2d at 816. He distinguished Lockett v. Ohio, 438 U.S. 586 (1978) and Witherspoon on the ground that they involved only prospective jurors who stated that they could not impose the death penalty. The Lockett and Witherspoon jurors had not stated that their attitude toward the penalty would prevent them from impartially determining guilt. Since the biases related only to the penalty phase, the dissenter argued that the state now bears the
petitioner.

As it had done in *Witherspoon*, the Court in *Adams* reversed the sentence of death levied against the claimant because the state trial court improperly excluded prospective jurors who merely stated that they would be "affected" by the spectre of the death penalty in their deliberations.93 The Court believed that those jurors had selected the term "affected" to describe the manner in which they would consider the accused's guilt. It stated that the jurors' responses "apparently meant only that the potentially lethal consequences . . . would invest their deliberations with greater seriousness and gravity" or would trigger their deeper emotions.94 The aim of the Court's analysis in *Adams* was therefore trained only on the size of the group excluded by the Texas trial court. It did not consider the question of whether the prospective jurors could be qualified on the death penalty issue prior to the determination of guilt.

There is considerable doubt about whether the Court would uphold the practice of excluding those prospective jurors who are unalterably opposed to capital punishment from the guilt determination phase of a capital trial. The reach of the Court's holdings in *Taylor* and *Duren* extend to every criminal trial. The state's interest in qualifying prospective jurors on the penalty issue in a capital case undoubtedly places some limitations on a capital defendant's fair-cross-section rights. The manner in which any limitations are imposed must be approached from the premise that a capital defendant has a fundamental right to be tried by a fair cross-section of his community, rather than from the premise that a state has a fundamental right to impanel a single set of jurors in a capital case. Since states presently do not have that right, the courts should accommodate the states' legitimate interests in a manner which least restricts the constitutional rights of a capital defendant.

B

While every state presently impanels only one jury to determine a capital defendant's guilt and sentence, many states have instituted bifurcated trial systems in capital cases.95 In a typical bifurcated trial system, a single jury makes a series of decisions.

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93. 448 U.S. at 49.
94. Id.
95. See note 88 supra.
The jury is initially instructed to return a verdict of guilt or innocence without giving any consideration to the appropriate sentence. If the jury finds the defendant guilty of the capital offense, a pre-sentence hearing is held at which evidence of aggravating and mitigating circumstances is presented. This evidence is then presented to the jury, which must make the determination as to whether the issue has been proven beyond a reasonable doubt. If the jury returns an affirmative finding on the issue, the court will impose the death penalty.96

Within the bifurcated trial procedures, every state grants the trial court or the parties the right to examine prospective jurors about their attitudes toward capital punishment prior to the time when the issue of guilt is determined.97 Inevitably, one or more prospective jurors must be excused from the venire on account of his or her convictions with respect to the death penalty. At the moment a trial court sustains a challenge for cause and thereby excludes a prospective juror from the guilt phase of the bifurcated trial, the capital defendant has been deprived of his right to have his guilt tried by a jury drawn from a fair cross-section of the community.

A prospective juror's attitudes with respect to capital punishment are only relevant after the determination of guilt has been made.98 A state's interest in impanelling jurors capable of making the sentencing determination does not adhere until after the jurors have found in favor of the prosecution. This interest, however, can be reconciled with a capital defendant's fair-cross-section rights in either of two ways.99 First, where the venire contains some members who should be disqualified on Witherspoon grounds from the sentencing phase, alternate jurors who are capable of making the sentencing determination could be impanelled at the outset to hear both phases of the capital trial.100 The alternate death quali-

100. During the voir dire examination on the penalty issue, the party which conducts the voir dire must make it unmistakably clear that jurors can be absolved of the responsibility for determining the sentence. A prospective juror might be able
fled jurors would not, however, participate in the deliberations on the issue of guilt. If a verdict of guilt is rendered, the alternate jurors can replace those jurors who are excludable from the sentencing determination because of their unalterable opposition to the death penalty. The alternate jurors, who listened to the evidence introduced during the guilt phase, could continue the deliberations on the penalty issue. Adherence to this procedure insulates a conviction from Witherspoon "conviction proneness" and Taylor "fair-cross-section" attacks.

In the alternative, a state might adopt the type of bifurcated trial system envisioned by the Supreme Court in Witherspoon. Under this system, a second death qualified jury should be impanelled for the sentencing determination. The "penalty" venire could be examined and selected in sequestration. However, nothing would prevent the "penalty" jury from listening to the evidence presented on the issue of guilt simultaneously with the nondeath qualified jury. The necessity of reintroducing the evidence would be avoided. Under this alternative "two jury" system, the jury which is selected to make the determination of guilt should be screened in the same manner as would be proper in a noncapital case. The first jury should not be confronted with the penalty issue. Though the "two jury" system might be criticized as too costly and time consuming, it averts the enormous expense and delay that occurs when a capital defendant attempts to demonstrate that the death qualifying process results in a jury biased in favor of conviction. Moreover, the fair-cross-section rights of a criminal defendant who faces the law's ultimate penalty should not be diminished in order to provide a less expensive and more

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101. 391 U.S. at 520 n.18. The Court stated that the question might arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

expeditious proceeding.\textsuperscript{102}

CONCLUSION

In \textit{Witherspoon v. Illinois}, the Supreme Court recognized that in capital cases the states have a legitimate interest in seating a jury whose members are capable of imposing a sentence of death. This recognition seemingly left intact the traditional practice of eliminating from both the guilt and penalty determinations those persons who could not vote in favor of capital punishment. Several years later, however, the Court held in \textit{Taylor v. Louisiana} and \textit{Duren v. Missouri} that the unjustified systematic exclusion of a distinct group of persons from the jury selection process deprived a criminal defendant of his fundamental right to have his guilt tried by a jury drawn from a fair cross-section of the community. These latter two cases placed limits on the traditional practice of excluding death penalty opponents from the guilt phase of a capital trial. A state may continue to death qualify a jury on the sentencing issue, but under \textit{Taylor} and \textit{Duren}, it may no longer eliminate opponents of capital punishment from the guilt phase unless they unequivocally state that even if they are absolved of responsibility for imposing a death sentence they could not be impartial on the issue of guilt.

The \textit{Taylor} and \textit{Duren} decisions compel states to abandon the traditional practice of excluding those prospective jurors who are unalterably opposed to capital punishment from the guilt determination phase of a capital trial. If a state adopts an alternate juror system, the alternate death qualified jurors would not participate in the deliberations on the issue of guilt. They would replace those members of the jury who must, under \textit{Witherspoon}, be excluded from the sentencing determination because of their convictions with respect to capital punishment. In a two jury system, the first jury, which would be composed entirely of nondeath qualified jurors, would make the guilt determination. The second jury would then deliberate on the sentencing issue when a verdict of guilty was returned by the first jury. The adoption of either of these two systems insulates a conviction from both "conviction proneness" and "fair-cross-section" attacks and reconciles a capital defendant's fair-cross-section rights with a state's legitimate interest in impanelling jurors capable of imposing the death penalty.

\textsuperscript{102} The \textit{Taylor} Court stated that "[t]he right to a proper jury cannot be overcome on merely rational grounds. There must be weightier reasons if a distinctive class . . . of the eligible jurors is for all practical purposes to be excluded from jury service." 419 U.S. at 534.