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Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis

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Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis

Erratum

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PROSECUTORIAL PEREMPTORY CHALLENGE PRACTICES IN CAPITAL CASES: AN EMPIRICAL STUDY AND A CONSTITUTIONAL ANALYSIS†

*Bruce J. Winick**

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* Professor of Law, University of Miami School of Law. A.B. 1965, Brooklyn College; J.D. 1968, New York University School of Law. Funds to enable the performance of this study were provided by grants from the Veatch Program of the North Shore Unitarian Society and the Florida Justice Institute, Inc., and I am most grateful for their support. Howard S. Gitlow, Professor of Management Science and Computer Information Systems at the University of Miami, assisted in the preparation of the research design and performed the statistical analysis of the data. His assistance was indispensable.

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As presently construed, the Constitution does not prohibit the death penalty.¹ The states² and the federal government³ may punish

1. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976); *Jurek v. Texas*, 428 U.S. 262, 268 (1976). The Supreme Court's eighth amendment jurisprudence would permit reconsideration of the constitutional question should society reject capital punishment in the future. See *Gregg v. Georgia*, 428 U.S. at 173, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see generally Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978).

2. Thirty-six states had capital punishment laws in effect as of December 31, 1981. UNITED STATES BUREAU OF JUSTICE STATISTICS, DEATH-ROW PRISONERS 1981, 2-3 (1982) [hereinafter referred to as DEATH-ROW PRISONERS 1981]. E.g., FLA. STAT. ANN. § 921.141 (West 1982); ILL. REV. STAT. ch. 38, § 9-1 (1979); TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 1981). For a compilation of state death penalty statutes, see Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-19 (1980) (App. I). At the end of 1981, a record high of 838 persons were being held under sentence of death in state prisons. DEATH-ROW PRISONERS 1981 at 1.

3. A number of federal statutes impose the death penalty, e.g., 18 U.S.C. § 1751 (1976); 49 U.S.C. § 1472(i)(1)(B) (1979), although their constitutionality is in doubt. No federal prisoners are currently under sentence of death, with the exception of four inmates held under Armed Forces jurisdiction in accordance with the capital provisions of the Uniform Code of Military Justice. DEATH-ROW PRISONERS 1981, *supra* note 2 at 2.

the commission of certain crimes⁴ with death, so long as the extreme penalty is not imposed on a mandatory basis⁵ and so long as the procedures used in imposing a death sentence meet constitutional scrutiny.⁶

One such procedure — subjected to constitutional scrutiny since 1968⁷ — is the means by which a capital jury is selected. Capital jury selection practices, and the composition of capital juries they produce, have taken on added importance in recent years. In its 1972 decision in *Furman v. Georgia*,⁸ the Supreme Court invalidated capital punishment statutes leaving the life or death decision to the unfettered discretion of the jury, in view of the high potential for arbitrary and discriminatory application of the penalty. In response to *Furman*, however, thirty-five states and the federal government enacted new death penalty statutes, typically attempting to channel capital sentencing discretion by specifying aggravating and mitigating standards.⁹ This response led the Court in 1976 to reject the contention that capital punishment did not reflect “the evolving standards of decency that mark the progress of a maturing society,” the

4. The eighth amendment's prohibition on cruel and unusual punishments limits the ability of legislatures to impose death for certain crimes where the penalty would be disproportionate to the offense. *Coker v. Georgia*, 433 U.S. 584, 599-600 (1977) (plurality opinion) (unconstitutional for crime of rape of adult woman); *Buford v. State*, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 102 S. Ct. 1039 (1982) (unconstitutional for crime of rape of child under 12). In fact homicide may be the only crime for which death may be imposed under the eighth amendment, and not all homicides will pass muster. *See Enmund v. Florida*, 102 S. Ct. 3368 (1982) (unconstitutional to impose death for conviction for felony murder when defendant neither committed the murder himself, attempted to do so, nor intended to take life); Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356 (1978).

5. *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam) (unconstitutional to require death penalty for intentional killing of a firefighter or peace officer engaged in performance of duties); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (“the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”); *Roberts v. Louisiana*, 428 U.S. 325 (1976). The Court has reserved the question whether mandatory death laws are permissible in the limited circumstance of a prisoner or escapee serving a life sentence who commits murder. *See Lockett v. Ohio*, 438 U.S. 586, 604 n.11 (1976) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. at 637 n.5; *Roberts v. Louisiana*, 428 U.S. 325, 334 n.9 (1976) (plurality opinion).

6. *E.g.*, *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981); *Adams v. Texas*, 448 U.S. 38 (1980); *Beck v. Alabama*, 447 U.S. 625 (1980); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. 349 (1977); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Witherspoon v. Illinois*, 391 U.S. 510 (1968). The Court recently reiterated its “insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.” *Eddings v. Oklahoma*, 102 S. Ct. at 875.

7. *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *see* text accompanying notes 118-133 *infra*.

8. 408 U.S. 238 (1972) (per curiam).

9. *See* *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (plurality opinion).

Court's traditional standard for applying the eighth amendment's ban on cruel and unusual punishments.¹⁰ In so doing the Court relied not only on the actions of legislatures in revealing the society's standards of decency, but also stressed the conduct of capital juries, acting as reflectors of community sentiments on the death penalty question. Noting that some 460 death sentences were imposed in less than four years following *Furman*,¹¹ the Court found that these jury determinations serve as "a significant and reliable objective index of contemporary values,"¹² and indicated that the community had not rejected the death penalty as an appropriate punishment. At the same time, the Court rejected as cruel and unusual statutes mandating the death penalty for conviction of certain crimes, relying on the reluctance of American juries to convict a significant portion of those charged under such mandatory statutes as indicating a repudiation of automatic death sentences.¹³

The compromise struck by the Supreme Court thus has left the hard questions involved in imposing the death penalty to the jury room.¹⁴ The composition of the capital jury is therefore crucial to the fairness of the death penalty and to its continuing constitutional validity as a method of punishment. A central premise underlying the Court's decision to uphold capital punishment is that capital juries reflect the standards of decency of the community on the crucial life or death question.¹⁵ There is substantial doubt, however, about

10. 428 U.S. at 173, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

11. 428 U.S. at 182.

12. 428 U.S. at 181. For similar expressions concerning the importance of jury determinations in assessing the constitutionality of capital punishment, see *Enmund v. Florida*, 102 S. Ct. 3368, 3375-76 (1982); 102 S. Ct. at 3386 (O'Connor, J., dissenting, joined by Burger, C.J., Powell, & Rehnquist, JJ.); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion); *Furman v. Georgia*, 498 U.S. 238, 299-300 (1972) (Brennan, J., concurring); 498 U.S. at 386 n.11 (Burger, C.J., dissenting); 498 U.S. at 439-40 (Powell, J., dissenting, joined by Burger, C.J., Blackmun, & Rehnquist, JJ.).

13. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976). See also *Enmund v. Florida*, 102 S. Ct. at 3375-76 (finding that the eighth amendment was violated by a statute authorizing capital punishment for felony murder where defendant did not commit the homicide, attempt to kill, or intend that the killing take place supported by evidence that "American juries have repudiated imposition of the death penalty for crimes such as" these); *Coker v. Georgia*, 433 U.S. at 596-97 (finding that eighth amendment was violated by statute authorizing capital punishment for rape supported by "the response of juries reflected by their sentencing decisions," declining to impose the death penalty in at least 90% of the rape convictions in Georgia since 1973).

14. Although jury sentencing in capital cases is prevalent, a minority of states permit the judge to decide the death penalty question. See Gillers, *supra* note 2, at 14, 101-19 (App. I). Professor Gillers has argued that the Constitution requires that a capital defendant be sentenced by a jury, unless waived. *Id.* at 39-74. The Supreme Court has never resolved this question. See *Lockett v. Ohio*, 438 U.S. 586, 609 n.16 (1978).

15. See note 12 *supra*.

the accuracy of this underlying premise. Many criminal defense attorneys believe that prosecutors seek to prevent persons who are generally or even vaguely opposed to the death penalty from serving on capital juries. Although the Supreme Court in its 1968 decision in *Witherspoon v. Illinois*¹⁶ limited the prosecutor's ability to use the challenge for cause for this purpose, it is commonly believed that the practice continues through use of the peremptory challenge.¹⁷

If prosecutors do engage in such a practice, several constitutional issues are raised. The systematic exclusion of jurors generally opposed to the death penalty by prosecutorial use of the peremptory challenge may violate a defendant's due process right to an impartial jury in the determination of sentence or in the determination of guilt.¹⁸ In addition, if opponents of the death penalty in the community involved are sufficiently numerous and distinctive to comprise a "cognizable class," the practice may also violate the sixth amendment fair cross-section requirement.¹⁹ Perhaps the overriding concern is with the ability of capital juries to reflect accurately the standards of decency of the community without which the eighth amendment prohibits the death penalty.²⁰

A demonstration that the prosecutor used the peremptory challenge in the manner described in a *single* case probably would be insufficient to support a constitutional challenge in the federal courts and in the vast majority of state courts. In these courts a prosecutor's use of the peremptory in a single case is generally beyond review.²¹ To raise a constitutional challenge, a defendant may have to show a systematic pattern in the use of peremptories by prosecutors over a

16. 391 U.S. 510 (1968).

17. See Gillers, *supra* note 2, at 85 n.391; *People v. Velasquez*, 26 Cal. 3d 425, 438 n.9, 606 P.2d 341, 348 n.9, 162 Cal. Rptr. 306, 313 n.9 (1979) (quoting prosecutor's statement at voir dire concerning a venireperson who had expressed opposition to the death penalty, that "if she were not a challenge for cause, I would kick her off on a peremptory challenge."); *In re Anderson*, 69 Cal. 2d 613, 619, 447 P.2d 117, 121, 73 Cal. Rptr. 21, 25 (1968) ("The Attorney General asserts that since the chances of a jury's being able to determine the penalty impartially are diminished if the jury contains even one person who is hostile to, or has reservations concerning, the death penalty, it may be assumed that, if the challenges for cause had not been available, the prosecutor would have excluded the veniremen in question by way of peremptory challenge . . .").

18. See notes 116-205 *infra* and accompanying text.

19. See notes 205-309 *infra* and accompanying text. The class of opponents of the death penalty would constitute all with scruples against capital punishment, whether removed for cause or by peremptory challenge.

20. See notes 310-27 *infra* and accompanying text.

21. See *Swain v. Alabama*, 380 U.S. 202 (1965); see text accompanying notes 30-36 *infra*. For the minority view, see *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); see notes 38, 40-44 *infra* and accompanying text.

significant number of cases,²² including the removal of at least one juror opposed to the death penalty in the defendant's own case.²³

To determine whether this practice by prosecutors does in fact exist, the author conducted a study of capital jury selection in Florida's Fourth Judicial Circuit. After presenting the results of that study, this Article analyzes the constitutional issues raised by the data, and proposes restructuring the voir dire in capital cases to prevent abuse of the peremptory challenge.

Part II of this Article reviews the limits on the prosecutor's use of the peremptory challenge. Although a strong presumption favors the propriety and nonreviewability of the peremptory, a showing of a consistent pattern of behavior with no apparent constitutional justification can overcome this presumption. Where the government's use of the peremptory reflects a systematic pattern inimical to constitutional values, the jury selection process contravenes the due process of law guaranteed to the defendant by the fourteenth amendment. Part III presents the results of a study which reveals both a systematic use of prosecution peremptory challenges against death-scrupled jurors and their resulting underrepresentation on juries actually selected. Part IV argues that the use of peremptory challenges to eliminate potential jurors opposed to the death penalty offends due process and sixth and eighth amendment values. Part V argues that a restructured voir dire could cure the constitutional infirmities of unfettered prosecutorial peremptory challenges in capital cases. This reform would eliminate the possibility of constitutionally objectionable use of the peremptory challenge while preserving the state's interest in the nonreviewability of its peremptory challenges and in excluding jurors within the existing standards for challenges for cause.

II. RESTRICTING THE PROSECUTOR'S USE OF THE PEREMPTORY CHALLENGE

The peremptory challenge, although not constitutionally required,²⁴ has a long history as a "necessary part of trial by jury."²⁵ A

22. 380 U.S. at 223.

23. Absent the removal of at least one such juror in his case, any pattern shown would not have harmed the defendant, and he would lack standing to assert either his own rights or those of the excluded class.

24. *Swain v. Alabama*, 380 U.S. at 219, citing *Stilson v. United States*, 250 U.S. 583, 586 (1919). *But see Babcock, Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545, 555-56 (1975).

25. 380 U.S. at 205. Peremptories were historically used by defendants to eliminate jurors thought to be biased against them. *See* 4 W. BLACKSTONE, COMMENTARIES *353. Peremptory

major purpose of the peremptory challenge is to eliminate bias which does not fall within the narrow criteria necessary to sustain a challenge for cause.²⁶ The peremptory challenge is "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely the race, religion, nationality, occupation or affiliations of people summoned for jury duty."²⁷ A second purpose is to remove counsel's reluctance to offend venirepersons during questioning relating to challenges for cause that might not ultimately be allowed.²⁸ Close judicial scrutiny of the prosecutor's use of the peremptory challenge in a single case might limit the utility of the device, since uncertainty as to its availability would undermine its salutary effect of encouraging vigorous voir dire examination.²⁹ In

challenges by the prosecution have not always been permitted and were the subject of debate. See J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES* 139-50 (1977). By the beginning of this century, the prosecution had firmly established both the right to exercise peremptories and the ability to use them to eliminate entire races or classes of people. *Id.* at 150; see Babcock, *supra* note 24, at 551 n.20.

The Court in *Swain* acknowledged the differences in the history of the defendants' and the prosecutors' right to peremptory challenges, but noted that the American jury system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." *Swain v. Alabama*, 380 U.S. at 220, quoting *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). But see J. VAN DYKE, *supra* at 140-57, 167; Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1155, 1170-73 (1966).

26. The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise Although historically the incidence of the prosecutor's challenge has differed from that of the accused, the view in this country has been that the system should guarantee "not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held."

The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control. . . . While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable.

Swain v. Alabama, 320 U.S. at 220 (citations omitted). Challenges for cause are restricted to eliminating actual bias — an acknowledged prejudicial state of mind — or implied bias, presumed from the juror's relationships or interests in ways specified by statute. Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1499-501 (1975); see generally J. VAN DYKE, *supra* note 25, at 140-69. By contrast to the peremptory, the challenge for cause, although each side may make an unlimited number, must be approved by the trial judge, and is based on narrow grounds, such as actual or presumed specific bias toward a party or witness. See, e.g., *Hopt v. Utah*, 120 U.S. 430, 433 (1887); see *ABA Project on Minimum Standards for Criminal Justice — Standards Relating to Trial by Jury* 68-69 (Approved Draft, 1968).

27. *Swain v. Alabama*, 380 U.S. at 220 (footnote omitted).

28. 380 U.S. at 220; notes 103-104 *infra* and accompanying text.

29. This assumption underlies the *Swain* Court's reluctance to find prosecutorial peremptory practice unconstitutional absent compelling proof of a sustained and systematic pattern of exclusion. The belief that the peremptory challenge cannot survive judicial supervision, however, has been expressly rejected by six state courts. *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *People v. Payne*, 31 CRIM. L. RPTR. (BNA) 2229 (Ill. App., May 19, 1982); *State v. Brown*, 371 So. 2d 751 (La. 1979); *Commonwealth v. Soares*, 377 Mass.

Swain v. Alabama,³⁰ however, the Court made it clear that the prosecution's use of the peremptory challenge is not totally beyond review.

A. *Swain v. Alabama*

Swain presented the Supreme Court with a challenge by a black defendant to the prosecutor's use of peremptory challenges to remove all black members of the venire. The defendant showed that in selecting his jury, the prosecutor used peremptory challenges to eliminate all six blacks on the jury panel.³¹ The defendant further showed that no black had ever served on a petit jury in Talladega County, Alabama since 1950 because those few who were included on jury venires were challenged peremptorily or for cause.³² None-

461, 387 N.E.2d 499 (1979), cert. denied, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). The cases are discussed more fully at notes 40-44 *infra* and accompanying text. See also Brown, McGuire & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 NEW ENG. L. REV. 192 (1978); Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 370 (1979); Comment, *People v. Wheeler: Peremptory Challenges—A New Interpretation*, 14 NEW ENG. L. REV. 370 (1978); Comment, *A New Standard for Peremptory Challenges: People v. Wheeler*, 32 STAN. L. REV. 189 (1979).

30. 380 U.S. 202 (1965).

31. 380 U.S. at 210.

32. 380 U.S. at 226. The defendant also challenged the selection of the grand jury and the petit jury venire. The defendant produced data showing that while black males constituted 26% of all males in Talladega County only 10 to 15% of the grand jury and petit jury panels were black. The Court rejected the defendant's contention that he had established a prima facie violation of equal protection since the burden on the defendant was to show purposeful discrimination. Purposeful discrimination, according to the Court, required more than a mere showing that blacks were underrepresented by as much as 10%. 380 U.S. at 208-09. Thus, although the Court in *Swain* was willing to accept statistical proof of discriminatory purpose, the defendant simply had failed to meet the then-required statistical burden.

At the time of *Swain*, a prima facie case of discrimination could be established by demonstrating a substantial disparity between minority group members in the population and on the jury list plus the existence of a selection procedure subject to use for discriminatory ends. *E.g.*, *Avery v. Georgia*, 345, 559 (1953). The Court in *Swain* declined to find the disparity shown to be sufficient, and also declined to treat the Alabama selection procedure as involving a discrimination-prone device. 380 U.S. at 207-09. More recent cases have relaxed both aspects of the standard. An influential article demonstrated statistically that the disparity in *Swain* could have occurred by chance only in one out of 100 trillion venires, and urged the use of statistical decision theory in jury discrimination cases. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 356-58 (1967). The Court soon utilized this new statistical tool, *C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 455-56 (1980); see, e.g., *Alexander v. Louisiana*, 405 U.S. 625, 630 n.9 (1972); *Whitus v. Georgia*, 385 U.S. 545, 552 n.2 (1967), and it is now the accepted method of proving discrimination in jury cases. See *Castaneda v. Partida*, 430 U.S. 482, 494 n.17 (1977).

More recent cases have also relaxed the second aspect of the standard so that a selection procedure that lends itself to use for discriminatory ends will suffice (in conjunction with a substantial disparity) to establish a prima facie case even where the procedure is not facially race-focused. Compare *Castaneda v. Partida*, 430 U.S. 482, and *Alexander v. Louisiana*, 405 U.S. 625, with *Whitus v. Georgia*, 385 U.S. 545, and *Avery v. Georgia*, 345 U.S. 559. Thus

theless, the Court rejected this challenge on the basis that the defendant did not make a showing of *systematic* discrimination by the state because he failed to separate blacks challenged peremptorily by the prosecution from those challenged by the defense.

Despite its concern for protecting the exercise of peremptory challenges from routine judicial scrutiny, the Court did recognize that the challenge was subject to some constitutional restrictions:

We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . .

[S]uch proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right to participate in the administration of justice enjoyed by the white population.³³

Swain, then, acknowledges that prosecutorial peremptory challenge practices are subject to judicial review of their constitutionality, although the facts in that case did not justify the exercise of that authority.

The Court in *Swain* explicitly discussed only the rights of blacks to serve on juries, although other cases have established the right of defendants not to have blacks excluded by law from their juries.³⁴

Castaneda treats Spanish surname visibility, 430 U.S. at 495, and the subjectivity of the key-man system, 430 U.S. at 497, as suspect although neither is explicable only as a discriminatory device. The Court in *Swain* declined to treat the Alabama version of the key-man system in this way. 380 U.S. at 207-09.

Thus in both respects, the approach of *Swain* has been eclipsed by more recent equal protection cases that use statistical decision theory to establish discrimination, and that treat an opportunity to discriminate which is not explicable solely as a discriminatory device as sufficient to trigger the *Avery* rule. Moreover, if the violation asserted is of the sixth amendment fair cross-section requirement, rather than equal protection, no showing of discriminatory purpose is necessary. *Duren v. Missouri*, 439 U.S. 357, 368-69 & n.26 (1979); see notes 294-96 *infra* and accompanying text.

33. 380 U.S. at 223 (dicta). "In these circumstances," the Court noted, "it would appear that the purpose of the peremptory challenge is being perverted." *Id.* at 223-24.

34. *E.g.*, *Peters v. Kiff*, 407 U.S. 493 (1972). *Swain* was decided before the sixth amendment was held applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and therefore representativeness was not in issue. Prior cases had established that it is denial of equal protection to try a minority defendant before a jury from which all members of his race have been excluded. *Hernandez v. Texas*, 347 U.S. 475 (1954); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935); *Strauder v. West Virginia*, 100 U.S. 303 (1880).

Whatever rights defendants might have on their own, the *Swain* decision clearly indicates that the defendant, at least if he can show exclusion in his particular trial, would have standing to assert the rights of the excluded class of jurors.³⁵ But because the defense, as well as the prosecution, participated in the peremptory process, the Court held that the defendant had not shown that the underrepresentation of blacks was the result of unconstitutional jury selection procedures by the state.³⁶

Commentators have severely criticized the *Swain* decision for imposing an impossibly high burden of proof upon defendants seeking to challenge a prosecutor's use of the peremptory challenge.³⁷ *Swain* seriously restricts the way a defendant can demonstrate that the

In *Swain* the Court was less concerned with the equal protection rights of minority defendants, 380 U.S. at 221-22, but instead was concerned with the rights of blacks to serve as jurors in general, 380 U.S. at 324.

In *Peters v. Kiff*, three members of the Court based their decision reversing the conviction of a white defendant who had been tried by a jury from which blacks had been systematically excluded on due process grounds. 407 U.S. at 501 (Marshall, J., joined by Douglas & Stewart, JJ.). Three other members of the Court concurred on the basis that 18 U.S.C. § 243 (1976) expressed a strong policy against excluding qualified jurors on the basis of race. 407 U.S. at 507 (White, J., joined by Brennan & Powell, JJ.). Since the sixth amendment fair cross-section requirement has been held applicable to the states, *Taylor v. Louisiana*, 419 U.S. 522 (1975), and since blacks are plainly a cognizable class, their systematic exclusion from juries would today be considered a violation of the sixth amendment.

35. The Court suggests that if the proper showing of a pattern of exclusion were made, the case would be sufficiently analogous to the cases cited in note 34 *supra* (involving other types of exclusion by the state) as to warrant reversal. A white defendant could not make the same analogy to those prior cases, but since *Peters v. Kiff*, 407 U.S. 493, he should have standing to assert the *Swain* claim.

36. Unlike the selection process, which is wholly in the hands of state officers, defense counsel participate in the peremptory challenge system, and indeed generally have a far greater role than any officers of the State. It is for this reason that a showing that Negroes have not served during a specified period of time does not, absent a sufficient showing of the prosecutor's participation, give rise to the inference of systematic discrimination on the part of the state.

380 U.S. at 227. The record must show with some "acceptable degree of clarity . . . when, how often, and under what circumstances the prosecutor alone has been responsible for striking" the underrepresented group. 380 U.S. at 224.

A dissenting opinion accused the majority of confusing priorities by exalting a procedural device over a constitutional right. 380 U.S. at 244 (Goldberg, J., dissenting). The dissent emphasized that the Constitution does not require the use of peremptory challenges, but does require trial by a representative jury. Moreover, the dissent noted, a finding that the prosecutor's practice in *Swain* violated the Constitution would not require the abandonment of the peremptory challenge; only where the prosecutor's use of the peremptory reaches the extreme level presented in *Swain* would exercise of the peremptory be subject to restriction. 380 U.S. at 244-45.

37. See, e.g., Brown, McGuire & Winters, *supra* note 29; Finkelstein, *supra* note 32 at 351-52; Comment, *The Prosecutor's Exercise of the Peremptory to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 555, 560 (1977) [hereinafter cited as *Cincinnati Comment*]; Comment, *supra* note 25 at 1160; Note, *Fair Jury Selection Procedures*, 75 YALE L.J. 322, 323 (1965); Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1723 & n.36 (1977) [hereinafter cited as *Yale Note*].

prosecutor *systematically* eliminated a disproportionate number of members of a group by requiring a showing of prosecutorial conduct in the relevant district over some indefinite period of time. Not only does such a showing require transcribing voir dices of a large number of cases, itself an expensive undertaking, but additional investigation would be required to ascertain the race of each venireperson, as the voir dire transcripts rarely reflect this factor. Such a showing is beyond the ability and resources of virtually all defendants.³⁸ As a result, prosecutors can continue to eliminate members of minority groups through the use of the peremptory challenge, virtually without restriction.³⁹

For these reasons a number of state courts have recently rejected the *Swain* approach. In the leading case, *People v. Wheeler*, the California Supreme Court adopted a more lenient standard.⁴⁰ In *Wheeler*, the California court overturned the conviction of a black defendant because the prosecutor had exercised his peremptory challenges against all seven blacks on the jury panel, leaving an all white jury.

The California court, expressing the need to "define a burden of proof which a party may reasonably be expected to sustain in meritorious cases,"⁴¹ found the *Swain* standard inappropriate. To protect

38. See *People v. Wheeler*, 22 Cal. 3d 258, 286, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909 (1978) (rejecting the *Swain* rationale partially for this reason).

39. The only limitation, outside of establishing the evidence required by *Swain*, is the countervailing use of defense peremptories. This limitation is particularly ineffective where the defense tries to maintain the representation of a minority group by its challenges against the majority. See note 152 *infra* and accompanying text.

40. 22 Cal. 3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). The court recognized that the exercise of a peremptory challenge is presumptively based on legitimate considerations, but refused to concede that this presumption allows the prosecutor to exercise the challenge without any limitation. While conceding that the peremptory is a challenge for which "no reason need be given," the court emphasized that it is not a challenge "for which no reason need exist." 22 Cal. 3d at 274, 583 P.2d at 760, 148 Cal. Rptr. at 901. Otherwise, the court noted, the peremptory could be used to eliminate jurors on the basis of group membership in violation of the fair cross-section requirement of both the state and federal constitutions. 22 Cal. 3d at 272, 583 P.2d at 758, 148 Cal. Rptr. at 899-900. The court construed the state constitutional right to an impartial jury to include the fair cross section requirement. Although noting that both the state provision and the Sixth Amendment guaranteed the right, the court rested its decision on state grounds. 22 Cal. 3d at 276-77, 583 P.2d at 761-62, 148 Cal. Rptr. at 903.

41. 22 Cal. 3d at 278, 583 P.2d at 763, 148 Cal. Rptr. at 904. The statistical methods required by the *Swain* decision for showing systematic exclusion, while helpful in attacking the construction of jury source lists, were found inadequate "during voir dire . . . when counsel may be trying to expose an emerging pattern of discrimination in time to forestall an unfair trial." 22 Cal. 3d at 279, 583 P.2d at 764, 148 Cal. Rptr. at 905. The court rejected the *Swain* standard of systematic exclusion over an indefinite period of time for several reasons. The court found the standard "virtually impossible" to meet statistically in the context of peremptory challenges because of the discretionary nature of the peremptory. Moreover, the court was concerned that *Swain* offered no protection to the first defendant who is a victim of prosecutorial abuse of the peremptory challenge as it would not be possible to establish a systematic pattern of exclusion using a single case. 22 Cal. 3d at 285, 583 P.2d at 767, 148 Cal.

effectively the right to a representative jury, the court found it necessary to adopt a standard under which the defense could establish systematic exclusion of all or nearly all members of a group on the basis of a single voir dire. Under this approach, a prima facie case can be established by showing that the prosecutor excluded all or nearly all members of a "cognizable group within the meaning of the representative cross section rule," or that he or she directed a disproportionate number of peremptories at such a group.⁴² A defendant need not compile an extensive statistical record; he or she need only establish that "from all the circumstances in the case" there was a "strong likelihood" that these persons were excluded because of their group affiliations. Once a prima facie case is established, the burden shifts to the state to show that the challenges were based on trial-related factors rather than group bias.⁴³

The *Wheeler* decision has prompted extensive commentary on the peremptory challenge and the rejection of the *Swain* standard in at least four other states.⁴⁴ Most of the commentators have approved of *Wheeler*, citing the deficiencies of the *Swain* approach in prevent-

Rptr. at 908-909. Finally, the court noted that any attempt to meet the *Swain* burden would require large expenditures beyond the ability of the typical defendant. Moreover, even if funds were available, the data are not, and few, if any, judges would interrupt the proceedings by granting continuances of unpredictable length to permit the necessary investigation. 22 Cal. 3d at 285-86, 583 P.2d at 767-68, 148 Cal. Rptr. at 909.

42. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

43. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. The defendant in *Wheeler* attempted to establish a prima facie case of systematic exclusion by showing that the prosecutor removed every black from the jury. However, the trial court would not require the prosecutor to explain his use of the peremptory, on the ground that such use was beyond judicial scrutiny. 22 Cal. 3d at 264, 585 P.2d at 753, 148 Cal. Rptr. at 894. The California Supreme Court reversed, holding that a demonstration that the prosecutor had excluded a disproportionate number of blacks required him to explain his motives. The court's remedy was based on proposals made by J. VAN DYKE, *supra* note 25, at 166-67; *Yale Note, supra* note 37, at 1733-41.

In *People v. Johnson*, 22 Cal. 3d 296, 583 P.2d 774, 148 Cal. Rptr. 915 (1978), a companion case to *Wheeler*, the California court clarified what a prosecutor must show to rebut a prima facie case. In *Johnson*, unlike *Wheeler*, the prosecutor freely admitted his intent to exclude blacks from the jury. The prosecutor claimed that he was challenging blacks because the state's witness had used the word "nigger," and the prosecutor feared that black jurors might be offended by the language and, as a result, be unable to serve as impartial jurors. 22 Cal. 3d at 298-99, 583 P.2d at 775, 148 Cal. Rptr. at 916. The court found this reason insufficient to justify the exclusion of all blacks since many whites are offended by the same language. More importantly, added the court, the benefit of having black jurors serve in a racially related trial outweighs any harm of bias that may result. The sixth amendment was intended to include all community perspectives on the jury including those of people who are offended by the issues at trial. 22 Cal. 3d at 300, 583 P.2d at 775-76, 148 Cal. Rptr. at 917.

44. *People v. Payne*, 31 CRIM. L. RPT. (BNA) 2229 (Ill. App., May 19, 1982); *Commonwealth v. Reid*, 424 N.E.2d 495 (Mass. 1981); *Commonwealth v. Soares*, 347 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *People v. Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (1981). For cases rejecting the *Wheeler* approach, *see State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *State v. Grady*, 93 Wis. 2d 1, 13, 286 N.W.2d 607, 612 (1979). For cases reserving judgment on the *Wheeler*

ing prosecutorial abuse of the peremptory challenge.⁴⁵ Nonetheless, the majority of states and the federal courts still follow *Swain*; in these jurisdictions a successful attack on prosecutorial use of the peremptory challenge continues to depend upon meeting the heavy burden imposed by that decision.

B. *The Burden Imposed by Swain*

Nearly every attempt to meet the burden imposed by *Swain* to demonstrate prosecutorial abuse of the peremptory challenge has failed.⁴⁶ Almost all of the cases challenging prosecutorial peremptory challenge practices have involved the use of the peremptory to exclude blacks.⁴⁷ However, a few have involved peremptory challenges of jurors opposed to the death penalty.⁴⁸ Most of these attempts have failed to meet the *Swain* standard because of an insufficient showing relating to the number of venirepersons chal-

approach, *see* Mallott v. State, 608 P.2d 737 (Alaska 1980); People v. Smith, 622 P.2d 90 (Colo. App. 1980).

45. *See, e.g.*, Brown, McGuire & Winters, *supra* note 29; Note, *The Defendant's Right to Object to Prosecutorial Misuse of the Peremptory Challenge*, 92 HARV. L. REV. 1770 (1979); Comment, People v. Wheeler: *California's Answer to Misuse of the Peremptory Challenge*, 16 SAN DIEGO L. REV. 897 (1979). For critical commentary, *see* Saltzburg & Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337 (1982).

46. People v. Wheeler, 22 Cal. 3d 258, 286, 583 P.2d 748, 768, 148 Cal. Rptr. 890, 909 (1978); Brown, McGuire & Winters, *supra* note 29, at 203; *Yale Note, supra* note 37, at 1715; *see* Annot., 79 A.L.R.3d 14, 24 (1977 & Supp. 1981).

47. 79 A.L.R.3d at 27-46. Attempts to challenge the use of the peremptory to exclude members of other ethnic groups have also been unsuccessful. *See, e.g.*, State v. Rossi, 273 So. 2d 265 (La. 1973) (Italian-Americans); State v. Salinas, 87 Wash. 2d 112, 549 P.2d 712 (1976) (Mexican-Americans).

Some courts have gone so far as to state that even where the prosecutor admits that he is purposely excluding blacks there is no violation of equal protection. *E.g.*, United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), *aff'd.*, 620 F.2d 286 (2d Cir. 1980). In *Danzey*, the court construed *Swain* as giving the prosecutor unfettered discretion in the exercise of the peremptory challenge in a single case. According to the *Danzey* court, a prosecutor's motive in exercising the peremptory is wholly irrelevant: a violation of equal protection occurs only when the prosecutor uses the peremptory systematically to eliminate blacks in case after case over a sufficient period of time. This conclusion is dubious at best since the only reason the *Swain* Court cited for requiring a showing of exclusion in case after case is the presumption that the prosecutor is acting on the basis of legitimate considerations in any single case. If the prosecutor concedes that he is acting on the basis of illegitimate considerations, he is no longer entitled to that presumption, and a violation of equal protection (or of the sixth amendment if a "cognizable class" is affected, *see* notes 233-57 *infra* and accompanying text) would be established. What constitutes an illegitimate purpose is not entirely clear. *Swain* indicates that exclusion of blacks because of race may be legitimate if the prosecutor has reason to believe blacks are more likely to be biased against the state in a particular case. 380 U.S. at 220-21.

48. *See, e.g.*, People v. Floyd, 1 Cal. 3d 694, 464 P.2d 64, 83 Cal. Rptr. 608 (1970); Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979); Smith v. Hopper, 240 Ga. 93, 239 S.E.2d 510 (1977); Lee v. State, 226 Ga. 162, 173 S.E.2d 209 (1970), *vacated on other grounds*, 408 U.S. 936 (1972); Brice v. State, 264 Md. 352, 286 A.2d 132 (1972).

lenged,⁴⁹ the use of an insufficient number of cases to establish a systematic pattern,⁵⁰ or an insufficient showing of state participation in such challenges.⁵¹

All of these cases, although recognizing the heavy burden imposed by *Swain*, continue to acknowledge the viability of the *Swain* exception if the defendant can show systematic exclusion over a sufficient period of time.⁵² In one significant case, *United States v. Pearson*,⁵³ the Fifth Circuit emphasized that "the burden is not insurmountable."⁵⁴ The court stated that a defendant's burden under *Swain*:

might require checking the docket for a reasonable period of time for the names of defendants and their attorneys, investigation as to the race of the various defendants, the final composition of the petit jury and the manner in which each side exercised its peremptory challenges.⁵⁵

The court further noted that the burden imposed by *Swain* did not require a showing of 100% exclusion of the group in question.⁵⁶

In several recent cases defendants have submitted comprehensive studies concerning the prosecutor's use of the peremptory. In one such case, *United States v. McDaniels*, a study of court records in a particular district for a two-year period showed that 68% of the per-

49. See, e.g., *United States v. Carter*, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976) (no showing of systematic exclusion where blacks served on eight of the fifteen cases included in the defendant's study).

50. See, e.g., *United States v. Durham*, 587 F.2d 799 (5th Cir. 1979); *United States v. McLaurin*, 557 F.2d 1064 (5th Cir. 1977); *United States v. Nelson*, 529 F.2d 40 (8th Cir.), cert. denied, 426 U.S. 922 (1976); *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1971); *Commonwealth v. Green*, 246 Pa. Super. 472, 400 A.2d 182 (1979); *State v. Bolton*, 354 So. 2d 517, 519 (La. 1978). In *Pearson*, the defendant's study included only a one-week period. In the other cases the defendant relied solely on exclusion of blacks from the jury in his own case. The Eighth Circuit has suggested that even fifteen cases may be insufficient to establish a systematic pattern. *United States v. Carter*, 528 F.2d 844, 850 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976).

51. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 227 (1965). Other attempts have failed because the defendant's study did not include all types of cases. See, e.g., *McKinney v. Walker*, 394 F. Supp. 1015 (D.S.C. 1974) (defendant showed that blacks were excluded in cases where the defendant was black but failed to show a similar exclusion in cases where the defendant was white). In *United States v. Newman*, 549 F.2d 240 (2d Cir.), cert. denied, 432 U.S. 908 (1977), discussed *infra* note 59, defendant's challenge was rejected because his study included cases from two independent divisions within the same district, thereby skewing the statistics.

52. See cases cited in Annot., 79 A.L.R.3d 14, 53-56 (1977 & Supp. 1981).

53. 448 F.2d 1207 (5th Cir. 1971).

54. 448 F.2d at 1218. Other cases, expressing concern over prosecutorial abuse of the peremptory challenge, have also noted that the defendant's burden under *Swain* is not insurmountable. See, e.g., *United States v. Nelson*, 529 F.2d 40, 43 (8th Cir. 1976); *United States v. Carter*, 528 F.2d 844, 850 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976).

55. 448 F.2d at 1217. The defendant in *Pearson* failed to meet the *Swain* burden of proof because his study of one week did not encompass a sufficient period of time. 448 F.2d at 1218.

56. 448 F.2d at 1217.

emptory challenges used by the prosecutor were directed against blacks,⁵⁷ but in five of the fifty-three cases in the study the prosecutor challenged no blacks, and blacks actually served on a number of juries. Although the evidence showed that blacks were challenged three times more frequently than whites, the percentage of blacks actually serving on juries fairly approximated the percentage of blacks in the community.⁵⁸ The court considered this evidence comprehensive but insufficient to meet the heavy *Swain* burden, emphasizing that, despite the prosecutor's use of the peremptory, the juries remained fairly representative. The court was sufficiently disturbed by the pattern in the prosecutor's use of the peremptory revealed by the study, however, to grant a new trial "in the interest of justice."⁵⁹

This growing concern over prosecutorial abuse of the peremptory recently led the Supreme Court of Louisiana to overturn a conviction based on its conclusion that the defendant had met his burden

57. 379 F. Supp. 1243, 1244 (E.D. La. 1974). The probability that the prosecutor used the peremptory without regard to racial factors was calculated as .00002568726. 379 F. Supp. at 1246 n.5.

58. 379 F. Supp. at 1244. The percentage of blacks serving on juries (22.8%) compared very favorably with the percentage of blacks on voter registration lists (21.4%) from which prospective jurors were drawn. The court hypothesized that the prosecutors' use of the peremptory against blacks was offset by the defendants' use of the peremptory to exclude whites. 379 F. Supp. at 1245 n.3. The conditions under which this offsetting can be accomplished and the extent to which it justifies the prosecutor's actions are discussed at notes 151-56 *infra* and accompanying text.

59. 379 F. Supp. at 1250 (applying FED. R. CRIM. P. 33). In a similar case, a federal district court found that the *Swain* burden had been met by the defendant. *United States v. Robinson*, 421 F. Supp. 467 (D. Conn. 1976), *vacated sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir.), *cert. denied*, 432 U.S. 908 (1977). In *Robinson*, the defendant's study, including thirty-nine trials, showed that the prosecutor had used his peremptory to exclude 69.5% of blacks and 84.8% of blacks and hispanics from the petit juries. 451 F. Supp. at 472. Given the percentage of blacks on the final panel before exercise of the peremptory, the expected frequency of a jury containing at least one black member was calculated at 68%, but the actual frequency of juries with a black member was only 33.3%. 451 F. Supp. at 472-73. On the basis of these findings the court concluded that the prosecutor's use of the peremptory to exclude blacks had reached an excessive point and that judicial relief was necessary. The court disallowed the challenges of the black venirepersons and ordered that jury selection continue with the blacks included. In addition, the court imposed a prospective remedy requiring the United States Attorney to maintain a record of future use of the peremptory against minority groups. 451 F. Supp. at 474.

The Second Circuit vacated the order on the basis that the district court had erroneously combined statistics from two independent divisions within the same district. 549 F.2d at 244-45. In the appropriate division, the actual frequency of blacks appearing on juries was sixty percent, a figure which compared favorably with the expected frequency of sixty-eight percent. The district court's conclusion that the prosecutor was systematically eliminating blacks through use of the peremptory was therefore found to be unwarranted. *Newman* has been criticized for adopting the overly restrictive language of *Swain* requiring absolute exclusion of blacks to establish a violation. See *Cincinnati Comment, supra* note 37, at 565. The court's separation of the two divisions for purposes of analyzing the statistical data is also questionable since the United States Attorney operates throughout the district. See *Recent Decisions, Constitutional Law — Exclusion of Black Veniremen Through Use of Prosecution's Peremptory Challenges Held to be in Violation of Equal Protection Clause*, 8 CUMB. L. REV. 307, 318 (1977).

of proof under *Swain*. In *State v. Brown*⁶⁰ the defendant showed that the prosecutor had exercised five peremptory challenges, all against blacks, creating an all white jury in his case. In addition, the defendant referred the court to several cases recently decided by the Louisiana courts wherein the same prosecutor or other prosecutors in the same district had exercised their peremptory challenges to create all white or nearly all white juries. In these prior cases, the Louisiana courts had denied relief, finding that *Swain* placed beyond scrutiny a prosecutor's exercise of the peremptory challenge in a single case.⁶¹ In *Brown*, however, the court found that the defendant had demonstrated a prima facie case of systematic exclusion on the basis of the record in his case and the other cases.⁶²

Several state cases have rejected challenges to the prosecutor's use of the peremptory to exclude jurors who voice general objections to the death penalty.⁶³ However, with one recent exception, in each of these cases the defendant challenged only the exercise of the prosecutor's peremptory challenges in his own case. In these cases the defense made no effort to establish a systematic pattern of exclusion extending over a period of time.⁶⁴ Therefore, the cases are substantially consistent with *Swain* and do not suggest that a court would uphold systematic use of the peremptory challenge to exclude scrupled jurors.⁶⁵ The recent exception was the Florida case in which the

60. 371 So. 2d 751 (La. 1979).

61. 371 So. 2d at 752-53.

62. Because the prosecutor failed to justify his exercise of peremptory challenges, the court reversed the conviction. See also *State v. Washington*, 375 So. 2d 1162 (La. 1979), where the court, relying on *Brown*, found systematic exclusion on the basis of testimony by three local attorneys and the prosecutor's admission that he had consistently used his peremptory challenge to exclude blacks.

63. See, e.g., *Smith v. Hopper*, 240 Ga. 93, 239 S.E.2d 510 (1970); *Brice v. State*, 264 Md. 352, 286 A.2d 132 (1972); *Capler v. State*, 237 So. 2d 445 (Miss. 1970), vacated on other grounds, 408 U.S. 937 (1972); *Brown v. Commonwealth*, 212 Va. 515, 184 S.E.2d 786, vacated on other grounds, 408 U.S. 940 (1971). See also *People v. Fitzpatrick*, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, cert. denied, 414 U.S. 1050 (1973) (death penalty vacated under *Furman*, court finding it unnecessary to reach claim that *Swain* violated where all 33 scrupled venirepersons remaining after defense and court challenges were removed by prosecutor: 20 by challenges for cause, and 13 by peremptory challenges). For additional cases, see Annot., 79 A.L.R.3d 14, 46-50 (1977 & Supp. 1981). In a recent California case, the defendant raised the issue, attempting to combine *Wheeler* with *Witherspoon*. *People v. Murtishaw*, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (decided on other grounds).

64. In light of the recent *Wheeler* decision, see notes 40-44 *supra* and accompanying text, in some jurisdictions it may be sufficient to show that jurors generally opposed to the death penalty were excluded in a single voir dire.

65. Some cases have implied that the use of the peremptory to exclude jurors with reservations concerning the death penalty is always permissible. See, e.g., *Capler v. State*, 237 So. 2d 445, 449 (Miss. 1970), vacated on other grounds, 408 U.S. 607 (1972) (objections to the death penalty may give rise to "doubt on the part of the prosecution that the juror would follow the law as to imposition of the death penalty" and such doubt is sufficient reason for exercise of the peremptory); cf. *People v. Moore*, 42 Ill. 2d 73, 246 N.E.2d 299, *revd. on other grounds*, 408

preliminary results of the study described in the following Part were reported.⁶⁶

U.S. 786 (1972) (exclusion of jurors in violation of *Witherspoon* is harmless error where the prosecutor has remaining peremptories since the peremptory may permissibly be used to exclude scrupled jurors). *But cf.* *Alderman v. Austin*, 663 F.2d 558, 564 n.7 (5th Cir. 1981) (rejecting harmless error contention based on remaining peremptories); *Burns v. Estelle*, 592 F.2d 1297, 1300 (5th Cir. 1979), *affd. en banc*, 626 F.2d 396 (5th Cir. 1980) (same); *People v. Sears*, 71 Cal. 2d 635, 648 n.5, 450 P.2d 248, 257 n.5, 74 Cal. Rptr. 872, 881 n.5 (1969), *revd. on other grounds*, 2 Cal. 3d 180, 465 P.2d 847, 84 Cal. Rptr. 711 (1970) (prosecutor's duty to assure defendant a fair trial includes obligation to refrain from exercising peremptory challenges so as to produce an unrepresentative jury on capital punishment); *In re Anderson*, 69 Cal. 2d 613, 619-20, 447 P.2d 117, 122, 73 Cal. Rptr. 21, 26 (1968); *Blankenship v. State*, 247 Ga. 596, 280 S.E.2d 623 (1981); *Grijalva v. State*, 614 S.W.2d 420, 425 (Tex. Crim. App. 1980).

66. *Dobbert v. State*, 409 So. 2d 1033 (Fla. 1982). Soon after the governor had signed a warrant for his execution, Dobbert filed in the trial court — Florida's Fourth Judicial Circuit — a motion to vacate his death sentence. As one of the grounds for relief, the defendant alleged violation of his due process and sixth amendment rights resulting from the systematic exercise of peremptory challenges by prosecutors in the circuit to exclude death-scrupled jurors. On January 20, 1982, testimony was presented in the trial court concerning the preliminary results of the study reported in this Article. At the time, only 26 of the 30 cases ultimately reviewed had been analyzed; transcripts had not yet been completed in four of the cases. The testimony revealed the systematic pattern presented in greater detail in this Article. No attempt was made by the state to explain the exercise of peremptory challenges on any basis other than views on the death penalty. The testimony also revealed that the prosecutor challenged all 12 death-scrupled venirepersons in Dobbert's case who were subject to possible prosecutorial peremptory challenge, with the result that no death-scrupled juror remained on the jury that convicted him. The trial court denied the motion, holding that neither the testimony nor the pleadings took the case beyond the scope of *Swain v. Alabama*, 380 U.S. 202 (1965).

On appeal, the Supreme Court of Florida affirmed. 409 So. 2d 1033. The court noted that the exception recognized in *Swain* for attacking systematic exercise of peremptory challenges was based on the systematic exclusion of blacks, and found no indication that the Supreme Court would extend the exception to the systematic exclusion of other groups. 409 So. 2d at 1057. The court, however, declined to resolve the issue, finding that even if it were to conclude that the *Swain* exception was applicable, the defendant had failed to demonstrate that his rights had been violated. Without any further explanation, the court concluded that "neither the record nor the pleading, including the study by Professor Winick, are sufficient to move this case beyond the general rule of *Swain v. Alabama*." 409 So. 2d at 1057. As an alternate holding, the court found that the defendant had waived any right to challenge the jury by his failure to raise an objection at trial concerning the State's use of peremptory challenges. The court further noted that in any event, the defendant was not prejudiced by the State's use of peremptory challenges. Although the prosecutor had removed all 12 venirepersons expressing opposition to the death penalty who were subject to possible prosecutorial peremptory challenge, the court noted that the jury had recommended by a vote of 10 to 2 that Dobbert receive a life sentence rather than the death penalty. 409 So. 2d at 1057-58. Since under Florida law the trial judge may impose a death sentence no matter what the jury recommends, *see* FLA. STAT. ANN. § 921.141(1), (2) (West 1982), the court labeled as "frivolous" the defendant's claim that the judge might have imposed a life sentence had the jury's life recommendation been unanimous.

The defendant then filed a federal habeas corpus petition challenging the systematic use of peremptory challenges and raising a number of other grounds. The habeas court ruled that the Florida Supreme Court had not reached the merits, but had decided the case on a waiver theory. *Dobbert v. Strickland*, 532 F. Supp. 545, 559 (M.D. Fla. 1982). It denied relief, agreeing that the issue had been waived by failure of the defendant to raise a contemporaneous objection. 532 F. Supp. at 561. The court further found that the "cause" and "prejudice" exception to the waiver rule recognized by *Wainwright v. Sykes*, 433 U.S. 72 (1977), was inapplicable because the defendant had shown neither cause nor prejudice. The district court also expressed the view that defendant's claim was in any event without merit. Noting that the defendant's legal theory was based on *Swain* and *Witherspoon*, the court found *Witherspoon*

These recent cases illustrate growing judicial concern with

clearly inapplicable as it dealt only with challenges for cause, and further found that the *Swain* exception was limited to racial discrimination. 532 F. Supp. at 561-62.

Dobbert appealed the denial of habeas corpus relief to the Eleventh Circuit Court of Appeals, which on February 5, 1982, just hours before his pending execution, granted a stay of execution pending appeal. *Dobbert v. Strickland*, 670 F.2d 938 (11th Cir. 1982). Assuming that the Eleventh Circuit does not reverse Dobbert's conviction and death sentence based upon one of the many other grounds asserted in his appeal, it is likely that the court will reach the merits of his peremptory challenge claim notwithstanding the waiver problem that troubled the district court and the Supreme Court of Florida. Even if the appellate court finds that the Florida court based its decision on its procedural default rule rather than on the merits, compare *Ulster County Court v. Allen*, 442 U.S. 140, 152 (1979) (if under state law failure to comply with state procedural rule does not bar consideration of constitutional claim, federal court may consider the claim on habeas), and *Newman v. Henderson*, 425 U.S. 969 (1976) (federal court cannot apply a state waiver rule precluding habeas corpus petition if the state court had declined to impose the procedural bar), with *Ratcliff v. Estelle*, 597 F.2d 474, 477-78 (5th Cir. 1979) (federal court may apply state timely objection rule to bar constitutional claim where state court discussed merits of claim after ruling that there is a procedural defect), and even if abuse of peremptory challenges is deemed waivable, compare *Witherspoon v. Illinois*, 391 U.S. 510, 522, 523 n.22 (1968), and *Wigglesworth v. Ohio*, 403 U.S. 947 (1971) (*Witherspoon* error not waived by failure contemporaneously to object), with *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) (*Witherspoon* error waived by failure of counsel to order transcript of voir dire; however, court indicated that such failure might not have barred the claim, had it been deemed meritorious), cause and prejudice should be found on these facts.

The Supreme Court, although originally leaving open the definition of "cause" and "prejudice," *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 (1977), has recently discussed both requirements. *Engle v. Isaac*, 102 S. Ct. 1558 (1982); *United States v. Frady*, 102 S. Ct. 1584 (1982). In *Engle*, the Court suggested that both take their meaning from principles of comity and finality, which counsel against revision of state court convictions absent a showing that the incarceration attacked is fundamentally unjust. 102 S. Ct. at 1575. The Court declined to find "cause" where, although the petitioner did not know of the constitutional defect at the time of trial, the basis of the constitutional claim was available and had been litigated by others. 102 S. Ct. at 1574-75. In *Dobbert*, the claim advanced is a novel one, never previously litigated. Moreover, at the time of voir dire, Dobbert "lacked the tools to construct" his constitutional claim. *Engle v. Isaac*, 102 S. Ct. at 1574. Although the legal tools (*Witherspoon* and *Swain*) were available, they had not previously been put together for use in this context; nor did the factual predicate to their combined use exist at the time of the voir dire, which occurred in 1974. At that time Dobbert would not have been able to raise the constitutional claim. The voir dire in his case, held about a year after Florida had reenacted its post-*Furman* death penalty statute, occurred at the very beginning of the pattern found to exist in the study. At that time any objection to the use of peremptory challenges would have been rejected under the holding of *Swain*. The evidence of the pattern and practice necessary to support a *Swain* claim was unavailable at that time, and became available only with the completion of this study.

Thus, a contemporaneous objection in *Dobbert* would have been futile, not merely in the sense that the trial court under existing law would have rejected it, see *Engle v. Isaac*, 102 S. Ct. at 1572 & n.35, but also in the sense that the claim was not ripe and would not have become ripe for several years. As a result, there is no possibility that Dobbert's failure contemporaneously to raise the issue was a deliberate choice to withhold the claim "in order to 'sandbag' — to gamble on acquittal while saving a dispositive claim in case the gamble doesn't pay off." *Engle v. Isaac*, 102 S. Ct. at 1572 n.34; *Wainwright v. Sykes*, 433 U.S. at 89-90; see *Huffman v. Wainwright*, 651 F.2d 347, 352 (5th Cir. 1981).

Moreover, contrary to the view of the Supreme Court of Florida, Dobbert was prejudiced by the practice complained of. Had his jury contained at least some of the 12 death penalty objectors excluded by prosecutorial peremptory challenges, it might have decided his guilt differently. Moreover, it might have voted unanimously for a life sentence, rather than voting 10 to 2 for life. Certainly it cannot be assumed that a sentencing judge would be unaffected by the difference between disagreeing with a unanimous jury recommendation and one in which two jurors agreed with him if he imposed death. There thus is a substantial "risk of a funda-

prosecutorial abuse of the peremptory challenge. The prosecutor's exercise of the challenge is increasingly seen as no longer beyond judicial reproach. Even in those jurisdictions adhering to the strict rule of *Swain*, a defendant who can compile an adequate statistical record of prosecutorial use of the peremptory in a particular district over a several year period should be able to meet the *Swain* burden and invoke judicial review of the prosecutor's conduct.

The defendant's heavy burden under *Swain* should as a matter of law be at least somewhat easier to carry when the alleged systematic pattern in the use of peremptory challenges has been applied in death penalty cases. Capital cases are unique, different even from race cases, and this fact should make courts especially sensitive to the use of peremptory challenges to produce a jury disposed toward death. As the Supreme Court has recognized in every death penalty case since *Furman*, "death is a punishment which is different from all other sanctions in kind rather than degree."⁶⁷ As a result, the Court has acknowledged that more in the way of due process is required to impose the death penalty than a sentence to a term of years:

mental miscarriage of justice in this case." *United States v. Frady*, 102 S. Ct. at 1596. The Court in *Frady*, in a substantial tightening of the standard of "actual prejudice," stated that a habeas petitioner must show "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." 102 S. Ct. at 1596. The error complained of in *Frady*, however, concerned jury instructions, and the Court's analysis of the evidence and of the jury's verdict led it to conclude that there was "no substantial likelihood" that the instructions "prejudiced Frady's chances with the jury." 102 S. Ct. at 1597-98. With regard to certain errors, however, including those involving jury composition, such an assessment as to prejudicial impact is not possible. For this reason, the Supreme Court in the closely related context of applying the rule of harmless error has declined to require a showing of particularized prejudice and has automatically reversed convictions where the jury was improperly composed. *E.g.*, *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v. Kiff*, 407 U.S. 493 (1972); *see Tumey v. Ohio*, 273 U.S. 510 (1927) (judge with pecuniary interest in outcome); *Swain v. Alabama*, 380 U.S. at 219 (denial or impairment of peremptory challenge); *Lewis v. United States*, 146 U.S. 370, 376 (1892) (same). It would seem inappropriate to read the actual prejudice approach of *Frady* to ban a habeas petitioner in *Dobbert's* situation from challenging jury selection practices that create a substantial risk of material prejudice. *See Huffman v. Wainwright*, 651 F.2d at 350.

It thus seems likely that the Eleventh Circuit will reject the waiver argument accepted by both the Supreme Court of Florida and the federal district court, and resolve the merits of *Dobbert's* constitutional attack.

67. *Enmund v. Florida*, 102 S. Ct. at 3377; *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976) (plurality opinion). *See Eddings v. Oklahoma*, 102 S. Ct. 869, 874 (1982); *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion of Burger, C.J.); *Coker v. Georgia*, 433 U.S. 584 (1977); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion of Stevens, J.); 430 U.S. at 363-64 (White, J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 187-89 (1976); *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring). *See also Rummel v. Estelle*, 445 U.S. 263 (1980) (noncapital case). For a philosophical analysis of the notion that death is different, *see J. MURPHY, Cruel and Unusual Punishment*, in *RETRIBUTION, JUSTICE AND THERAPY* 223-49 (1979).

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.⁶⁸

Not only is this sentiment frequently expressed, but in a variety of contexts the courts have actually treated death penalty cases differently than other cases.⁶⁹ Thus, the use of peremptory challenges in capital cases should be subjected to closer scrutiny than in noncapital cases.⁷⁰

68. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). The most recent expression of this view came from the Court's newest member, Justice O'Connor:

[T]his Court has gone to extraordinary lengths to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.

Eddings v. Oklahoma, 102 S. Ct. 869, 878 (1982) (concurring opinion). An earlier expression came in *Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring):

[C]apital cases . . . stand on quite a different footing than other offenses. In such cases the law is especially sensitive to . . . procedural fairness I do not concede that whatever process is "due" an offender faced with a fine or prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel . . . ; nor is it negligible, being literally that between life and death.

See also cases cited in note 67 *supra*; *Williams v. Georgia*, 349 U.S. 375, 391 (1955) (Frankfurter, J.); *Stein v. New York*, 346 U.S. 156, 196 (opinion of Jackson, J.); *Andres v. United States*, 33 U.S. 740, 752 (1948) (opinion of Reed, J.); *Gillers*, *supra* note 2, at 31-35, 60-61, 86-89; Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 So. CAL. L. REV. 1143, 1155-63 (1980); White, *Death-Qualified Juries: The "Prosecution-Prone-ness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 353-54, 402-04 (1980).

This approach is fully consistent with the Supreme Court's general due process calculus, under which the level of process that is required in a particular situation depends on a balancing of several factors, including the private interest affected by governmental action and the risk and cost of error. *E.g.*, *Parham v. J.R.*, 442 U.S. 584, 604-08 (1979); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Winick, Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331, 399-400 (1981).

69. Compare *United States v. Jackson*, 390 U.S. 570 (1968) (provision of Federal Kidnaping Act authorizing the death penalty following jury verdict, but not where jury trial waived, unconstitutionally burdens right to trial by jury), with *Corbett v. New Jersey*, 439 U.S. 212 (1978) (state homicide statute authorizing life sentence following jury verdict, but lesser sentence where defendant pleads *non vult* and waives jury trial, held not to burden defendant's rights unconstitutionally under the fifth, sixth and fourteenth amendments); compare *Furman v. Georgia*, 408 U.S. 238 (1972) (standardless death penalty statutes violate eighth amendment), with *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980) (standardless sentencing statute in noncapital case held not to violate eighth amendment); compare *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty statute violates eighth amendment), with *Commonwealth v. Jackson*, 369 Mass. 904, 344 N.E.2d 166 (1976) (mandatory one-year sentence for carrying firearm without a license held not to violate the eighth amendment); compare *Powell v. Alabama*, 287 U.S. 45 (1932) (capital defendant unable to employ counsel or make his own defense has due process right to assigned counsel), with *Betts v. Brady*, 316 U.S. 455 (1942) (refusal to appoint counsel for robbery suspect held not to violate due process).

70. One difference might be to permit a lower level of statistical significance to demonstrate a *prima facie* case under *Swain* in a capital case than in noncapital contexts. See D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* 318 (1980).

III. A STUDY OF PROSECUTORIAL USE OF THE PEREMPTORY CHALLENGE TO EXCLUDE SCRUPLED JURORS

The *Swain* test is empirical, requiring proof of a pattern of prosecutorial abuse of the peremptory challenge over a substantial period of time. The study presented here addresses the issue of whether a careful review of the data on capital jury selection in a single district would reveal such a pattern. The data indicate that the prosecution relied on its peremptory challenges to systematically exclude death-scrupled individuals from capital juries.⁷¹ This result, at least for the district studied, brings the government's conduct within the ambit of *Swain*, justifying judicial review to ensure that the prosecution's peremptory challenges conform to constitutional standards.

A. *The Study*

The study analyzes data drawn from Florida's Fourth Judicial Circuit. To comply with the requirements imposed by *Swain* for showing systematic exclusion of a particular group over a period of time, the study covers the five-year period⁷² from January 1974, soon after Florida's reenactment of the death penalty,⁷³ through December 1978.

The *Swain* analysis focuses on prosecutorial practices in a particular district. In Florida the relevant district is the judicial circuit, of which there are twenty in the state.⁷⁴ Each circuit contains one or more counties. Because of considerations of manageability and cost, the study examines only the Fourth Judicial Circuit, located in the northeast portion of the state. The Fourth Circuit includes Duval County, which is coterminous with the City of Jacksonville, a large urban area, and two principally rural counties, Clay and Nassau.⁷⁵

71. The term "death qualified" could be used to describe the resulting jury although the term usually is used to describe the result of challenges for *cause* of venirepersons because of their death penalty attitudes. The term, although frequently used, is ambiguous. See *Hovey v. Superior Court*, 28 Cal. 3d 1, 16 n.34, 616 P.2d 1301, 1307 n.34, 168 Cal. Rptr. 128, 134 n.34 (1980); Hoffman, Witherspoon *After* Wheeler: *Death-Qualifying Is Bad For Defendant*, 1 CRIM. JUSTICE J. 1, 3-4 (1979). As used here, it shall refer to the use of challenges by the prosecutor, either for cause or peremptory to remove venirepersons who at voir dire express opposition to the death penalty. The venirepersons are here referred to as "scrupled" or "death-scrupled," in accordance with prevailing usage.

72. See *United States v. McDaniels*, 379 F. Supp. 1243, 1248 n.6 (E.D. La. 1974) (two-year period held sufficient in the context of *Swain* challenge to the systematic exclusion of blacks).

73. 1974 Fla. Laws. ch. 74-379.

74. A. MORRIS, *THE FLORIDA HANDBOOK* 517-18 (18th ed. 1981).

75. According to 1970 figures, Duval County had a population of 528,865 (98% urban), Clay County had a population of 32,059 (47.7% urban), and Nassau County had a population of 20,626 (33% urban). A. MORRIS, *supra* note 74, at 517-18. Juries in the Fourth Circuit are selected from voter registration lists. According to voter registration lists for the 1976 general

Court records revealed the cases during this five-year period in which defendants were indicted for capital offenses — first degree murder⁷⁶ or involuntary sexual battery of a child under twelve,⁷⁷ the two capital crimes at the time. The data presented do not include cases in which prior to jury selection defendants plead guilty, had their charges nolle prosequed, died, or were adjudicated not guilty by reason of insanity. Nor do they include two other cases, one because the prosecution and defense attorneys had stipulated prior to jury selection that the state would not seek the death penalty,⁷⁸ and the other because the prosecutor, who failed to mention the death penalty during voir dire, admitted that he did not treat the case as a death penalty case.⁷⁹ Finally, three cases were eliminated because neither transcripts nor court reporter notes existed.⁸⁰

Several of the cases involved joint trials of more than one defendant in which a single voir dire occurred. Thus a total of thirty-three juries were selected during the five-year period in cases treated as death penalty cases, and the study includes all thirty available voir dire.

B. Methodology

To establish a prima facie case under *Swain* it should suffice to show that the prosecution uses the peremptory challenge to remove scrupled jurors to an extent that can be characterized as "systematic."⁸¹ A number of circuit court opinions make clear that "system-

election, the voters of the Fourth Circuit were 21.3% black (23% for Duval County, 5% for Clay County, and 14% for Nassau County) and 75.5% white (73.6% for Duval County, 91.1% for Clay County, and 84.9% for Nassau County). THE 1978 FLORIDA ALMANAC 392-93 (D. Marth & M. Marth eds. 1978). Eighty-one and one-third percent of voters were Democrats (81.5% for Duval County, 73% for Clay County, and 93% for Nassau County), 15.4% were Republicans (15.2% for Duval County, 23% for Clay County, and 6% for Nassau County), and 3.3% were registered with other parties or as independents (3.3% for Duval County, 4% for Clay County, and 1% for Nassau County). *Id.*

76. FLA. STAT. ANN. § 782.04(1) (West 1982).

77. FLA. STAT. ANN. § 794.011(2) (West 1982). The Supreme Court of Florida, applying *Coker v. Georgia*, 433 U.S. 584 (1977), has since ruled that the death penalty under this statute would offend the eighth amendment. *Buford v. State*, 403 So. 2d 943 (1981), *cert. denied*, 102 S. Ct. 1039 (1982).

78. *State v. Walker*, No. 78-1622 (Duval County Ct., Fla.).

79. *State v. Freeman*, No. 76-818 CF (Duval County Ct., Fla.).

80. *State v. Swain*, No. 77-4172 CF (Duval County Ct., Fla.); *State v. Freeman*, No. 76-818 CF (Duval County Ct., Fla.); *State v. Turner*, No. 73-179 (Nassau County Ct., Fla.). For a discussion of nonresponse error treatment, *see* note 106 *infra*.

81. *See, e.g.*, *Swain v. Alabama*, 380 U.S. 202, 227 (1965); *United States v. Nelson*, 529 F.2d 40, 43 (8th Cir. 1976); *United States v. Carter*, 528 F.2d 844, 850 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976); *United States v. Pollard*, 483 F.2d 929, 930 (8th Cir. 1973); *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971).

atic exclusion" does not require a showing of 100% exclusion.⁸² How much less than 100% is an open question as *Swain* and its progeny set no specific standard for when use of the peremptory to eliminate members of a class qualifies as "systematic." Guidance can be found in the parallel context of selection of the pool of eligible jurors for the formation of grand and petit juries, where "systematic exclusion" is necessary to demonstrate a prima facie case of violation of the fair cross-section requirement of the sixth amendment or of equal protection. Indeed, the Supreme Court in *Swain* cited cases involving selection of jury pools in its discussion of the demonstration required to "show the prosecutor's systematic use of peremptory challenges . . . over a period of time."⁸³ In both contexts unrepresentative juries can be seen as products of "systematic" official action when the underrepresentation produced is "inherent in the particular jury-selection process utilized."⁸⁴ In both, similar statistical methods should be acceptable to determine whether the discrepancy produced qualifies as "systematic."

In cases involving challenges to the jury selection methods used to form grand and petit jury pools, the courts hold that a prima facie case of constitutional violation is established by showing substantial underrepresentation of a group.⁸⁵ Such underrepresentation is established by a "method of proof, sometimes called the 'rule of exclusion'" involving a statistical comparison of "the proportion of the group in the total population to the proportion . . . [actually serving as] jurors, over a significant period of time."⁸⁶ This methodology, using statistical probability theory to demonstrate satisfaction of the legal standard of "systematic exclusion,"⁸⁷ should be acceptable in

82. *United States v. Pearson*, 448 F.2d 1207, 1217 (5th Cir. 1971); *accord*, circuit court cases cited in note 81 *supra*.

83. *See Swain v. Alabama*, 380 U.S. at 226-27, citing *Hernandez v. Texas*, 347 U.S. 475, 480 (1954); *Patton v. Mississippi*, 322 U.S. 463 (1947); *Norris v. Alabama*, 294 U.S. 587 (1935). The Court required a more detailed showing that prosecutorial conduct produced the unrepresentative result in the peremptory challenge context because of the possibility in the peremptory process but not in the selection process that defense counsel peremptory practices may have produced the result. 380 U.S. at 227.

84. *Duren v. Missouri*, 439 U.S. 357, 366-67 (1979).

85. "While the earlier cases involved absolute exclusion of an identifiable group [due to the system by which juries were selected], later cases established the principle that substantial under-representation of the group constitutes a constitutional violation as well, if it results from purposeful discrimination." *Castaneda v. Partida*, 430 U.S. 482, 493 (1977); *see Alexander v. Louisiana*, 405 U.S. 625 (1972); *Whitus v. Georgia*, 385 U.S. 545 (1967).

86. *Castaneda v. Partida*, 430 U.S. at 494. *See also Alexander v. Louisiana*, 405 U.S. at 630 & n.9; *Sims v. Georgia*, 389 U.S. 404 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967); *Whitus v. Georgia*, 385 U.S. at 552 n.2.

87. *See D. BALDUS & J. COLE, supra note 70; Finkelstein, supra note 32, at 338, 353-56; Kairys, Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771, 785-89 (1972); *Sperlich & Jaspovice, Statistical Decision Theory and*

the preemptory challenge context and can be adapted to test whether prosecutors systematically use their preemptory challenge to eliminate from capital juries those expressing opposition to the death penalty.⁸⁸

Analysis of the transcripts of the voir dires of capital cases over a significant period of time can establish how the prosecutors use their preemptory challenges for nonscrupled venirepersons and for scrupled venirepersons. By comparing prosecutorial practices for the two groups, the probability that the number of scrupled jurors challenged occurred by chance can be calculated by using the binomial distribution. If the difference between the number of scrupled venirepersons expected to be challenged (based on the prosecutor's pattern in the use of preemptories for nonscrupled venirepersons) and the number actually challenged is greater than two or three standard deviations — a probability between 5% (.05) and 1% (.01) — then the hypothesis that the result was achieved at random "would be suspect to a social scientist."⁸⁹

the Selection of Grand Jurors: Testing for Discrimination in a Single Panel, 2 HASTINGS CONST. L.Q. 75 (1975); Comment, *The Civil Petitioner's Right to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally*, 20 UCLA L. REV. 581, 620-31 (1973). In *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), the Supreme Court used this methodology to reach its conclusion that a prima facie case of discrimination in the selection of grand juries in a Texas county had occurred. The Court cited the Finkelstein article, *supra*, as well as several standard statistics texts: P. HOEL, INTRODUCTION TO MATHEMATICAL STATISTICS (4th ed. 1971); F. MOSTELLER, R. ROURKE & G. THOMAS, PROBABILITY WITH STATISTICAL APPLICATIONS (2d ed. 1970). The Supreme Court has used statistical probability theory in other contexts as well. In *Ballew v. Georgia*, 435 U.S. 223, 237 (1978), for example, the Court relied on this methodology for its finding that reduction in jury size below six would reduce minority group representation on juries, citing Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975). This methodology is also commonly used in employment discrimination cases. See generally D. BALDUS & J. COLE, *supra* note 70.

88. See cases cited at note 81 *supra* (prima facie case of systematic exclusion through use of the preemptory is established by a statistical showing that the prosecutor has systematically exercised his preemptory challenges to exclude blacks over a period of time); *United States v. Robinson*, 421 F. Supp. 467, 472-73 (D. Conn. 1976), *vacated sub nom.* *United States v. Newman*, 549 F.2d 240 (2d Cir.), *cert. denied*, 432 U.S. 908 (1977) (approving use of statistical probability theory to carry *Swain* burden); *United States v. McDaniels*, 379 F. Supp. 1243, 1246 n.5 (E.D. La 1974) (same).

89. *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977). In explicitly approving this methodology in the jury selection context, the Court has indicated that for large samples, "if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." The two or three standard deviation rule has been applied by the courts in other contexts as well. See, e.g., *Hazelwood School Dist. v. United States*, 443 U.S. 299, 308, 311 nn.14&17 (1977); *Hameed v. International Assn. of Bridge, Structural & Ornamental Iron Workers Local 396*, 637 F.2d 506, 513-14 (8th Cir. 1980); *EEOC v. United Va. Bank*, 615 F.2d 147, 151-52 (4th Cir. 1980); *Board of Educ. v. Califano*, 584 F.2d 576, 784 n.29 (2d Cir. 1980); see D. BALDUS & J. COLE, *supra* note 70, at 294-95. Two standard deviations is the equivalent of a probability of 5% (.05), the point normally regarded by statisticians and social scientists as "statistically significant." *Hovey v. Superior Court*, 28 Cal. 3d 1, 26 n.58, 616 P.2d 1301, 1314 n.58, 168 Cal. Rptr. 128, 141 n.58 (1980); R. WINKLER & W. HAYES, STATISTICS:

Of course, variables other than the venireperson's views on capital punishment could account for any relationship found. To control for any such potentially confounding variables, analysis of the voir dire transcripts can also identify other possibly relevant variables — demographic characteristics of the venireperson and his or her responses to certain voir dire questions. Twenty-nine such potential confounding variables were identified,⁹⁰ and multivariate analysis is used to determine if a statistically significant relationship exists between venirepersons' attitudes concerning capital punishment and the exercise of prosecutorial peremptory challenges, after removing the potentially confounding effects of these variables.

If a statistically significant relationship, *i.e.*, one exceeding the two or three standard deviation rule, is demonstrated between the prosecutor's exercise of peremptory challenges and attitudes toward capital punishment, and if this relationship remains statistically significant after removal of the effects of potentially confounding variables, then a prima facie case of prosecutorial abuse of the peremptory may be found.⁹¹ Under the traditional approach applied

PROBABILITY, INFERENCE AND DECISION 413 (2d ed. 1975); Finkelstein, *supra* note 37, at 359. Three standard deviations is the equivalent of a probability of 1% (.01), regarded as "highly significant." *Hovey v. Superior Court*, 28 Cal. 3d at 26 n.58, 616 P.2d at 1314 n.58, 168 Cal. Rptr. at 141 n.58.

In *Castaneda*, the Supreme Court described the method of computing the standard deviation and illustrated it with the facts of the case before it:

Given that 79.1% of the population is Mexican-American, the expected number of Mexican-Americans among the 870 persons summoned to serve as grand jurors over the 11-year period is approximately 688. The observed number is 339. Of course, in any given drawing some fluctuation from the expected number is predicted. The important point, however, is that the statistical model shows that the results of a random drawing are likely to fall in the vicinity of the expected value. . . . The measure of the predicted fluctuation from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 870) times the probability of selecting a Mexican-American (0.791) times the probability of selecting a non-Mexican American (0.209).

430 U.S. at 496-97 n.17. The difference between the expected and observed number of Mexican-Americans was approximately 29 standard deviations, the likelihood that such a substantial departure from the expected value would occur by chance was less than 1 in 10¹⁴⁰. Thus, the Court found that a prima facie case of discrimination against Mexican-Americans had been established. 430 U.S. at 496 & n. 17. Similar methodology has been approved in cases raising *Swain* challenges to the systematic exclusion of black venirepersons. *See United States v. Robinson*, 421 F. Supp. 467, 472-73 (D. Conn. 1976), *vacated sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir.), *cert. denied*, 432 U.S. 908 (1977); *United States v. McDaniels*, 379 F. Supp. 1243, 1246 n.5 (E.D. La 1974).

90. *See* text following note 100 *infra*.

91. Even though potential confounding variables were analyzed in this study, it should not be legally necessary for a defendant to perform this analysis to demonstrate a prima facie case of prosecutorial abuse of the peremptory challenge. The lower federal courts, in discussing the burden imposed by *Swain*, have not mentioned any need for the defendant to eliminate the possibility that variables other than race may explain the prosecutors exercise of peremptories. *See, e.g.*, *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1981). Moreover, in the jury selection context, a prima facie case of violation of the sixth amendment cross-section requirement or of equal protection is demonstrated by a statistical showing of substantial underrepresenta-

in jury selection cases, such a *prima facie* case would shift to the prosecutor the burden to demonstrate that the challenges were based on trial related factors, rather than merely on opposition to the death penalty.⁹²

This methodology can also be used to assess the impact of such a systematic practice by prosecutors on the representative character of the juries selected. For this purpose a typical application of the "rule of exclusion" will suffice. Thus, a statistical comparison can be made of the proportion of scrupled venirepersons in the cases in the period studied who remained after challenges for cause and exercise of defense peremptories to the proportion actually selected as jurors. Establishing a statistically significant discrepancy between the expected number of scrupled jurors and the number actually selected would further support a constitutional challenge. In addition, an analysis of both defense and prosecutorial peremptory practices would meet the *Swain* requirement that any unrepresentative product of peremptory challenge practices be attributed to the action of prosecutors rather than of defense counsel.⁹³

C. The Data

Table 1 represents the total number of venirepersons in the voir dire studies examined as potential jurors or alternates, subdivided into nonscrupled venirepersons (those not expressing opposition to the death penalty) and scrupled venirepersons (those ex-

tion of a cognizable class in the jury pool selected, without the necessity of eliminating the effect, if any, of other potential variables. *See, e.g.*, *Duren v. Missouri*, 439 U.S. 357 (1979) (sixth amendment); *Castaneda v. Partida*, 430 U.S. 482 (1977) (equal protection). For example, in *Castaneda*, a challenge to composition of grand juries, the defendant relied on statistical methods to demonstrate substantial underrepresentation of Mexican-Americans in the county over a substantial period of time. The state courts had rejected this equal protection claim, finding that the defendant had failed to make out a *prima facie* case because, among other things, he did not demonstrate that factors other than race — age, poor health, lack of citizenship, illiteracy, unsound mind, lack of moral character, criminal charges pending or a criminal record — had not accounted for the disproportionate results shown. The Supreme Court disagreed, finding that a *prima facie* case had been established even though the defendant had not attempted to control for these potentially confounding variables, each of which would have disqualified a juror under state law. 430 U.S. at 484-85, 496, 504.

92. This "question-raising, burden-shifting" use of statistical proofs is the approach commonly used in discrimination cases. *See* D. BALDUS & J. COLE, *supra* note 70, at 27-30.

93. Because defense attorneys are involved in the peremptory challenge system, the majority in *Swain* stated that the rule of exclusion, "a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion . . . , cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service." 380 U.S. 202, 227. However, if a study identified the use of peremptory challenges by both prosecutors and defense attorneys, it would be possible to assess the extent of state responsibility for any unrepresentative result that had occurred. If this could be done, the rule of exclusion would seem the applicable method of demonstrating the existence of a pattern of "systematic exclusion."

pressing such opposition at the voir dire).⁹⁴ The characterization of venirepersons reflects only their responses to inquiries at voir dire,⁹⁵

94. Venirepersons were separated into two groups for purposes of the study: those who voiced opposition to the death penalty and those who did not. It is useful to subdivide these categories further to delineate some of the issues made relevant by *Witherspoon v. Illinois*, 391 U.S. 510 (1968). See text accompanying notes 118-33 *infra*. With certain modifications, the typography of the spectrum of attitudes on capital punishment developed in *Hovey v. Superior Court*, 28 Cal. 3d 1, 20, 616 P.2d 1301, 1311, 168 Cal. Rptr. 128, 138 (1980), will be used. The group expressing opposition to the death penalty, also referred to here as "scrupled" venirepersons, can be further subdivided into three categories: (1) the "automatic acquittal" group, those opposed to the death penalty who could never return a verdict of guilt, and who therefore are subject to challenge for cause under *Witherspoon*, see *Lockett v. Ohio*, 438 U.S. 586, 596 (1978); (2) the "automatic life imprisonment" group, those opposed to the death penalty who although they could consider a verdict of guilt, could never recommend a sentence of death, also subject to removal under *Witherspoon*; and (3) the "oppose death penalty" group, those opposed to the death penalty who will not automatically vote against it or against guilt in every case, and who therefore may not be removed by challenge for cause consistent with *Witherspoon*. The group not expressing opposition to the death penalty, also referred to here as "nonscrupled" venirepersons, can be further subdivided into three categories: (1) the "automatic death penalty" group, those who favor the death penalty and will automatically vote for it if the defendant is convicted, and who are presumably subject to challenge for cause by the defendant, see *Witherspoon v. Illinois*, 391 U.S. 510, 521-22 n.20 (1968), citing *Crawford v. Bounds*, 395 F.2d 297, 303-04 (4th Cir.), vacated and remanded for further consideration in light of *Witherspoon*, 393 U.S. 76 (1968), reinstated (unreported), cert. denied, 397 U.S. 936 (1970) (alternative holding); *Witherspoon v. Illinois*, 393 U.S. at 536 (Black, J., dissenting); *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981) (dictum); *Hovey v. Superior Court*, 28 Cal. 3d at 20 n.48, 616 P.2d at 1310 n.48, 168 Cal. Rptr. at 137 n.48; Gillers, *supra* note 2, at 99 n.452 (suggesting that permitting such jurors to serve may undercut *Woodson*, invalidating legislatively mandated death sentences, and *Lockett*, commanding that a capital defendant receive individualized consideration); (2) the "favor death penalty" group, those who favor the death penalty but will not vote to impose it in every case; and (3) the "indifferent" group, those who express indifference to the death penalty, neither favoring nor opposing it, or who state they are undecided about the death penalty. The last two categories of venirepersons would not be subject to challenge for cause based on their views on capital punishment.

95. While it is possible that some jurors who actually oppose the death penalty failed to voice objection (as well as that some who favor the penalty lied and voiced opposition, perhaps in an effort to avoid jury service), this should not affect the value of the study. First, under the method of questioning used in capital voir dices, persons who oppose the death penalty are asked to state their opposition. As *Witherspoon* forbids the prosecutor to inquire as to the venireperson's views of the propriety of death in the case at issue, 391 U.S. at 522 n.21, the questioning usually concerns whether the venireperson is opposed to the death penalty in general or harbors moral or religious scruples against it. In a typical capital voir dire, the prosecutor questions each venireperson intensively on the issue of capital punishment if the venireperson expresses any opposition or even hesitancy concerning capital punishment in order to determine whether the person may be challenged for cause under *Witherspoon*. Moreover, the practice condemned by *Witherspoon* is the challenge of jurors "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522 (emphasis added).

Of course the verbal responses of venirepersons do not tell the entire story. Prospective jurors also communicate through paralinguistic behavior ("aspects of speech — such as breathing, pauses and latencies, pitch and tone of voice, and speech disturbances") and kinetic behavior or "body language" ("facial expressions, body movements, body orientation, eye contact, and hand movements"). Suggs & Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 ARIZ. L. REV. 629, 630-31 (1978). However, a study of this kind — dependent as it is on the transcribed record of the voir dire — is necessarily limited to the verbal communication of venirepersons. As venirepersons in capital cases are asked to verbalize their opposition to the death penalty, this is not a shortcoming. Moreover, as appellate challenges to jury selection practices in capital cases raising *Witherspoon* error are adjudi-

typically by the prosecutor, as to whether they opposed the death penalty. Table 1 also shows the numbers of venirepersons removed for cause,⁹⁶ those removed by defense peremptory challenges, and those remaining, the latter category constituting venirepersons subject to exercise of prosecutorial peremptory challenge.

Table 1 shows several interesting trends. First, the fraction of scrupled jurors in this area of the country amounts to about thirteen percent, approximately half the national average.⁹⁷ The high number of challenges for cause among the scrupled jurors indicates that slightly more than half of the scrupled jurors could not vote for the death penalty under any circumstances, or were biased on the issue of guilt.⁹⁸ The breakdown of venirepersons remaining after challenges for cause consequently includes only about 6% scrupled potential jurors. The defense peremptory challenges are extremely one-sided in favor of keeping scrupled jurors, and have the effect of increasing their representation from about 6% to about 8% of the potential jurors.

Table 2 shows how the prosecutors used their peremptory challenges on potential jury members and alternates,⁹⁹ subdivided into scrupled and non-scrupled venirepersons.

Table 2 shows that while the prosecution used peremptory challenges against 28% of the non-scrupled jurors, it eliminated 77% of the scrupled jurors. And whereas 13% of the community opposed the death penalty, and 6% opposed it in a manner not justifying re-

cated purely on the transcribed record, this should be sufficient as a matter of law in the peremptory challenge context as well.

96. Venirepersons were removed for cause on the motion of the prosecutor or defense, and sometimes by the court without motion. The trial court traditionally has the discretion to excuse a juror on its own motion. *E.g.*, *United States v. Richardson*, 582 F.2d 968, 969 (5th Cir. 1978) (*per curiam*).

97. Opposition to the death penalty has dramatically lessened in the past 15 years. At the time of the *Witherspoon* decision, approximately 47% of the population fell into the "generally opposed to capital punishment" category. *See* 391 U.S. at 520 n.16 (citing 2 POLLS, INTERNATIONAL REVIEW ON PUBLIC OPINION No. 3, at 84 (1967)). Gallup polls conducted periodically since indicate that the nation's views have changed significantly, with only 25% opposing capital punishment and 66% favoring it in 1981. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS — 1981, 209-12 (T. Flanagan, D. van Alstyne & M. Gottfriedson eds. 1982) (hereinafter cited as SOURCEBOOK).

98. Based on the experience with non-scrupled jurors, one would expect about 18 of the 147 scrupled venirepersons to be challenged for cause independent of their death penalty attitudes. Of the remaining 129, 74, or about 57%, were challenged for cause, presumably because of their views on the death penalty.

99. In Florida each party generally has 10 peremptory challenges in a capital case. FLA. STAT. ANN. § 913.08(1)(a)(2) (West 1982); FLA. R. CRIM. P. 3.350(a). (Each party is given an additional peremptory challenge for each alternate juror selected. FLA. R. CRIM. P. 3.350(f). Two alternates are usually selected.

removal for cause under *Witherspoon*, fewer than 3% of the actual jurors and alternates opposed the death penalty.

The Appendix includes a breakdown of the data shown in Tables 1 and 2 according to the venireperson's status as either a potential juror or potential alternate. These data do not suggest any different conclusions regarding these two categories, particularly in view of the relatively small number of potential alternates.

For each of the 629 venirepersons subject to exercise of prosecutorial peremptory challenge, data was also collected concerning twenty-nine potentially confounding variables. Based on the transcripts of the voir dices,¹⁰⁰ data were collected concerning such demographic factors as the venireperson's sex, marital status, age, number of children, occupation (based on eleven occupational categories), employment status, level of education, and length of time in the community. Data were also collected concerning the venireperson's response to typical voir dire questions such as whether he or she knew or had a relative who knew the defendant, the prosecutor, the defense attorney, the judge, a witness or another juror; whether he or she had previously been the victim of a crime or had a relative who had been such a victim; whether he or she had previously served as a juror; and whether he or she had previously served as a juror in a capital case. In addition, data were collected concerning whether the prosecutor had attempted to remove the venireperson for cause, had attempted to remove him or her for cause based on death penalty attitudes, and had questioned the venireperson concerning his or her ability to be impartial in deciding the defendant's guilt.

In the case of twenty-two of these potential confounding variables, the transcripts did not contain sufficient information to permit

100. The inability of a study of the kind undertaken here to go beyond the transcribed voir dire places obvious limits on the consideration of possibly confounding variables. For many venirepersons, the transcripts did not contain information on some of the control variables sought to be analyzed. However, unless the prosecutors had prior knowledge concerning the members of the venire (or in the case of a few of the demographic variables, unless the prosecutors were able to identify these factors visually), the absence of information in the transcripts also indicates that the prosecutors lacked information concerning these variables, making it highly unlikely that they significantly affected the exercise of peremptories. Of course, some demographic variables not revealed by the transcripts were subject to visual observation — the race, personal appearance, and style of dress of the members of the venire, for example. And it is possible that prosecutors had access to out-of-court sources of information concerning the venirepersons that might influence the exercise of peremptory challenges. However, in the Florida case in which the study was raised, the state made no attempt to explain the exercise of peremptories on any of these bases. See note 66 *supra*. In the face of the strong inference created by the data, see notes 106-13 *infra* and accompanying text, this omission suggests that additional variables were not related to the exercise of peremptories by the prosecutors.

TABLE 1
TOTAL VENIRE PERSONS EXAMINED (JURORS AND ALTERNATES)
 (Based on 30 cases)

	Venire persons examined as potential jurors	Challenged for cause by prosecutor	Challenged for cause by defense	Excused for cause by court without motion	Venire persons remaining after excuse for cause	Excused by defense peremptory challenge	Subject to exercise of prosecutorial peremptory challenge (those remaining after excuse for cause and defense peremptories)
Non-scrupled not opposed to death penalty	969 (86.83%)	36 (34.95%)	25 (96.15%)	60 (71.43%)	848 (93.91%)	271 (98.9%)	577 (91.73%)
Scrupled opposed to death penalty)	147 (13.17%)	67 (65.05%)	1 (3.85%)	24 (28.57%)	55 (6.09%)	3 (1.1%)	52 (8.27%)
Total	1116	103	26	84	903	274	629

TABLE 2

**USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
IN SELECTING JURORS AND ALTERNATE JURORS
(Based on 30 cases)**

	Potential jurors subject to exercise of prosecutorial peremptory challenge (those remaining after excused for cause and defense peremptories)	Challenged	Not challenged (those selected as jurors or alternates)
Non-scrupled (not opposed to death penalty)	577	163 (28.25%)	414 (71.75%)
Scrupled (opposed to death penalty)	52	40 (76.92%)	12 (23.08%)
Total	629	203 (32.27%)	426 (67.73%)

the multivariate analysis planned.¹⁰¹ Further analysis of these variables was not attempted because of the biases in statistical computa-

101. The following table reports the percentage of missing data for each variable considered to have severe missing data problems.

<u>Variable</u>	<u>Percentage missing (out of 629)</u>
1) age of venireperson	89.83%
2) number of children of venireperson	24.96%
3) occupation of venireperson	23.69%
4) level of education of venireperson	82.83%
5) time of venireperson in community	24.17%
6) venireperson knew prosecutor	22.58%
7) venireperson knew defense lawyer	22.58%
8) venireperson knew judge	96.98%
9) venireperson knew other juror	92.85%
10) venireperson knew witness	36.88%
11) relative of venireperson knew defendant	99.52%
12) relative of venireperson knew prosecutor	99.84%
13) relative of venireperson knew defense lawyer	99.36%
14) relative of venireperson knew judge	96.18%
15) relative of venireperson knew other juror	96.18%
16) relative of venireperson knew witness	96.18%
17) venireperson had criminal record	74.09%
18) relative of venireperson had criminal record	82.35%
19) venireperson was victim of crime	54.21%
20) relative of venireperson was victim of crime	66.3 %
21) venireperson had previously served as juror	37.68%
22) venireperson had previously served as juror in capital case.	34.82%

tion which would be caused by the missing data. In the case of seven of the potential confounding variables there either was no missing data or the extent of missing data (less than 5%) was regarded as minimal. These variables were the venireperson's sex, marital status, and employment status, and whether the venireperson knew the defendant, was unsuccessfully challenged for cause by the prosecutor, was unsuccessfully challenged for cause by the prosecutor based on death penalty attitudes, and was questioned by the prosecutor as to ability to be impartial in deciding guilt. Table 3 presents summary data on the use of prosecutorial peremptory challenges as a function of each of these variables, for scrupled and nonscrupled venirepersons. A more detailed breakdown of the data is tabulated in the Appendix.

TABLE 3

ANALYSIS OF POTENTIAL CONFOUNDING VARIABLES

Venireperson Characteristics	Percent Scrupled	Percent of Venirepersons Challenged		
		Total	Scrupled	Nonscrupled
Male	7.5	33.5	77.3	29.9
Female	8.9	31.3	76.7	26.8
Married	6.7	22.5	64.3	19.5
Not Married	11.0	49.2	90.5	44.1
Employed	7.4	29.9	73.5	26.5
Not Employed	8.7	36.0	84.6	31.4
*Know Defendant	0.0	83.3	0.0	83.3
Not Know Defendant	8.4	31.9	76.0	27.8
*Challenged for Cause	61.1	94.4	90.9	100.0
Not Challenged for Cause	6.7	30.4	73.2	27.4
*Challenged for Cause (Death)	100.0	100.0	100.0	—
Not Challenged for Cause (Death)	6.8	31.2	71.4	28.2
Questioned on Guilt Impartialty	8.5	31.0	76.9	26.7
*Not Questioned	0.0	73.7	—	73.7

*Small number of venirepersons (less than 3% of total)

This Table illustrates a slight difference¹⁰² only between the use of peremptory challenges for males (33.4%) and for females (31.3%). However, a substantial disparity between the use of peremptories for scrupled and for nonscrupled venirepersons is shown for both males

The prosecutors' failure to inquire as to these variables suggests that they did not relate to the exercise of peremptories, unless, of course, the prosecutors had independent knowledge concerning these factors. See note 100 *supra*.

102. The use of the terms "slight difference" and "substantial disparity" in the description of the data appearing in Table 3 is not intended to convey any statistical conclusion.

(77.3% of scrupled male venirepersons were challenged compared to 29.9% of those who were nonscrupled) and females (76.7% of scrupled females were challenged compared to 26.8% for those who were nonscrupled). Thus although as shown in Table 3, women are slightly more likely to be death-scrupled than are men, there is no indication that the study results are the result of challenges based on sex rather than death penalty attitudes.

The prosecutors challenged 22.5% of married venirepersons compared to more than twice this percentage (49.2%) for those not married. And unmarried venirepersons are more likely to be scrupled. Nonetheless, within each sub-category a substantial disparity is shown between the use of peremptories for scrupled and non-scrupled venirepersons: for those not married, 90.5% of scrupled venirepersons were challenged compared to 44.1% for those non-scrupled; for those who were married, 64.3% of scrupled venirepersons were challenged compared to 19.5% for those who were nonscrupled.

A slight difference only is observed between the exercise of peremptory challenges for employed venirepersons (29.9%) and for those who were unemployed (36%). Again, within each sub-category, a substantial disparity between the use of peremptories for scrupled and for nonscrupled venirepersons is shown: for those employed, 73.5% of scrupled venirepersons were challenged compared to only 26.5% for those who were nonscrupled; for those who were not employed, 84.6% of scrupled venirepersons were challenged compared to 31.4% for those who were nonscrupled.

Not surprisingly, a substantial percentage (83.3%) of those responding affirmatively to the question of whether they had previously known the defendant were challenged. All six of these were nonscrupled venirepersons. For those who did not know the defendant previously — 99% of total venirepersons — a substantial disparity between the use of peremptories for scrupled and for non-scrupled venirepersons is shown: 76% of scrupled venirepersons compared to 27.8% of those who were nonscrupled were challenged.

One of the principal functions of peremptory challenges is to facilitate exercise of the challenge for cause;¹⁰³ indeed, their availability minimizes tensions inherent in our system of challenges for cause.¹⁰⁴ As a result, it can be expected that prosecutors will chal-

103. *Swain v. Alabama*, 380 U.S. 202, 219-20 (1965); 4 W. BLACKSTONE, COMMENTARIES *353; Lempert, *Jury Size And The Peremptory Challenge*, in *THE STRUCTURE OF PROCEDURE* 349, 353-54 (R. Cover & O. Fiss 1979).

104. Lempert, *supra* note 103, at 354.

lenge peremptorily all or virtually all of those who they had previously attempted to remove for cause. This table reveals the expected result as 17 of the 18 venirepersons unsuccessfully challenged for cause (94.4%) were removed peremptorily. All seven of these who were nonscrupled were removed, but perhaps suprisingly, one of the 11 scrupled venirepersons unsuccessfully challenged for cause (9.1%) was not excused peremptorily. For those venirepersons not challenged for cause — 97% of total venirepersons — a substantial disparity between the use of peremptories for scrupled and for non-scrupled venirepersons is shown: 73.2% of scrupled venirepersons in this category were excused by peremptory compared to only 27.4% for those non-scrupled.

The next comparison in Table 3 examines a subset of those unsuccessfully challenged for cause by the prosecutor — those so challenged based on their attitudes concerning the death penalty. All ten venirepersons in this category were removed peremptorily; by definition, all venirepersons in this category were scrupled. For those not challenged for cause as a result of their attitudes on the death penalty — representing more than 98% of the total — a substantial disparity between the use of peremptories for scrupled and for non-scrupled venirepersons is shown: 71.4% of scrupled venirepersons are removed for cause compared to 28.2% of those who are nonscrupled.

As the peremptory challenge is primarily “ a device for eliminating from the jury individuals whose capacity for impartial judgment is suspect, but not so much as to require their exclusion as a matter of law,”¹⁰⁵ one would expect that a higher percentage of those whose impartiality was questioned by the prosecutor would be removed by peremptory challenge than those whose impartiality was not questioned. Surprisingly, the data showed the contrary. For those questioned as to their ability to be impartial in deciding guilt — 97% of total venirepersons — 31% were removed. Although only 19 venirepersons were not so questioned (perhaps because a decision to challenge them had already been made on other grounds), of these, 73.7% were removed by peremptory challenge. All 52 scrupled venirepersons were questioned as to impartiality, as were 97% of those who were non-scrupled, but 76.9% of the scrupled in this category were removed compared to 26.7% for those who were non-scrupled.

105. *Id.*

D. *Analysis*

The question under investigation is whether prosecutors in the Fourth Judicial Circuit systematically used their peremptory challenges to eliminate from capital juries those potential jurors expressing opposition to the death penalty. Table 2 shows that for scrupled jurors subject to prosecutorial peremptory challenge, 40 out of 52 (76.9%) were challenged. Given that prosecutors used peremptory challenges for 28.2% of nonscrupled potential jurors, one would expect that 15 of the 52 scrupled jurors would have been challenged. The chance of 40 or more scrupled potential jurors being removed by prosecutorial peremptory challenge at random is approximately eleven in one hundred billion (.000,000,000,11), or the equivalent of 7.6 standard deviations. This presents an astronomical degree of statistical significance; the result could be pure chance to approximately the same extent that flipping 33 heads in a row could be a chance result using an unbiased coin.¹⁰⁶

Moreover, the data demonstrate that, despite even more one-sided (in the opposite direction) use of defense peremptories, the pattern in the use of peremptories by the prosecutors produced a substantial underrepresentation of scrupled jurors on the jury panels selected. Table 1 reveals that 147 out of 1116 (13.2%) venirepersons examined as potential jurors expressed opposition to the death penalty, and that 969 (86.8%) did not. After those excused for cause and by defense peremptory challenge were eliminated, 629 venirepersons remained. Of these, 52 (8.3%) were scrupled and 577 (91.7%) were nonscrupled. Table 2 reveals that 426 jurors and alternates were actually selected. Of these, one would expect that 35 (8.3%) would have been scrupled. In fact, as Table 2 reveals, only 12 scrupled

106. Although the transcripts in three cases were unavailable, *see* note 80 *supra* and accompanying text, their unavailability did not appear to be related to any variable that would suggest that the 30 voir dres analyzed were in any way unrepresentative. Confidence in drawing conclusions based on 30 out of 33 voir dres is also appropriate in view of the response rate (90.91%), which is extremely high for studies of this type, involving court records that are rarely complete. Accordingly, the small nonresponse error problem encountered is not serious.

To demonstrate further the strength of the conclusions reached on the basis of the 30 voir dres studied, a "worst case" analysis was performed in which the incredible assumption was made that in each of the three missing cases, all 12 jurors selected were opposed to the death penalty. This would add 36 scrupled potential jurors subject to prosecutorial peremptory challenge who were not challenged, resulting in 39 out of 84 (46.43%) scrupled jurors challenged. *See* Table A.1 at page 91 *infra*. Given that the prosecutors used peremptory challenges for 30.08% of nonscrupled potential jurors, one would expect that about 25 of these 84 scrupled jurors would have been challenged. The chances of 39 or more of the scrupled potential jurors being removed by prosecutorial peremptory challenge at random is calculated at thirteen in one million (.000,013), or the equivalent of 4.2 standard deviations. Thus, even a "worst case analysis" of the three missing cases reveals a result that is statistically significant to an extremely high degree.

venirepersons were selected, the remaining 40 having been removed by prosecutorial peremptory challenge. The chance of 12 or fewer scrupled jurors being selected at random is calculated at approximately 32 out of one million (.000,032), or the equivalent of 4.0 standard deviations. This presents a high degree of statistical significance; the probability of such a result occurring by chance is approximately equal to that of flipping 14 heads in a row with an unbiased coin.

Of course, the Supreme Court in *Swain* warned that the rule of exclusion, "a proof standard developed in a context where there is no question of state responsibility for the alleged exclusion," should not be "woodenly applied" in the peremptory challenge context, where the unrepresentative result may well be attributable to action of defense counsel.¹⁰⁷ The substantial underrepresentation of scrupled jurors just demonstrated, however, resulted exclusively from prosecutorial action — the exercise by prosecutors of peremptory challenges to remove 40 out of 52 scrupled potential jurors who *but for* these challenges would have served on the juries selected. Tables 1 and 2 demonstrate that the substantial underrepresentation of scrupled jurors occurred despite, rather than because of, defense action.¹⁰⁸ Of the 43 scrupled venirepersons removed by either party by means of peremptory challenge, 40 were removed by the prosecution and only 3 by the defense. By contrast, the defense accounted for 271 of the 434 peremptory challenges to nonscrupled venirepersons.

Several methods may be used to test for the effects of potential confounding variables on the preceding results.¹⁰⁹ A trivariate chi-

107. *Swain v. Alabama*, 380 U.S. 202, 227 (1965); *see note 93 supra*.

108. If the above calculation of the effect of prosecutorial peremptory challenges on the representative character of panels of jurors and alternate jurors selected is recomputed by adding back in those potential jurors subject to defense peremptory challenge, the results still indicate a statistically significant underrepresentation in the number of scrupled jurors and alternates selected. Table 1 reveals that 147 out of 1116 venirepersons examined (13.17%) expressed opposition to the death penalty, and that 969 (86.83%) did not. After those excused for cause were eliminated, 55 scrupled venirepersons (6.09%) and 848 nonscrupled venirepersons (93.91%) remained. Table 2 reveals that 426 venirepersons were actually selected as jurors and alternate jurors. Given that 426 venirepersons were actually selected, one would expect that 26 of them (6.09%) would have been scrupled venirepersons. In fact, as Tables 1 and 2 reveal, only 12 scrupled venirepersons were selected, the remaining 43 having been eliminated by peremptory challenge (40 by prosecutors and 3 by defense attorneys). The chances of 12 or fewer scrupled venirepersons being selected at random is approximately 33 out of 10,000 (.0033), or the equivalent of 2.72 standard deviations. Moreover, this substantial underrepresentation was produced overwhelmingly by prosecutorial peremptory challenges. Of the 43 scrupled venirepersons removed by peremptory challenge, 40 (93.02%) were removed by prosecutorial peremptories and only 3 (6.98%) by defense peremptories.

109. *See, e.g.*, D. BALDUS & J. COLE, *supra* note 70, at 211-86; Y. BISHOP, S. FEINBERG & P. HOLLAND, *DISCRETE MULTIVARIATE ANALYSIS: THEORY & PRACTICE* (1975); D. MORRISON, *MULTIVARIATE STATISTICAL METHODS* (2d ed. 1976).

square analysis was used to assess the effect of each of the seven potentially confounding variables on the relationship between exercise of prosecutorial peremptory challenges and death penalty attitudes.¹¹⁰ For the variables of sex, marital status, and employment status, a trivariate chi-square analysis was appropriate and demonstrated that a statistically significant relationship remained between the exercise of peremptory challenges and death penalty attitudes after removing the effects of these variables.¹¹¹ For the remaining four

110. See B. WINER, *STATISTICAL PRINCIPLES AND EXPERIMENTAL DESIGN* 855-59 (2d ed. 1971). A related methodology is sometimes used in employment discrimination cases. See D. BALDUS & J. COLE, *supra* note 70, at 211-17 (subgroup comparison). Because this study examined an entire population — all death penalty cases in which a jury was impanelled in Florida's Fourth Judicial Circuit for the five-year period — rather than a sample, there is controversy concerning whether chi-square analysis may be applied. Compare N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER & D. BENT, *STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES* 224 (2d ed. 1975) (inappropriate for entire populations), with Gold, *Statistical Tests and Substantive Significance*, 4 AM. SOCIOLOGIST 42 (1969), and Winch & Campbell, *Proof? No. Evidence? Yes. The Significance of Tests of Significance*, 4 AM. SOCIOLOGIST 140 (1969) (appropriate).

An alternate method of analysis that could not be used here is multiple regression, a device for making quantitative estimates of the effects of different factors on a dependent variable. See D. BALDUS & J. COLE, *supra* note 70, at 239-86; Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 COLUM. L. REV. 737 (1980); Finkelstein, *Regression Models in Administrative Proceedings*, 86 HARV. L. REV. 1442 (1973); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702 (1980); Smith & Abram, *Quantitative Analysis and Proof of Employment Discrimination*, 1981 U. ILL. L. REV. 33; Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975). Where the dependent variable is dichotomous, as it is here (challenged or not challenged), a number of threats to validity are presented that render multiple regression analysis generally unavailable. See D. BALDUS & J. COLE, *supra* note 70, at 267-72. An emerging methodology, "logit" analysis or "probit analysis," is available in certain instances with dichotomous dependent variables. See D. BALDUS & J. COLE, *supra*, at 271-72 n.55; *Id.* 1981 Supplement at 55; Y. BISHOP, S. FEINBERG & P. HOLLAND, *supra* note 109; E. HANUSHEK & J. JACKSON, *Statistical Methods for Social Scientists* 190-200, 204-05 (1977). For recent legal studies using this methodology, see Baldus, Pulaski, Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980); Nagel & Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982). Unfortunately, as the computer programs for these methods were unavailable at the University of Miami, it could not be determined whether the data were amenable to these techniques of analysis.

111. For sex, the disparity shown was significant at the .000,000,000,3 level of statistical significance. No other relationship (*i.e.*, between challenges and sex, with the effects of death penalty attitude removed; or between death penalty attitude and sex, with the effects of exercise of challenges removed; or the three-way interaction among all of them) was significant beyond the .27 level of statistical significance.

For employment status, the disparity shown was significant at the .000,000,000,2 level of statistical significance. No other relationship (*i.e.*, between challenges and employment status, with the effects of death penalty attitude removed; or between death penalty attitude and employment status, with the effects of exercise of challenges removed; or the three-way interaction among all of them) was significant beyond the .157 level of statistical significance.

For marital status, the disparity shown was significant at the .000,000,000,2 level of statistical significance. However, marital status was statistically related to the exercise of challenges at the .000,000,000,3 level. The relationship of death penalty attitude with marital status, having removed the effects of exercise of challenges was not statistically significant (at the .693 level). The three-way interaction among all of them was statistically significant at the .000,28

variables — whether the venireperson knew the defendant, whether the venireperson was unsuccessfully challenged for cause by the prosecutor, whether the venireperson was unsuccessfully challenged for cause by the prosecutor based on death penalty attitudes, and whether the venireperson was questioned by the prosecutor on ability to be impartial in deciding guilt — the small number of venirepersons in some entries in the detailed data tabulated in the Appendix indicates that the trivariate chi-square analysis is not appropriate and a descriptive discussion of the impact of these variables on peremptory challenge practices and death penalty attitudes is all that is possible. As none of the venirepersons who knew the defendant were scrupled, a comparison was possible only for those (99% of the total) who did not know the defendant. In this subgroup, the disparity between scrupled (76% challenged) and nonscrupled venirepersons (27.8% challenged) mirrored the overall disparity shown. With respect to the variable of prior unsuccessful challenge for cause by prosecutor, a slight difference is shown between scrupled (90.9% challenged) and nonscrupled venirepersons (100% challenged) for the small number of venirepersons (3% of the total) previously challenged. For those not so challenged (97% of the total), however, the disparity between scrupled (73.4% challenged) and nonscrupled venirepersons (27.4% challenged) mirrored the overall disparity shown. As none of the venirepersons who were unsuccessfully challenged for cause by the prosecutor based on death penalty attitudes were nonscrupled, a comparison was possible only for those (more than 98% of the total) who were not challenged for cause on this basis. In this subgroup, the disparity between scrupled (71.4% challenged) and nonscrupled venirepersons (28.2% challenged) mirrored the overall disparity shown. As all of the scrupled venirepersons were questioned by the prosecutor concerning their ability to be impartial, a comparison was not possible for those not so questioned. For those questioned on impartiality (97% of the total), the disparity between scrupled (76.9% challenged) and nonscrupled (26.7% challenged) mirrored the overall disparity shown.

Thus, the binomial distribution analysis demonstrates a relationship between exercise of prosecutorial peremptory challenges and death penalty attitudes that is statistically significant to an astronomical degree, a relationship that remains unchanged after removing, through trivariate chi-square analysis, the effects of the three

level. These relationships found for the variable of marital status do not in any way detract from the conclusion that exercise of challenges and death penalty attitudes are related to a statistically significant extent.

potential confounding variables for which there was sufficient data to perform the analysis. This should certainly suffice to satisfy the burden imposed by *Swain*. For the five-year period studied a prima facie case has been demonstrated that prosecutors in Florida's Fourth Judicial Circuit systematically used their peremptory challenges to eliminate from capital juries venirepersons expressing opposition to the death penalty.¹¹² And, because those opposed to the death penalty are in the minority,¹¹³ this practice resulted in their substantial underrepresentation despite the best countervailing efforts of the defense.

IV. CONSTITUTIONAL IMPLICATIONS OF THE SYSTEMATIC EXCLUSION OF SCRUPLED JURORS

Under *Swain*, the prosecution's use of the peremptory challenge is subject to review if the defense can show a pattern of abuse extending over a sufficient number of cases¹¹⁴ Part II discussed the requirement of systematic use of the peremptory; Part III presented data indicating such a pattern in the district studied. The remaining requirement to make out a case under *Swain* is that the Constitution must forbid the particular systematic practice challenged by the defense. In *Swain*, the exclusion of blacks from juries clearly violated their right to equal participation in the criminal justice system and, arguably, the right of the defendant to a representative jury.¹¹⁵ The systematic use by prosecutors of their peremptory challenges to eliminate from capital juries those who express opposition to the death penalty implicates a number of constitutional rights, including the

112. Under the traditional approach in jury selection cases, the establishment of such a prima facie case shifts to the state the burden of demonstrating that the challenges were based on legitimate trial related factors rather than merely on opposition to the death penalty. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977); *Alexander v. Louisiana*, 405 U.S. 625 (1972); see note 91 *supra* and accompanying text. In the Florida case in which the study was raised, the state made no attempt to explain its exercise of peremptories on any basis other than views on capital punishment. See note 66 *supra*. Under the traditional approach, such a failure to offer evidence to rebut the inference suggested by the data results in judgment for the defendant. See, e.g., *Castaneda v. Partida*, 430 U.S. 482.

113. See note 97 *supra*.

114. To have standing to question the prosecutor's pattern of peremptory abuses, the defendant probably would have to show that the jury composition in his case was adversely affected, although this was not an issue in *Swain*.

115. *Swain* did not raise the issue of representativeness, since it was decided before the sixth amendment was held applicable to the states. See note 34 *supra*. However, representativeness clearly was involved in earlier equal protection jury cases, see, e.g., *Strauder v. West Virginia*, 100 U.S. 303, 308-09 (1880), and arguably *Swain* simply held that the state could not achieve through the use of the peremptory what it could not do by statute under *Strauder*. Thus representativeness seems to have been an underlying, if not explicit concern.

fourteenth amendment due process right and the fair cross-section right inherent in the sixth and eighth amendment guarantees.

A. *Systematic Exclusion of Scrupled Jurors and the Due Process Right to an Impartial Jury*

1. *Witherspoon and the Right to Jury Impartiality on Sentence*

The right to trial by an impartial jury lies at the very heart of due process. Even before the Supreme Court held that the sixth amendment right to jury trial applied to the states as a matter of due process,¹¹⁶ the Court declared that due process guarantees to the criminally accused "a fair trial by a panel of impartial, 'indifferent' jurors."¹¹⁷ It was this due process right — and not the fair cross-section requirement of the sixth amendment right to jury trial — that the Court found to have been violated by the practice condemned in *Witherspoon v. Illinois*.¹¹⁸

In *Witherspoon*, the United States Supreme Court restricted the use of the challenge for cause to remove from capital juries persons generally opposed to the death penalty. The Court did not condemn all challenges for cause based on opposition to the death penalty. It specifically declined to disapprove of the removal of venirepersons who made 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*."¹¹⁹ However, the Court ruled out the removal for cause of potential jurors who merely express general opposition to the death

116. See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

117. *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); see also *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Turner v. Louisiana*, 379 U.S. 466, 471 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963). The Court has more recently noted that the right to an impartial jury arises from both the sixth amendment and principles of due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976).

118. 391 U.S. 510 (1968). Although the Court used the language of due process, 391 U.S. at 523, and cited prior due process cases, it also mentioned the sixth amendment, and its reference to the jury's role of "express[ing] the conscience of the community" in assessing punishment suggests that it was applying the fair cross-section requirement. 391 U.S. at 518-19. However, *Witherspoon* could not have been a sixth amendment case, as the trial in *Witherspoon* occurred before the sixth amendment was held applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and the Court, two weeks after *Witherspoon* was decided, declined to give *Duncan* retroactive effect. *DeStefano v. Woods*, 392 U.S. 631 (1968). *Witherspoon* can thus be viewed as applying the constitutional principles "of due process as seen through the filter of Sixth Amendment values." *Hovey v. Superior Court*, 28 Cal. 3d 1, 10-11 n.17, 616 P.2d 1301, 1304 n.17, 168 Cal. Rptr. 128, 131 n.17 (1980).

119. *Witherspoon v. Illinois*, 391 U.S. at 522-23 n.21 (emphasis in original). *Accord*, *Adams v. Texas*, 448 U.S. 38, 44 (1980); *Boulden v. Holman*, 394 U.S. 478, 482 (1969).

penalty but who are willing to consider the possibility of its imposition in at least some cases and to make an impartial decision on the issue of the defendant's guilt.¹²⁰ In the years since its decision the Court has consistently adhered to *Witherspoon*, applying it repeatedly to invalidate death sentences imposed by juries from which even one prospective juror was excluded for cause because of views on capital punishment on "any broader basis" than authorized by *Witherspoon*.¹²¹

Prior to the Court's decision, under the generally prevailing practice prosecutors ascertained on voir dire whether prospective jurors harbored any opposition to the death penalty, and removed for cause all who did.¹²² The desire to select an impartial jury was not necessarily the only factor that led prosecutors to use the challenge for cause in this manner. The practice may also have been fueled by the prosecutor's desire to select a jury inclined to impose a death sentence as well as one that would likely identify more with the prosecution than with the defense and thus be more likely to convict.¹²³

In *Witherspoon*, the defendant was tried pursuant to a statute which gave the jury wide discretion in choosing between life imprisonment and the death penalty, and also permitted the prosecutor to challenge for cause any juror who stated "that he has conscientious scruples against capital punishment, or that he is opposed to the same."¹²⁴ The trial court eliminated forty-seven venirepersons because of their opposition to the death penalty. Of those eliminated,

120. Just as veniremen cannot be excluded for cause on the ground that they hold such views [against capital punishment], so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

Witherspoon v. Illinois, 391 U.S. at 522-23 n.21. Moreover, even a "juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition" might be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." 391 U.S. at 514 n.7. See also *Boulden v. Holman*, 394 U.S. 478, 484 (1969).

121. *E.g.*, *Adams v. Texas*, 448 U.S. 38 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Mathis v. New Jersey* 403 U.S. 946 (1971) (reversing death sentences in consolidated petitions). See also *Maxwell v. Bishop*, 398 U.S. 262 (1970) (remanding); *Boulden v. Holman*, 394 U.S. 478 (1969) (remanding).

122. See note 17 *supra*.

123. See generally Bedau, *The Courts, Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201, 209; Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545, 555 (1961); White, *supra* note 68, at 405.

124. ILL. REV. STAT. ch. 38, § 743 (1959); see 391 U.S. at 519.

only five had stated that they would not vote for the death penalty under any circumstances; the remainder were dismissed before it could be ascertained whether they could vote for death in an appropriate case despite their general opposition to capital punishment.¹²⁵

By permitting the automatic removal for cause of jurors who had scruples against capital punishment, Illinois had denied *Witherspoon* his due process right to an impartial jury on the issue of sentence. When the state "swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle,"¹²⁶ it produced a "hanging jury,"¹²⁷ one "uncommonly willing to condemn a man to die."¹²⁸ Under the jury selection practices at issue, Illinois had "stacked the deck"¹²⁹ against the defendant, producing a "tribunal organized to return a verdict of death."¹³⁰ This violated one of the "basic requirements of procedural fairness . . . that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death."¹³¹

The *Witherspoon* Court thus held that a jury culled of all who opposed the death penalty could not be neutral on the question of sentence, as the due process right to an impartial jury requires, but would be biased in favor of returning a sentence of death. Moreover, a defendant suffering *Witherspoon* error need not demonstrate particularized prejudice; the Court found it "self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled."¹³² The Court left open the question of whether such a jury

125. 391 U.S. at 514.

126. 391 U.S. at 520.

127. 391 U.S. at 523.

128. 391 U.S. at 521.

129. 391 U.S. at 523.

130. 391 U.S. at 521.

131. 391 U.S. at 521-22 n.20.

132. 391 U.S. at 518. At another point, the Court noted that by excluding all who opposed capital punishment, the state had "crossed the line of neutrality." 391 U.S. at 520. No empirical support was deemed necessary to justify the conclusion of bias as to sentence. In a number of cases, both prior to *Witherspoon* and more recently, the Court has also employed a presumption that the fact-finder was biased. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (state licensing board with pecuniary interest in outcome may not conduct license revocation proceedings); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (a judge who was the subject of the defendant's contemptuous utterances at trial may not preside over his post-trial criminal contempt proceeding); *Leonard v. United States*, 378 U.S. 544 (1964) (per curiam) (prospective jurors who had heard guilty verdict announced in open court against defendant about to be tried in second trial on similar charges presumed biased); *In re Murchison*, 349 U.S. 133 (1955) (judge who had conducted prior grand jury inquiry may not preside at defendants' trials for criminal contempt stemming from their grand jury appearances); *Tumey v. Ohio*, 273 U.S. 510

could fairly consider the question of a defendant's innocence or guilt.¹³³

When prosecutors use their peremptory challenges in a systematic fashion to exclude from capital juries those not subject to removal for cause under *Witherspoon*, precisely the same result as that condemned in *Witherspoon* ensues.¹³⁴ A jury culled of all capital punishment objection — whether by removal for cause or by peremptory challenge — may be considered just as much a “hanging jury,” as one “organized to return a verdict of death.” As *Witherspoon* seeks to protect the fundamental principle of jury impartiality, it would seem to condemn capital sentencing decisions “made on scales that are . . . deliberately tipped toward death”¹³⁵ no matter how accomplished. There is more than one way to “stack a deck,” and when the prosecutor accomplishes indirectly through use of the peremptory challenge the precise result condemned in *Witherspoon* through use of the challenge for cause, the constitutional conse-

(1927) (judge with pecuniary interest in outcome may not hear case). For lower court applications of implied bias rules, *see, e.g.*, *McCoy v. Goldston*, 652 F.2d 654 (6th Cir. 1981) (bias implied where juror conceals information at voir dire that would have resulted in disqualification for cause); *United States v. Allsup*, 566 F.2d 68 (9th Cir. 1977) (new trial required where two of the jurors in robbery trial had worked for bank that had been robbed); *Haak v. State*, — Ind. —, 417 N.E.2d 321 (1981) (juror whose husband was offered a job by prosecutor's office on day of jury selection impliedly biased). In other contexts the Court has rejected an implied bias approach in favor of a procedure at which the defendant is given the opportunity to prove actual bias. *See, e.g.*, *Smith v. Phillips*, 102 S. Ct 940 (1982) (juror's submission during trial of job application to prosecutor's office does not violate defendant's due process rights absent proof of actual bias); *Remmer v. United States*, 347 U.S. 277 (1954) (attempted bribe of juror); *Dennis v. United States*, 339 U.S. 162 (1950) (jury members in trial for criminal contempt for failure to appear before House of Representatives Committee on Un-American Activities were U.S. Government employees subject to discharge for disloyalty).

133. *Witherspoon v. Illinois*, 391 U.S. 510, 517, 518 (1968). The Court was presented with the preliminary and unpublished results of several studies indicating that death-qualified juries (those from which all prospective jurors generally opposed to the death penalty are removed) are biased in favor of the prosecution on the issue of guilt. 391 U.S. at 517 n.10; *see notes 163 & 164 infra*. The Court rejected this evidence as “too tentative and fragmentary.” 391 U.S. at 517; *but see notes 164-76 infra* and accompanying text.

134. The California Supreme Court, in deciding a related issue, has recognized that systematic use of the peremptory challenge to exclude jurors with conscientious scruples against the death penalty would violate the principle of *Swain*:

[I]n light of the *Witherspoon* definition of a capital jury which is “impartial” on the issue of imposing the death penalty it cannot be assumed that a prosecutor who uses peremptory challenges to remove all jurors who have reservations concerning the death penalty is acting on the basis of “acceptable considerations.” . . . [A] prosecutor who uses peremptory challenges for the purpose of producing [a death qualified] jury is violating his obligation to assure the defendant a fair trial.

People v. Sears, 71 Cal. 2d at 648 n.5, 450 P.2d at 257 n.5, 74 Cal. Rptr. at 881 n.5. The court reasoned that although *Swain* compels the presumption that the state is using its peremptories to obtain an impartial jury, the prosecutor as an “agent of sovereignty” has a duty to ensure a fair penalty determination within the limits of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *See also In re Anderson*, 69 Cal. 2d 613, 619-20, 447 P.2d 117, 122, 73 Cal. Rptr. 21, 26 (1968); *Paramore v. State*, 229 So. 2d 855, 858 (Fla. 1969).

135. 391 U.S. at 521-22 n.20.

quences should be the same. In both cases the resulting jury is not neutral on the question of sentence, but is biased in favor of capital punishment.

The *Witherspoon* principle, as the Court has recently noted in *Adams v. Texas*, constitutes "a limitation of the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out."¹³⁶ The *Witherspoon* principle thus reflects a careful balance between conflicting interests — the state's interest in enforcing its capital punishment scheme and the defendant's interest in an impartial jury on sentence. The state's interest would be satisfied if the prosecution could exclude jurors who would automatically vote against death in any case¹³⁷ or whose views would prevent them from being impartial on the question of guilt. Accordingly *Witherspoon* does not forbid exclusion of these jurors.¹³⁸ But once the state's interest in avoiding nullification of its statutory scheme is accomplished, the state's power to exclude comes to an end. At that point, the defendant's right to an impartial jury prohibits exclusion of scrupled jurors on "any broader basis" than is necessary to satisfy the state interest in avoiding nullification.

The Court's approach in *Adams* suggests that it would not sanction the upsetting of the careful balance struck in *Witherspoon* through means of the peremptory challenge, or indeed through any other means of exclusion. In *Adams*, the state brought about the exclusion of capital punishment objectors on a "broader basis" than approved by *Witherspoon* through means not of removal for cause based on scruples against the death penalty, but of disqualification for unwillingness or inability to swear, in accordance with a state statutory requirement, that the possibility that the defendant will be executed will not affect the juror's deliberations on any issue of fact. That the Court found that this method of exclusion violated *Witherspoon* indicates that it will not tolerate the infringement of the *Witherspoon* principle by other methods of exclusion, including systematic use of the peremptory challenge.

Arguably, the use of the peremptory challenge to achieve the re-

136. 448 U.S. 38, 48 (1980).

137. Professor White has argued, however, that so long as the state has left the death penalty decision to jury discretion, "it is not apparent why a juror's conscientious scruples against capital punishment or even her total unwillingness to vote for it in any case would incapacitate her from participating in the discretionary judgment." White, *supra* note 68, at 355.

138. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968); *Lockett v. Ohio*, 438 U.S. 586, 596 (1978).

sult described in *Witherspoon* can be distinguished from that case and from *Adams* because peremptory practice involves somewhat different state interests. Prohibiting the use of peremptories to achieve the proscribed result necessarily involves review of the motivation behind the challenges, threatening the important policies which underlie them. *Swain*, however, makes clear that the peremptory is not sacrosanct¹³⁹ and may not be used systematically by prosecutors to accomplish an unconstitutional result. Although *Swain* involved racial equality interests, traditionally protected by heightened scrutiny and solicitude from the courts, the defendant's interest in death penalty cases — literally a matter of life and death — should weigh no less against the state interest in the peremptory system.¹⁴⁰ Just as use of the peremptory systematically to exclude blacks would constitute a perversion of the challenge that is not beyond judicial review,¹⁴¹ its use systematically to exclude prospective jurors in death cases because of their views about capital punishment on a “broader basis” than approved by *Witherspoon* would seem no less offensive to the Constitution.

The state's primary interest in the peremptory challenge — the avoidance of juries biased against the state¹⁴² — is similar to the state interest protected in *Witherspoon*. As in *Witherspoon*, this interest is fully protected by limiting exclusion in such a way that jurors may not systematically be removed because of their views on capital punishment on “‘any broader basis’ than inability to follow

139. If anything, the prosecutorial conduct to which this Article objects should be subject to more searching judicial scrutiny than the conduct alleged in *Swain*. The presumption of prosecutorial propriety underlying that decision clearly made very difficult the inference that government officers deliberately and universally removed potential jurors because of the blatantly unconstitutional criterion of race. But presuming that prosecutors will not deliberately subvert constitutional values does not lead to the conclusion that they would not engage in the systematic exclusion of death-scrupled individuals from capital juries; they almost certainly, albeit erroneously, believe the practice to be constitutional. See note 17 *supra*. The unconstitutionality of peremptorily challenging death-scrupled venirepersons involves considerations of due process, trial by jury, and cruel and unusual punishment which are far subtler, if no less compelling, than the naked racism which the Court in *Swain* was so reluctant to infer from the record before it. The judiciary, therefore, would express no disrespect for prosecutorial motives by restricting peremptory challenges as advocated here.

Nor does the second policy underlying the *Swain* result, the need for the ability to challenge venirepersons whom vigorous voir dire examination may offend, as distinct from the presumption of prosecutorial good faith, weigh heavily against the rule this Article proposes. Since restructuring the voir dire by limiting inquiry into venirepersons' general attitudes toward the death penalty would not deprive the prosecution of any peremptories, see notes 336-51 *infra* and accompanying text, the government need not fear that vigorous investigation of potential jurors' attitudes might result in alienating venirepersons who could not later be removed for cause.

140. See notes 67-69 *supra* and accompanying text.

141. 380 U.S. at 223-24.

142. See note 26 *supra*.

the law or abide by their oaths.”¹⁴³ To permit systematic use of the peremptory to remove the very group of jurors that *Witherspoon* held should serve on capital juries if they were to remain impartial would thus produce the very jury *Witherspoon* condemned as biased on sentence. Unless there are significant additional state interests in the peremptory challenge, *Witherspoon* would seem dispositive.

Of course, to some extent, the state interest in the peremptory challenge can be seen as obtaining favorable jurors, not merely as avoiding jurors biased against the state. Whether the state interest in this partisan function of the peremptory should be deemed legitimate has never been decided. The purpose of the peremptory is typically seen as attempting “to obtain a fair and impartial jury to try the case before the court.”¹⁴⁴ The *Swain* Court’s description of the functions of the peremptory does not mention the purely partisan interest in obtaining favorable (as opposed to avoiding biased) jurors.¹⁴⁵ Indeed, some commentators have questioned the legitimacy of the prosecutor’s purely partisan interest in the peremptory.¹⁴⁶ However, even assuming the legitimacy, as an aspect of our adversary system, of the peremptory as a partisan tool to select favorable jurors, this interest would not justify systematic use of the challenge to achieve what would otherwise be an unconstitutional result. Thus, prosecutors might attempt to remove all black jurors peremptorily, on the assumption that black jurors as a class tend to be more pro-defense than white jurors.¹⁴⁷ Any attempt to justify such a use of the peremptory by reference to its partisan objectives, however, would violate the dicta in *Swain*.¹⁴⁸ Systematic use of the peremp-

143. *Adams v. Texas*, 448 U.S. 38, 48 (1980).

144. *Swain v. Alabama*, 380 U.S. 202, 222 (1965).

145. See 380 U.S. at 219-20 (to eliminate extremes of partiality; to assure the party that the jurors will decide on the basis of the evidence and not otherwise; to facilitate the exercise of challenges for cause by removing the fear of incurring a juror’s hostility through examination and challenge for cause). See also *Brown v. New Jersey*, 175 U.S. 172, 175 (1899) (“The manner of selection is one calculated to secure an impartial jury . . . The right to challenge is the right to reject, not to select, a juror.”); 4 W. Blackstone, COMMENTARIES *353 (peremptory challenges “grounded on two reasons”: (1) to allow a defendant to remove jurors conceived to be prejudiced, thus insuring that he has “a good opinion of the jury, the want of which might totally disconcert him”; and (2) to facilitate the exercise of challenges for cause since if such a challenge to a juror is rejected, “perhaps the bare questioning his indifference may sometimes provoke a resentment”).

146. See J. VAN DYKE, *supra* note 25, at 167 (“it is the duty of the prosecutor, as an officer of the state, to see that the accused is tried by a fair, impartial, and representative jury; it is not the role of the prosecutor to attempt to empanel a jury composed of those most likely to convict”); Saltzburg & Powers, *supra* note 25, at 357 n.97 (“the use of peremptories to obtain a partial jury would defeat its purpose”).

147. See *Yale Note*, *supra* note 45, at 1733 n.77.

148. See note 33 *supra* and accompanying text.

tory against members of a particular group, even though serving what might be a legitimate goal of the peremptory, cannot be permitted to produce the effect condemned by an overriding constitutional value — the value of equal protection in the *Swain* context, or of the fair trial guaranteed by due process in the capital trial context. Viewed in this way, the *Swain* dicta finds support in a number of constitutional contexts, where what would otherwise constitute legitimate state interests have not been permitted to violate overriding constitutional values.¹⁴⁹ In short, *Swain*, like *Witherspoon*, represents a careful balance between conflicting interests. It permits the prosecutor to seek partisan ends by partisan means without judicial oversight so long as the prosecutor does not act according to a general formula that produces a result in conflict with the constitutional command against excluding blacks as a class from jury service. When the prosecutor does act according to such a general formula, he “systematically” excludes blacks, and no partisan objective of the prosecution can justify that result. The constitutional value of protecting capital defendants against “hanging juries,” recognized in *Witherspoon*, is entitled to the same predominance over the partisan interest of the prosecutor in exercising peremptory challenges.¹⁵⁰

The state might object to the characterization of its partisan interest in the peremptory as merely an interest in obtaining a favorable jury. Rather, it might contend that given defense peremptories that are nonreviewable¹⁵¹ and clearly exercised for partisan ends — to remove death penalty advocates — the state must be able to use its peremptories to offset those of the defense. Otherwise, a jury will result that is more biased toward the defense on the death penalty question than would be one not subject to the peremptory process. Several considerations render this objection unpersuasive. First, it is almost impossible to predict how much systematic use of the peremptory would offset, but not surpass, the effect of the defense peremptories. For example, if only ten percent of the venire remaining after challenges for cause is opposed to the death pen-

149. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 353-74 (1976) (plurality opinion); *Pickering v. Board of Educ.*, 391 U.S. 563, 568-75 (1968); *Taylor v. Louisiana*, 370 U.S. 154, 155-56 (1962); *Schlochower v. Board of Higher Educ.*, 350 U.S. 551, 558-59 (1956).

150. Striking the balance in favor of the relevant constitutional value is particularly appropriate as the state interest in the peremptory challenge is enshrined in neither the Constitution, *Stilson v. United States*, 250 U.S. 583, 586 (1919), nor the common law. See *Swain v. Alabama*, 380 U.S. 202, 242-43 & n.4 (1965) (Goldberg, J., dissenting); *People v. Payne*, 31 CRIM. L. RPT. (BNA) 2229, 2230 (Ill. App., May 19, 1982); J. VAN DYKE, *supra* note 25, at 147-50, 166-67.

151. See, e.g., *Swain v. Alabama*, 380 U.S. at 219; *Harrison v. United States*, 163 U.S. 140, 142 (1896); *Lewis v. United States*, 146 U.S. 370, 376 (1892).

alty,¹⁵² the defense will have to challenge nine death penalty advocates for each opponent challenged by the prosecution to maintain a constant percentage of death-scrupled jurors. The defense, however, usually enjoys the same, or at most perhaps a slightly larger, number of challenges as the prosecution.¹⁵³

A second argument against permitting the state to attempt to offset the defense's use of the peremptory is that the prosecution has such a substantial initial advantage in being able to exclude one half to two thirds of the death penalty opponents for cause under *Witherspoon* before using its first peremptory challenge.¹⁵⁴ That advantage, which admittedly is necessary to protect the state's interest in enforcing its death penalty laws,¹⁵⁵ makes the jury more death-prone than the general population. It is unlikely that the defense challenges, even if used exclusively against death penalty advocates, are adequate to offset this initial bias.

Finally, the prosecution has a higher duty than the defense of assuring a fair trial.¹⁵⁶ In view of that duty, and the uncertainty in trying to gauge how many challenges (if any) are required to balance the defense peremptories, use of the peremptory systematically to remove jurors solely because of death penalty opposition (not rising to

152. In the study reported in this Article, scrupled venirepersons constituted only 6% of the total venire remaining at this stage. See text following note 98 *supra*. Admittedly, it is an oversimplification to view potential jurors as either scrupled or nonscrupled. There is a continuum of attitudes on the death penalty, and it is conceivable, but not likely, that the net effect of defense and prosecution peremptories is a jury no more inclined to the death penalty than the average of the population, despite the reduction in the percentage of jurors classified as "scrupled."

153. See, e.g., FED. R. CRIM. P. 24(b) (each side entitled to twenty peremptory challenges in capital cases); FLA. STAT. § 913.08(1)(a) and FLA. R. CRIM. P. 3.350(a) (each side entitled to ten peremptory challenges in capital cases); ILL. REV. STAT. ch. 38, § 115-4(e) (20 peremptories). Although historically the prosecutor enjoyed less peremptory challenges than the defense, see *Swain v. Alabama*, 380 U.S. 202, 214-15, 220 (1965), in most jurisdictions today both are entitled to the same number. E.g., FLA. STAT. § 913.08 (1); FLA. R. CRIM. P. 3.350. In a few jurisdictions, the defendant may be entitled to a few more than the prosecutor. E.g., FED. R. CRIM. P. 24(b) (in noncapital felony cases, defendant entitled to 10 peremptories and prosecutor to 6). The number of peremptory challenges may also increase with the severity of the crime. E.g., FED. R. CRIM. P. 24(b); FLA. STAT. § 913.08(1)(a)-(c); FLA. R. CRIM. P. 3.350 (a)-(c). For a detailed compilation of peremptory challenge systems in various states, see J. VAN DYKE, *supra* note 25, at 281-85 (Appendix D).

154. See notes 98 *supra* & 319 *infra*.

155. But see note 137 *supra*.

156. See *People v. Sears*, 71 Cal. 2d at 648 n.5, 450 P.2d at 257 n.5, 74 CAL. RPTR. at 881 n.5 (suggesting that "a prosecutor who uses peremptory challenges for the purpose of producing [a death qualified] jury is violating his obligation to assure the defendant a fair trial."). The court reasoned that although *Swain* compels the presumption that the state is using its peremptories to obtain an impartial jury, the prosecutor as an "agent of a sovereignty" has a duty to ensure a fair penalty determination within the limits of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). See also *United States v. Agurs*, 427 U.S. 97, 110-11 (1976); *Berger v. United States*, 295 U.S. 78, 88 (1935).

the *Witherspoon* standard) should not be justified by any state interest in attempting to offset defense peremptory practices.

Although *Witherspoon* involved the removal of *all* scrupled jurors, whereas systematic use of the peremptory may result only in removing a substantial number, somewhat less than all — in this study 81.3% of scrupled jurors who but for prosecutorial peremptory challenge would have served were removed¹⁵⁷ — this should make no difference. The Supreme Court has held that the *Witherspoon* principle is violated, and any ensuing death sentence must be vacated, where even one juror was excluded on “any broader basis” than authorized in *Witherspoon*.¹⁵⁸ Thus, as a matter of law, a jury from which even one scrupled juror was improperly removed is deemed to be biased on the issue of sentence. Identical bias results whether that one juror is removed by challenge for cause or by peremptory challenge, assuming in the latter case that his or her removal was part of a systematic pattern satisfying the *Swain* standard.

Thus, although the methods of exclusion differ somewhat, in both cases it can be said that the state “cross[es] the line of neutrality”¹⁵⁹ and exceeds “the state’s power to exclude.”¹⁶⁰ The ensuing prejudice is identical. To execute a death sentence imposed by a jury selected in either way “would deprive [the defendant] of his life without due process of law.”¹⁶¹

157. See Table A.3 at p. 93 *infra*. Including those removed by challenge for cause by the prosecutor or the court, 89.8% of scrupled venirepersons who but for prosecutorial challenge would have served as jurors were removed (115 in all — 76 for cause and 39 by peremptory — out of 128). See Tables A.1 and A.3 at pp. 91 & 93 *infra*. If jurors and alternates are considered together, then 76.9% of all venirepersons who but for prosecutorial challenge would have served were removed. See Table 2 at p. 31 *supra*. For this combined group, including those removed by challenge for cause by the prosecutor or the court, 89.11% of scrupled venirepersons who but for prosecutorial challenge would have served as jurors or alternates were removed (131 in all — 91 for cause and 40 by peremptory—out of 147). See Tables 1 & 2 at pp. 30 & 31 *supra*.

158. *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam).

159. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968).

160. *Adams v. Texas*, 448 U.S. 38, 48 (1980).

161. *Witherspoon v. Illinois*, 391 U.S. at 523. This conclusion is buttressed by the eighth amendment’s strong concern for reliability in capital sentencing processes. In its recent eighth amendment jurisprudence, the Supreme Court has focused on the “uniqueness” of the death penalty for the requirement, for example, that a state not limit the mitigating circumstances a capital defendant may ask the sentencer to consider, *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), even through application of an otherwise valid hearsay rule. *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam). In so doing, the Court stressed the need for “a greater degree of reliability when the death sentence is imposed,” *Lockett v. Ohio*, 438 U.S. at 605, and for avoiding the “risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.” 438 U.S. at 604. These concerns, which Professor Gillers has argued should disable the state from excluding any scrupled venirepersons, Gillers, *supra* note 2, at 84-91, should certainly support the view that the state may not through systematic use of the peremptory challenge produce a jury that is biased in favor of death.

2. *The Right to Jury Impartiality on Guilt*

a. *Witherspoon's invitation and the conviction-proneness studies.* The *Witherspoon* Court was unwilling to assume that a jury composed by excluding all death scrupled venirepersons, although biased in favor of death, was also biased in favor of conviction. The incomplete and unpublished versions of the three studies cited on appeal were considered "too tentative and fragmentary" to justify such a conclusion.¹⁶² Nevertheless, the Court regarded the question as an open one and suggested that future studies might result in a different ruling:

A defendant convicted by such a jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then 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.¹⁶³

The time has come to reassess this possibility.

In the intervening years, two of the three studies before the Court in *Witherspoon* were completed and published,¹⁶⁴ and a variety of new empirical studies were performed.¹⁶⁵ Moreover, extensive ex-

162. 391 U.S. at 517. The three studies relied upon were difficult for the Court to evaluate. As they were unpublished, they had never been subjected to the scholarly analysis of works in the public domain. Moreover, since they were submitted for the first time on appeal and in the case of one on certiorari, they had not been subjected to the scrutiny of cross-examination. As a result, the Court noted that it could "only speculate . . . as to the precise meaning of the terms used in those studies, the accuracy of the techniques employed, and the validity of the generalizations made." 391 U.S. at 517 n.11.

163. 391 U.S. at 520 n.18.

164. H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT (1968) (University of Chicago Center for Studies in Criminal Justice); Goldberg, *Toward Expansion of Witherspoon: Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R. - C.L. L. REV. 53 (1970). The third study was never published. W. Wilson, *Belief in Capital Punishment and Jury Performance* (unpub. 1957).

165. See unpublished studies by Ellsworth et al. cited in *Hovey v. Superior Court*, 28 Cal. 3d 1, 27-60, 616 P.2d 1301, 1315-41, 168 Cal. Rptr. 128, 142-68 (1980); Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some California Evidence*, 3 WOODROW WILSON J.L. 11 (1980); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Buckhout, Baker & Spiegel, *Jury Attitudes and the Death Penalty*, 3 SOCIAL ACTION & LAW 80 (1977); Crosson, *An Investigation into Certain Personality Variables among Capital Trial Jurors*, (unpub. doctoral dissertation), reported in PROC. 76TH ANN. MEETING AM. PSYCHOLOGICAL ASSN. (1968); Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512 (1980); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Juror's Attitudes and Authorita-*

pert testimony concerning these studies and related social science issues has been presented in a number of cases in which defendants accepted the *Witherspoon* invitation and attempted to demonstrate that juries are conviction-prone when formed by eliminating capital punishment objectors who, although unable to impose a death sentence, would be able to make an impartial decision as to the defendant's guilt.¹⁶⁶ A substantial body of research on the conviction proneness issue has thus emerged since *Witherspoon*, with the result that it is no longer possible to regard the evidence as "too tentative and fragmentary."¹⁶⁷ The new studies extensively examine differences between groups expressing opposition to the death penalty and those without such opposition in regard to such factors as conviction-proneness or juror voting behavior, attitudes concerning various aspects of the criminal justice system that might be associated with conviction-proneness, demographic characteristics like race and sex, and juror evaluation of evidence.¹⁶⁸

In its recent decision in *Hovey v. Superior Court*,¹⁶⁹ the Supreme Court of California gave extensive consideration to these studies. It quoted expert testimony that the studies designed to test for conviction-proneness had "convincingly established a strong correlation

rianism on Judicial Decisions, 25 J. PERSON & SOC. PSYCH. 123 (1973); Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQ. U. L. REV. 125 (1969-1970); Thayer, *Attitudes and Personality Differences between Conventional Jurors Who Could Return a Death Verdict and Those Who Could Not*, PROC. 78TH ANN. MEETING AM. PSYCHOLOGICAL ASSN. 445 (1970); Comment, *Grigsby v. Mabry: A New Look at Death-Qualified Juries*, 18 AM. CRIM. L. REV. 145 (1980); White *supra* note 68; White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1178 n.12, 1185-86 (1973) (summarizing study by Louis Harris & Assoc.). The studies by Professor Ellsworth and her colleagues summarized in *Hovey* will soon be published in a special edition of LAW & HUMAN BEHAVIOR dedicated to the question of death qualification and the *Hovey* case under the following titles: Cowan, Thompson & Ellsworth, *The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, Ellsworth, Bukety, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity*, Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death-Qualification and Jury Attitudes*, Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*.

166. *E.g.*, *Grigsby v. Mabry*, 483 F. Supp. 1372 (E.D. Ala.), *modified*, 637 F.2d 525 (8th Cir. 1980); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

167. *See Grigsby v. Mabry*, 483 F. Supp. at 1388; *Hovey v. Superior Court*, 28 Cal. 3d, 27-60, 616 P.2d 1301, 1314-41, 168 Cal. Rptr. 128, 142-68; White *supra* note 68, at 370. Several courts, on records that contained none or few of the recent studies, have, however, continued to find insufficient evidence to prove that death-qualified juries are conviction prone. *See, e.g.*, *Spinkellink v. Wainwright*, 578 F.2d 582, 593-95 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *United States ex. rel. Clark v. Fike*, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *United States ex. rel. Townsend v. Twomey*, 452 F.2d 350, 362-63 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972); *Craig v. Wyse*, 373 F. Supp. 1008, 1011 (D. Colo. 1974).

168. *Hovey v. Superior Court*, 28 Cal. 3d at 26, 616 P.2d at 1314, 168 Cal. Rptr. at 141 (1980).

169. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

between the tendencies of jurors to vote for conviction and juror attitudes toward capital punishment.”¹⁷⁰ The several attitude surveys introduced into evidence, considering juror attitudes toward a variety of criminal justice issues such as the privilege against self-incrimination and the role of defense counsel, established a significant relationship between death penalty opposition and pro-prosecution attitudes.¹⁷¹ The studies of demographic characteristics found that exclusion of capital punishment objectors results in the disproportionate exclusion of blacks and women.¹⁷² The research relating to juror evaluation of evidence revealed a significant difference between the two groups in their thresholds of reasonable doubt and in their perceptions of the credibility of defense and prosecution witnesses.¹⁷³ These consistent differences between death penalty opponents excludable under *Witherspoon* and those not so excludable, led the California court to find that the defendant “has shown . . . that if a state used all four ‘*Witherspoon*-qualified’ groups in a capital trial, the jury would not be neutral.”¹⁷⁴

The *Witherspoon*-qualified groups referred to by the *Hovey* court were labeled the “automatic death penalty” group, those who will vote automatically for the death penalty; the “favor death penalty” group, those who although favoring the death penalty, will not vote to impose it in every case; the “indifferent” group, neither favoring nor opposing the death penalty; and the “oppose death penalty” group, those with opposition or doubts about the death penalty but who will not automatically vote against it in every case.¹⁷⁵ The defendant in *Hovey* had contended that a jury composed of these four groups, but excluding a fifth group — the “automatic life imprisonment” group, those who oppose the death penalty and will automatically vote for life imprisonment but whose opposition will not affect their consideration of guilt — violated his right to an impartial jury on guilt.¹⁷⁶ Although finding that a jury composed of the first four groups, but excluding the fifth, “would not be neutral,” the California court rejected the defendant’s challenge on the basis that California is not a state that uses all four “*Witherspoon*-qualified”

170. *Hovey v. Superior Court*, 28 Cal. 3d. at 40, 616 P.2d at 1325, 168 Cal. Rptr. at 152.

171. 28 Cal. 3d at 43-54, 616 P.2d at 1326-37, 163 Cal. Rptr. at 153-64.

172. 28 Cal. 3d at 54-57, 616 P.2d at 1337-39, 168 Cal. Rptr. at 164-66.

173. 28 Cal. 3d at 57-60, 616 P.2d at 1337-39, 168 Cal. Rptr. at 166-68.

174. 28 Cal. 3d at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173.

175. 28 Cal. 3d at 20, 616 P.2d at 1311, 168 Cal. Rptr. at 138.

176. A sixth group, which could be termed the “automatic acquittal” group — those whose opposition to the death penalty will lead them automatically to vote to acquit in every case — was conceded by the defendant in *Hovey* to be properly excludable.

groups.¹⁷⁷ Rather, California law excludes the first group — the “automatic death penalty” group¹⁷⁸ — and, consequently, the court found that the studies, although sufficient to establish that death-qualification in general results in juries that are not neutral on the question of guilt, had “failed to make such a showing as to ‘death-qualified’ juries in California.”¹⁷⁹

b. *Applying the conviction-proneness argument to the combined use of cause and peremptory challenges to exclude scrupled jurors.* The *Hovey* court’s treatment of the prosecution-proneness question raised there, although different from the issue presented by the systematic use of the prosecutorial peremptory, is helpful in analyzing how the latter issue could be raised and how it would be dealt with by the courts. Indeed, it may be advantageous for defendants raising the latter issue — an attack on systematic use of the prosecutorial peremptory to exclude all or a substantial number of the “oppose death penalty” group — to combine this challenge with the one raised in *Hovey* to the use of challenges for cause to exclude the “automatic life imprisonment” group.

When prosecutors systematically use their peremptory challenges to remove the “oppose death penalty” group, and their challenges for cause to remove the “automatic life imprisonment” group, only at most three groups remain — the “automatic death penalty,” the “favor death penalty,” and the “indifferent” groups. As it is assumed that the “automatic death penalty” group is removable for cause by the defendant not only in California, but elsewhere as well,¹⁸⁰ and will be so removed, only the “favor death penalty” and the “indifferent” groups will actually remain to serve on capital juries. Thus, one way to state the question presented by the systematic use of prosecutorial peremptory challenges to exclude the “oppose death penalty” group is whether the remaining jury — composed only of the “favor death penalty” and “indifferent” groups—is conviction-prone and therefore not neutral or impartial on the question of guilt.

Of course, “conviction-proneness” is a comparative notion. To

177. 28 Cal. 3d at 67, 616 P.2d at 1346, 168 Cal. Rptr. at 173.

178. 28 Cal. 3d at 63-64 & n.110, 616 P.2d at 1343 & n.110, 168 Cal. Rptr. at 170 & n.110.

179. 28 Cal. 3d at 68-69, 616 P.2d at 1346, 163 Cal. Rptr. at 173-74.

180. *See Witherspoon v. Illinois*, 391 U.S. 510, 521-22 n.20 (1968), *citing Crawford v. Bounds*, 395 F.2d 297, 303-04 (4th Cir.), *vacated and remanded for further consideration in light of Witherspoon*, 393 U.S. 76 (1968), *reinstated* (unreported), *cert. denied*, 397 U.S. 936 (1970) (alternative holding); *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981) (dictum); *Gillers*, *supra* note 2, at 99 n.452.

what should the jury remaining after this combination of exclusions be compared? *Witherspoon* does not shed much light. Although suggesting the possibility that the exclusion of all scrupled jurors might produce a conviction-prone jury that failed to meet the due process requirement of an impartial jury as to guilt, the Court in *Witherspoon* failed to establish a benchmark against which a jury's propensity to convict should be measured.¹⁸¹ The lower courts and the commentators discussing the *Hovey*-type challenge to exclusion of the "automatic life imprisonment" group treat the relevant comparison as that between "*Witherspoon*-qualified" juries — composed of the "favor death penalty," the "indifferent," and the "oppose death penalty" groups, and the nondeath-qualified jury utilized in noncapital cases.¹⁸² Adapting this methodology to a combined attack on the systematic use of peremptories to remove the "oppose death penalty" group and challenges for cause to remove the "automatic life imprisonment" group would call for a comparison between the jury remaining after this combination of exclusions — a jury composed only of "favor death penalty" and "indifferent" jurors¹⁸³ — and a "neutral" jury, one selected without regard to views concerning the death penalty.¹⁸⁴

Defendants attacking the combined exclusion of the "oppose

181. White, *supra* note 68, at 373-74.

182. *Grigsby v. Mabry*, 637 F.2d 525, 527 (8th Cir. 1980) ("whether death-qualified jurors are more likely to convict than jurors selected without regard for their views on the death penalty"); *Hovey v. Superior Court*, 28 Cal. 3d 1, 18-22, 67-68, 616 P.2d 1301, 1309-12, 1346, 168 Cal. Rptr. 128, 136-39, 173 (1980); White, *supra* note 68, at 375, 381.

183. Two other groups whose removal is concededly proper would be excluded in conducting the comparison: the "automatic acquittal" group whose removal for cause *Witherspoon* authorizes, e.g., *Lockett v. Ohio*, 438 U.S. 586, 596 (1978), and the "automatic death penalty" group, which would presumably be removable for cause by the defendant, *see* cases cited in note 180 *supra*; *Hovey v. Superior Court*, 28 Cal. 3d at 63-64 & n.110, 616 P.2d at 1343 & n.110, 168 Cal. Rptr. at 170 & n.110.

184. The "neutral" jury would consist of the entire spectrum of attitudes on the death penalty — the "favor death penalty" group, the "indifferent" group, the "automatic life imprisonment" group, and the "oppose death penalty" group, *see* note 94 *supra*, with one exception. The only group excluded from the "neutral" jury would be the "automatic acquittal" group, those who could never return a verdict of guilt and who therefore are biased against the state. Some of the members of the "automatic death penalty" group — those who could not be fair and impartial in deciding guilt — would also be excluded. These jurors are biased as they will base their decision on something other than the legally relevant facts. *See, e.g., Dobbert v. Florida*, 431 U.S. 282, 302 (1977), quoting *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975) (impartial juror is one who will "render a verdict based on the evidence presented in court"); *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (defining an "indifferent" juror as one whose "verdict must be based upon the evidence developed at the trial"). The courts considering the *Hovey*-type challenge that treat the "neutral" jury for comparison purposes as a jury selected without regard to death penalty attitudes would also exclude the "oppose death penalty" group and presumably those members of the "automatic death penalty" group who could not be fair and impartial in assessing guilt. *See Hovey v. Superior Court*, 28 Cal. 3d at 17, 22 n.54, 616 P.2d at 1308, 1312 n.54, 168 Cal. Rptr. at 135, 139 n.54.

death penalty" and "automatic life imprisonment" groups, would thus have to show that resulting capital juries — composed only of "favor death penalty" and "indifferent" juries — are more conviction-prone than juries containing these two groups plus the "automatic life imprisonment" and "oppose death penalty" groups¹⁸⁵ and those members of the "automatic death penalty" group who could be fair and impartial in deciding guilt. The existing empirical studies do not establish this proposition, as they do not make the relevant comparison. The studies performed prior to *Witherspoon* compare groups opposed to the death penalty with those not opposed to capital punishment.¹⁸⁶ The more recent studies generally compare the "automatic life imprisonment" group with the four *Witherspoon*-qualified groups — the "automatic death penalty," the "favor death penalty," the "indifferent," and the "oppose death penalty" groups.¹⁸⁷ It may be possible that some of these studies can be reevaluated to realign the comparison groups.¹⁸⁸ If not, and perhaps in any event, new empirical studies will have to be designed that compare the relevant groups as to relative conviction-proneness.

c. *Assessing the state's interest in removing jurors who cannot impose death: the bifurcated trial alternative.* If empirical studies comparing the resulting capital jury with the "neutral" jury reveal that the former is more conviction-prone than the latter, then the question will need to be resolved whether the state's interests underlying the exclusion of "oppose death penalty" and "automatic life imprisonment" jurors can justify the nonneutral result. *Witherspoon* itself

185. In making this showing, a defendant may only have to establish a "substantial doubt" whether resulting juries are neutral with respect to guilt. See *Hovey v. Superior Court*, 28 Cal. 3d 1, 17 n.37, 616 P.2d 1301, 1308 n.37, 168 Cal. Rptr. 128, 135 n.37 (1980); cf. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (applying "substantial doubt" standard in sixth amendment context).

186. See studies cited in note 163 *supra*; *Hovey v. Superior Court*, *supra* note 185, at 27-33, 616 P.2d at 1315-19, 168 Cal. Rptr. at 142-46 (discussing studies). The Bronson Colorado study compares four groups — those who strongly favor capital punishment, those who favor it, those who oppose it, and those who strongly oppose it — and also compares the two favor capital punishment groups with the oppose groups. Bronson, *supra* note 165, at 8-9.

187. See studies cited in note 165 *supra*. *Hovey v. Superior Court*, *supra* note 186, at 33-40, 43-54, 57-60, 616 P.2d at 1319-25, 1327-37, 1339-41, 168 Cal. Rptr. at 142-52, 154-64, 166-68 (discussing studies).

188. The *Hovey* court equated the five-part spectrum of attitudes toward capital punishment used in the *Jurow* study, *supra* note 165, based on *Jurow's* "Capital Punishment Attitude Questionnaire" part B, or CPAQ (B), with the five-part *Hovey* spectrum. *Hovey v. Superior Court*, 28 Cal. 3d at 33-36 n.70, 616 P.2d at 1319-21 & n.70, 168 Cal. Rptr. at 144-48 n.70. However, the two spectrums do not in fact correspond. Other studies, if capable of reorganization and reanalysis, may permit an inference as to the ultimate fact of prosecution-proneness considered here. See *Ballew v. Georgia*, 435 U.S. 223 (1978) (studies considering effects of reducing jury size from 12 or 10 to smaller numbers relied on for finding concerning consequences of reducing jury size from 6 to 5).

recognized that a balancing of the state's interests and those of the defendant would be necessary by its statement that even if a defendant could demonstrate that juries formed by excluding the "automatic life imprisonment" group were "less than neutral with respect to *guilt*," the question would then 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."¹⁸⁹ The Court suggested that it might be possible to accommodate both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.¹⁹⁰ This same approach could be used to assess the validity of the combined exclusion of the "automatic life imprisonment" and the "oppose death penalty" groups.

In effect, the *Witherspoon* Court suggested the applicability of the "least restrictive alternative" doctrine¹⁹¹ to assess the constitutional validity of the means chosen — the use to decide both guilt and punishment of one jury from which "automatic life imprisonment" jurors were excluded — to accomplish the state's significant interest in having the penalty issue determined by a jury capable of imposing capital punishment. As those courts that have considered "prosecution-proneness" arguments have either rejected them on the basis

189. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.18 (1968).

190. 391 U.S. at 520 n.18; see *Grigsby v. Mabry*, 483 F. Supp. 1372, 1384 (E.D. Ark.), modified on other grounds, 637 F.2d 525 (8th Cir. 1980) (dictum).

191. See *Smith v. Balkcom*, 660 F.2d 573, 580 (5th Cir. 1981). In a variety of constitutional contexts, the Supreme Court has ruled that if alternative means exist which would accomplish the government's interest in a manner that intrudes less on the fundamental constitutional right at issue, the government may not choose the more intrusive means — the "less drastic means" or "least restrictive alternative" must be chosen. The doctrine originated in first amendment cases. In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Supreme Court struck down an Arkansas statute that required school teachers to disclose all of the organizations to which they belonged. The Court ruled:

[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

364 U.S. at 488. Similarly, in *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972), in which a durational residence requirement that interfered with the right to vote and the right to travel was held unconstitutional, the Court reiterated:

It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

405 U.S. at 343, quoting *Shelton v. Tucker*, 364 U.S. at 488. The doctrine has also been applied in cases involving the sixth amendment right to jury trial, where broad exclusionary rules that impinge on jury representativeness have been condemned on the ground that more precisely focused exclusions or exemptions would have served the states' asserted justifying interests with less intrusion upon the representative character of the jury. *Duren v. Missouri*, 439 U.S. 357, 367-70 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 533-35 (1975); see notes 296 & 301 *infra*.

that the empirical evidence was too "tentative and fragmentary"¹⁹² or that the studies addressed the wrong issue,¹⁹³ this "least restrictive alternative" question remains unresolved.

Undoubtedly the state has a significant interest in submitting the penalty issue to a jury capable of returning a death sentence. The question, however, is whether this interest requires exclusion of "automatic life imprisonment" jurors and all or a substantial number of "oppose death penalty" jurors, or whether the state's interest can be accomplished by means that do not result in a nonneutral jury on guilt. Addressing the exclusion of "automatic life imprisonment" jurors, *Witherspoon* suggested the possibility that the state's and the defendant's interests could be accommodated by means of a bifurcated trial using two juries — one to determine guilt (from which "automatic life imprisonment" jurors would not be removed) and one to determine punishment (from which these jurors would permissibly be removed).

Obviously, this would impose some costs on the state in excess of those incurred pursuant to the present system in which one jury is used to make both determinations. These potential additional costs, however, would seem fairly modest. First, capital cases constitute a relatively small number of criminal trials. Moreover, the number of these cases in which a penalty determination will be necessary is even smaller. A penalty determination will occur only where a verdict on guilt has been returned that authorizes the possible imposition of capital punishment, and only where the prosecutor decides that a death sentence should be sought. Even in cases in which a penalty determination will occur, the impaneling of a new penalty jury may not always be necessary. In some cases, it may be possible to have alternate jurors replace any "automatic life imprisonment" jurors who served at the guilt determination trial.¹⁹⁴

192. See cases cited in note 167 *supra*.

193. *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. at 170; *Justus v. Commonwealth*, — Va. —, —, 283 S.E.2d 905, 909 (1981); *State v. Peyton*, 29 Wash. App. 701, 630 P.2d 1362, 1367-68 (1981).

194. The trial judge typically has considerable discretion in selecting the number of alternate jurors. *E.g.*, FED. R. CRIM. P. 24(c) (not more than six alternate jurors). Moreover, although FED. R. CRIM. P. 24(c) provides that an alternate juror "who does not replace a regular juror shall be discharged after the jury retires to consider its verdict," this provision has been held not to be violated by the replacement of a regular juror by an alternate after deliberations have commenced. *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981); *United States v. Barone*, 83 F.R.D. 565 (S.D. Fla. 1979); *see also Henderson v. Lane*, 613 F.2d 175, 179 (7th Cir.), *cert. denied*, 446 U.S. 986 (1980) (substitution of alternate juror after regular juror suffered heart attack held not to violate state defendant's right to trial by jury under sixth and fourteenth amendments); *People v. Collins*, 17 Cal. 3d 687, 552 P.2d 742, 131 Cal. Rptr. 782 (1976), *cert. denied*, 429 U.S. 1077 (1977) (substitution of alternate juror after jury deliberations had begun permissible under California constitution); *but see People v. Ryan*, 19 N.Y.2d 100,

Certainly, however, some cases would require a second voir dire and the impaneling of a second jury. This would involve additional state time and expense, and will likely also lengthen the total time of trial as some portion of the evidence previously submitted at the guilt phase of the trial would have to be repeated at the penalty phase.¹⁹⁵ These costs can be minimized, however, through means of the trial courts' supervision of voir dire¹⁹⁶ as well as by a number of devices — stipulations to introduce summaries of prior evidence, the reading of portions of prior testimony to the penalty jury, or the showing of a video-tape of material portions of the guilt trial to the new penalty jury.¹⁹⁷ Moreover, against the added costs of impaneling a second jury, it must be considered that a portion of the death qualifying that presently occurs at voir dire in every capital case will be eliminated.

In any event, these state interests are essentially financial — savings in court time and costs — and precisely these interests were held insufficient justification for a state's attempt to reduce the size of misdemeanor juries to five members.¹⁹⁸ The five-member jury would

224 N.E.2d 710, 278 N.Y.S.2d 199 (1966) (New York constitution prohibits substitution of alternate juror after jury deliberations have begun).

A proposed amendment to the Federal Rule would expressly permit the substitution of alternate jurors for "jurors who become or are found to be unable or disqualified to perform their duties," even after deliberations have begun. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 42-43 (1981) (proposed FED. R. CRIM. P. 24(d)). The bifurcated capital trial may present special difficulties, however, for the substitution of alternate jurors. In a typical trial where juror substitution occurs before any decision has been reached, it may be reasonable to indulge the assumption that the reconstituted jury can consider the matter anew and that the new jurors will play a full role in deliberations. *See* United States v. Phillips, 664 F.2d 971; United States v. Barone, 83 F.R.D 565. *But see* J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 24.05 (2d ed. 1980) ("The inherent coercive effect upon an alternate who joins a jury leaning heavily toward a guilty verdict may result in the alternate reaching a premature guilty verdict."). In the capital case, however, the substitution would occur after verdict, and the jurors who voted to convict may therefore play a dominant role. Of course, in any case where the defendant wished to forgo such an objection, alternate juror substitutions could occur by agreement of the parties. *See* United States v. Evans, 635 F.2d 1124 (4th Cir. 1980).

195. A number of states authorize the impanelling of a new jury at the penalty phase of a bifurcated capital trial, *see, e.g.*, FLA. STAT. ANN. § 921.141 (West 1981); ILL. STAT. ANN. ch. 38, § 9-1 (Smith-Hurd 1979), thus recognizing that these added costs are warranted in appropriate circumstances.

196. *See* Ristaino v. Ross, 424 U.S. 589, 594 (1976).

197. *See* White, *supra* note 68, at 401.

198. Ballew v. Georgia, 435 U.S. 223, 244 (1978). *Accord*, Burch v. Louisiana, 441 U.S. 130, 139 (1979) (state interest in reducing time and expense of criminal justice administration insufficient justification for use of nonunanimous six-person juries); Taylor v. Louisiana, 419 U.S. 522, 535 (1975) ("the administrative convenience of dealing with women as a class is insufficient justification for" their wholesale exclusion). This is consistent with the Court's approach in other contexts rejecting the state interest in saving money as sufficient justification for infringing upon fundamental rights. *E.g.*, United States Trust Co. v. New Jersey, 431 U.S. 1, 29 (1977); Bounds v. Smith, 430 U.S. 817, 825 (1977); Bullock v. Carter, 405 U.S. 134, 147-49

have applied in all misdemeanor trials, an enormous number of cases, and therefore would have resulted in considerable cost savings to the state even if the savings in each individual case were minimal. As capital cases make up a relatively small number of criminal trials, the savings here would be considerably less. Moreover, in view of the Court's inclination to demand more in the way of due process in capital cases than in any other kind of case, it would seem that if the greater cost savings accomplished in the five-member misdemeanor jury context were deemed insufficient justification for the resulting infringement on defendant's jury trial rights, then *a fortiori* the lesser savings would be deemed insufficient in the capital punishment context.

The Fifth Circuit has raised a more fundamental objection to inclusion of "automatic life imprisonment" jurors even in a bifurcated trial system. In its view, a jury that included this group, rather than being neutral, might be biased in favor of the defendant, and therefore deny to the state its right to an impartial jury.¹⁹⁹ This conclusion appears inconsistent with *Witherspoon's* central holding that exclusion of "oppose death penalty" jurors results in an unconstitutionally death-prone jury. As applied to *Witherspoon's* facts, the Fifth Circuit approach would presumably call for affirmance of *Witherspoon's* death sentence on the basis that juries including "oppose death penalty" jurors are more life imprisonment-prone than death-qualified juries, and therefore biased in favor of the defendant. But *Witherspoon* explicitly rejected this contention in favor of a jury that the Court deemed more impartial than one which ex-

(1972); *Mayer v. Chicago*, 404 U.S. 189, 196-97 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969); see Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331, 381 (1981).

199. *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981); *Spinkellink v. Wainwright*, 578 F.2d 582, 594, 594-96 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). Underlying the Fifth Circuit's concerns may be the suspicion that "automatic life imprisonment" jurors may really be "automatic acquittal" jurors, although they swear at voir dire that they are not. However, any such suspicion could not alone justify the exclusion of these jurors consistent with the explicit holding of *Witherspoon* and *Adams* that the factual basis for a venireperson's exclusion on account of death penalty attitudes must be "unmistakably clear." See note 119 *supra* and accompanying text. Moreover, if death penalty opponents constitute a cognizable class for sixth amendment cross-section purposes, see Section IV-B, *infra*, the exclusion of these jurors based on such suspicion would also violate the *Taylor-Duren* prohibition of the use of rough rules of thumb in the jury selection context. See notes 191 *supra* and 296 & 301 *infra*.

Indeed, if the Fifth Circuit's view is correct, prosecutors presumably should be able to interrogate venirepersons in noncapital cases (assuming that their prosecution proneness would apply there as well) concerning their view on the death penalty, and remove for cause those who could never impose it. Nowhere, however, is this allowed. Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512, 514 (1980) (The process of "death qualification" is "unique to capital cases. In no other instance are prospective jurors systematically queried about their attitudes toward a particular legal punishment and then excluded, as a matter of law, depending on how they answer.")

cludes all death penalty objectors. *Witherspoon* thus suggests that if a capital jury resembling the jury²⁰⁰ that sits in the typical noncapital case — universally regarded as fair and impartial — is found to be significantly less conviction-prone than a death-qualified jury, then the latter would be constitutionally suspect as a trier of the defendant's guilt.

The Fifth Circuit has recently suggested an additional concern that might militate against use of a bifurcated trial with one jury to determine guilt and another to fix punishment.²⁰¹ The court suggested that the "less restrictive alternative" remedy proposed — the bifurcated trial — might be unacceptable because it would deprive the capital defendant at the penalty phase of the benefits of any "whimsical doubt" on the issue of guilt that the jurors might carry over into their penalty deliberations.²⁰² Of course, whether a capital defendant would be more disadvantaged by the destruction of the "whimsical doubt" that would accompany the bifurcated trial remedy than he would by a unitary trial system in which "automatic life imprisonment" jurors would be excluded from the determination of guilt is itself an unexplored empirical question.²⁰³ In any event, the Fifth Circuit's approach seems unduly paternalistic. The state's sub-

200. The comparison jury would resemble, but not be identical to, the typical jury in noncapital cases, as it would not include the "automatic acquittal" group. See note 184 *supra* and accompanying text. The Fifth Circuit's concern that adoption of the bifurcated trial system proposed would result in a jury biased in favor of the defendant would certainly be more understandable if "automatic acquittal" jurors would serve on the jury asked to assess guilt. Yet the defendant in *Smith* expressly disclaimed any desire to challenge the exclusion of these jurors. Brief for Petitioner-Appellant, *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. 1981), at 11.

According to the Fifth Circuit, the defendant in *Smith* also suggested the propriety of excluding the "automatic death penalty" group, a suggestion criticized by the court as seeking "the best of both worlds." 660 F.2d at 579 n.14. The court appears, however, to have misconstrued the defendant's contention, which was that "death-qualified juries are guilt-prone by comparison with the norm of all jurors who could fairly and impartially try guilt or innocence — that is, by comparison with the entire pool of prospective jurors from which juries are ordinarily drawn in criminal cases." Petitioner-Appellant John Smith's Suggestion for Rehearing En Banc, *Smith v. Balkcom*, 660 F.2d 573 at 7; see also *id.* at 4, 8. Thus the defendant in *Smith* seems to concede that "automatic death penalty" jurors who can be fair and impartial in assessing guilt should be included in the first stage of a bifurcated trial. In any event, the Fifth Circuit's concerns about the exclusion of "automatic death penalty" jurors from this first stage may be largely theoretical. There are probably few jurors in this category to begin with, see *Adams v. Texas*, 448 U.S. 38, 49 (1980) ("it is undeniable . . . that such jurors will be few indeed as compared with those excluded because of scruples against capital punishment"), and of those, there may be few so strongly in favor of capital punishment that they would automatically impose it, regardless of the facts, who also could be fair and impartial in deciding guilt. Of course, virtually nothing is actually known concerning the size or behavior of the "automatic death penalty" group.

201. *Smith v. Balkcom*, 660 F.2d 573.

202. 660 F.2d at 579-82.

203. The court acknowledged that its "whimsical doubt" concern "is not based upon review of the record in this case," but upon its own intuitions about juries. 660 F.2d at 582.

stantial interest in a penalty jury capable of imposing capital punishment in accordance with the state's statutory scheme can be satisfied either by removal of "automatic life imprisonment" jurors from participation in the determination of both guilt and punishment, or by the bifurcated trial mentioned in *Witherspoon*. As the state's interest in avoiding added costs should not itself justify the existing system, it would seem appropriate to allow a defendant himself to resolve the question as to which alternative would be more consistent with his own interests.²⁰⁴

d. *Assessing the state's interest in removing scrupled jurors who can consider imposing capital punishment.* If the "least restrictive alternative" question is resolved in favor of a defendant's assertion that a bifurcated trial system with one jury to determine guilt and another to determine penalty would accommodate the state's and defendant's respective interests, then the exclusion of "automatic life imprisonment" jurors and a substantial number of "oppose death penalty" jurors should be held to violate the defendant's due process right to an impartial jury on guilt. Whatever additional interest the state may assert in use of the peremptory challenge to remove members of the "oppose death penalty" group would seem fully protected by limiting exclusions in such a way that jurors may not systematically be removed because of their views on capital punishment on "any broader basis" than inability to follow the law or abide by their oaths.²⁰⁵

Moreover, even if the "least restrictive alternative" argument with regard to the removal for cause of the "automatic life imprisonment" group is rejected — or if a defendant does not attack the removal of this group, but seeks to challenge only the removal by peremptories of the "oppose death penalty" group — the due process challenge may still succeed. If empirical studies show that death-qualified juries brought about by a combination of prosecutorial challenges for cause and peremptory challenges of all or virtually all death scrupled jurors were less than neutral with regard to guilt when compared with "neutral" juries, then the lack of justification for the state's systematic use of the peremptory challenge should result in denial of the defendant's right to an impartial jury on guilt in any event. Thus, a potentially potent due process argument may be

204. *See* *Faretta v. California*, 422 U.S. 806 (1975) (even though self-representation may disadvantage a defendant compared to representation by appointed counsel, defendants entitled to choose self-representation).

205. *Adams v. Texas*, 448 U.S. 38, 48 (1980).

raised that the systematic use by prosecutors of peremptory challenges to remove death-scrupled jurors, either alone or in combination with the removal for cause of "automatic life imprisonment" jurors, would require not only the vacating of the defendant's death penalty, but the reversal of his conviction as well. The validity of this argument, however, depends upon empirical studies that have not as yet been performed.

B. *Systematic Exclusion of Scrupled Jurors and the Sixth Amendment*

1. *The Sixth Amendment Fair Cross-Section Requirement*

Witherspoon was not a sixth amendment case.²⁰⁶ Although two weeks before *Witherspoon* was decided, the Court in *Duncan v. Louisiana*,²⁰⁷ held the jury trial guarantee of the sixth amendment applicable to the states, the trial in *Witherspoon* occurred beforehand and *Duncan* was not given retroactive effect.²⁰⁸ The requirements of the sixth amendment, considerably different from the due process right to an impartial jury involved in *Witherspoon*, may thus pose a separate constitutional basis to invalidate the systematic exclusion of death-scrupled jurors.

∕ In *Taylor v. Louisiana*, the Supreme Court recognized that fundamental to the jury trial guarantee of the sixth amendment is the right to a jury selected from a representative "cross section of the community."²⁰⁹ In so doing, the Court subsumed within the sixth amendment the concern for jury representativeness previously articulated as a matter of equal protection or through the Court's supervisory powers over the lower federal courts. Use of equal protection doctrine to limit jury composition practices dates from the 1880 case of *Strauder v. West Virginia*, which invalidated a state statute that excluded all blacks from serving on juries.²¹⁰ The Supreme Court first articulated the representativeness principle in *Smith v. Texas*,²¹¹ another equal protection case involving racial discrimination in state

206. See note 118 *supra* and accompanying text.

207. 391 U.S. 145 (1968).

208. *DeStefano v. Woods*, 392 U.S. 631 (1968).

209. 419 U.S. 522, 530 (1975).

210. 100 U.S. 303 (1880). The Court's opinion expressed a concern with the "constitution of juries," not merely with discrimination based on race:

The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.
100 U.S. at 308.

211. 311 U.S. 128 (1940).

jury selection. The Court deemed it "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." Race discrimination in jury selection is not only unconstitutional, the Court noted, "but is at war with our basic concepts of a democratic society and a representative government."²¹² Two years later, in *Glasser v. United States*, the Court first spoke of the "concept of the jury as a cross-section of the community."²¹³ The first case to apply the cross-section requirement to reverse a jury verdict was *Thiel v. Southern Pacific Co.*, a civil case involving the seventh amendment right to jury trial in which the Court used its supervisory powers to invalidate the exclusion of daily wage earners from lists of prospective jurors:

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.²¹⁴

The cross-section requirement is violated if the jury pool is made up solely from "segments of the populace or if large, distinctive groups are excluded from the pool."²¹⁵

The use of peremptory challenges, of course, does not affect the representatives of the jury pool — the venire from which jurors are selected by a process of elimination occurring through exercise of challenges for cause and peremptory challenges. However, such challenges can affect the representativeness of the juries actually selected. Although the Fifth Circuit has recently suggested that the sixth amendment cross-section requirement may apply only to

212. 311 U.S. at 130.

213. 315 U.S. 60, 86 (1942).

214. 328 U.S. 217, 220 (1946) (citations omitted). For further discussions of the cross-section requirement, see generally J. VAN DYKE, *supra* note 25 at 45-83; Daughtrey, *Cross Sectionalism in Jury-Selection Procedures After Taylor v. Louisiana*, 43 TENN. L. REV. 1 (1975); Kairys, Kadane & Lehoczy, *Jury Representativeness: A Mandate for Multiple Source Lists*, 65 CAL. L. REV. 776, 780-88 (1977).

215. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

venires, and not to actual juries,²¹⁶ this suggestion seems inconsistent with the policies underlying the constitutional requirement. The purpose of the fair cross-section mandate is the selection of representative juries, not merely representative venires.²¹⁷

The concept of the jury as representing a fair cross-section of the community serves not only the interest of the litigants in a fair trial, *i.e.*, the assurance of at least some degree of what Mr. Justice Frankfurter called "diffused impartiality,"²¹⁸ but significant societal goals as well. Community participation in the jury system comports with "our basic concepts of a democratic society and a representative government."²¹⁹ Moreover, it is also "critical to public confidence in the fairness of the criminal justice system."²²⁰ These goals would not be accomplished if the representativeness requirement pertained only to jury pools, and if challenges systematically could be used in such a way that the juries actually selected are "made up of only special segments of the populace or if large, distinctive groups are excluded."²²¹ Moreover, the essential purpose of the jury — to interpose the "common sense judgement of the community as a hedge against the over-zealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge"²²² — is not achieved if the over-zealous prosecutor or over-conditioned judge can eliminate the representative character of the jury through the jury challenge process.

The systematic use of jury challenges should thus be subject to scrutiny under the sixth amendment cross-section requirement.²²³

216. *Smith v. Balkcom*, 660 F.2d 573, 583 n.26 (5th Cir. 1981).

217. *See* *People v. Payne*, 31 CRIM. L. RPTR. (BNA) 2229, 2229 (Ill. App., May 19, 1982) ("The desired goal of interaction of a cross-section of the community does not occur within the venire, but rather, is only effectuated by the petit jury that is selected and sworn to try the issues."); *Commonwealth v. Soares*, 377 Mass. 461, 482, 387 N.E.2d 499, 513, *cert. denied*, 444 U.S. 881 (1979) ("The desired interaction of a cross-section of the community does not occur [at the venire]; it is only effectuated within the jury room itself.")

218. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting), *quoted in* *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975).

219. *Smith v. Texas*, 311 U.S. 128, 130 (1940); *see also* *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("our democratic heritage"); A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 127-28 (New American Library ed. 1956).

220. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

221. 419 U.S. at 530. *See* J. VAN DYKE, *supra* note 25, at 168-69.

222. 419 U.S. at 530. *See* *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

223. *See* *Grigsby v. Mabry*, 483 F. Supp. 1372, 1376-85 (E.D. Ark.), *modified on other grounds*, 637 F.2d 525 (8th Cir. 1980) (exclusion for cause in capital case of "automatic life imprisonment" group scrutinized under cross-section requirement); *People v. Payne*, 31 CRIM. L. RPTR. (BNA) 2229 (Ill. App., May 19, 1982) (peremptory challenge of 6 of 7 blacks on venire scrutinized under sixth amendment cross-section requirement); *People v. Wheeler*, 22 Cal. 3d 258, 274, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 901 (1978) (peremptory challenge of all blacks on venire to produce all-white jury scrutinized under state constitution cross-section

The Supreme Court's decision in *Ballew v. Georgia*,²²⁴ scrutinizing under the cross-section requirement a statutory reduction in jury size to five persons in misdemeanor cases, supports this conclusion. The Court noted that the sixth amendment mandates a jury of sufficient size "to provide a representative cross-section of the community,"²²⁵ and invalidated the five-person jury in part because of its concern that this size "prevents juries from truly representing their communities."²²⁶ No issue was raised concerning the representativeness of the jury pools from which Georgia selected five-person juries, or concerning the arbitrary exclusion of any particular class from five-person juries. Yet the Court noted that the absence of an equal protection problem did not dispose of "the question of representation," which combined with other factors created "a problem of constitutional significance under the Sixth and Fourteenth Amendments."²²⁷ If the cross-section requirement places limits on statutory reductions in jury size because resulting juries may not truly represent the community, then it should also be deemed to place limits on jury challenges which interfere with the representative character of resulting juries.

To subject jury challenges to scrutiny under the sixth amendment, however, is not to say that the absence or substantial underrepresentation of any particular group on a petit jury violates the cross-section requirement. A defendant is not entitled to "a jury of any particular composition,"²²⁸ or to a jury that mirrors the community.²²⁹ The random application of unobjectionable jury selection methods, or the legitimate exercise of challenges for cause or peremptory challenges, will often result in particular juries that do not even approximately mirror the community. Indeed, a jury of twelve

requirement); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) (peremptory challenge of 12 of 13 blacks on venire scrutinized under state constitution cross-section requirement).

224. 435 U.S. 223 (1978).

225. 435 U.S. at 230.

226. 435 U.S. at 239. Mr. Justice White concurred solely on the ground that a jury of fewer than six persons "would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments." 435 U.S. at 245.

227. 435 U.S. at 242.

228. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

229. 419 U.S. at 538; *United States v. D'Alora*, 585 F.2d 16, 22 (1st Cir. 1978); *United States v. Turcotte*, 558 F.2d 893, 895 (8th Cir. 1977); *United States v. Calhoun*, 542 F.2d 1094, 1103 (9th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *Stewart v. Ricketts*, 451 F. Supp. 911, 917 (M.D. Ga. 1978); *People v. Wheeler*, 22 Cal. 3d 258, 274, 583 P.2d 748, 760, 148 Cal. Rptr. 890, 903 (1978); *Commonwealth v. Soares*, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979).

could never reflect all the distinctive groups in the population.²³⁰ A defendant is entitled only to jury selection procedures which do not "systematically exclude distinctive groups in the community."²³¹ If a particular type of challenge for cause, or the systematic use of peremptory challenges against a distinctive group, by its nature results in unrepresentative petit juries, then it should be subject to scrutiny under the sixth amendment cross-section requirement no less than are selection methods that produce unrepresentative jury wheels, pools of names, panels or venires.

As was discussed before, it is not absolutely certain that the jury resulting after peremptory challenges by both the defense and the prosecution is more likely to impose the death penalty than a random sample of the population would be.²³² The sixth amendment claim, however, is not that the attitude of the jury on a particular issue does not accord with that of the population at large, but instead that a "cognizable class," sharing a wide range of attitudes bearing on how it might view evidence, judge credibility or assess reasonable doubt, in addition to how it might recommend penalties, has been systematically excluded.

2. *The Cognizable Class Requirement Applied to Scrupled Jurors*

In *Duren v. Missouri*, the Supreme Court defined the elements of proof necessary to establish a prima facie violation of the cross-section requirement:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.²³³

The requirement of a "distinctive" group, also frequently referred to as a "cognizable class," has been said to include "economic, social, religious, racial, political, and geographical groups of the community."²³⁴

The concept of cognizability, however, is not free of ambiguity, and Supreme Court treatment of the issue has not always been con-

230. *Commonwealth v. Soares*, 377 Mass. at 481-82, 387 N.E.2d at 512.

231. *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

232. See note 152 *supra* and accompanying text.

233. 439 U.S. 357, 364 (1979).

234. *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

sistent. In *Rawlins v. Georgia*, the Court said that the test was whether those excluded would "act otherwise than those who were drawn would act."²³⁵ Justice Frankfurter, in his frequently cited dissenting opinion in *Thiel*, said the test was whether the persons excluded "have a different outlook psychologically and economically," whether they "adopt a different social outlook," and whether they "have a different sense of justice, and a different conception of a juror's responsibility."²³⁶ In *Ballard v. United States*,²³⁷ the Court invoked its supervisory powers to reverse a conviction where women had been systematically excluded from grand and petit juries. The Court was willing to assume that women constituted a cognizable class, without requiring proof that they share attitudes or perspectives different from that of men. It rejected the argument that because women did not tend to act as a class, they should not be considered a cognizable group. The Court stressed that "a community made up exclusively of one [of the sexes] is different from a community composed of both A flavor, a distinct quality is lost if either sex is excluded."²³⁸

In *Hernandez v. Texas*, finding Mexican-Americans to be a cognizable group, the Court noted that "[w]hether such a group exists within a community is a question of fact" that defendant had the "initial burden" of proving.²³⁹ Hernandez had satisfied the burden by demonstrating the "attitude of the community," which subjected Mexican-Americans to different treatment from whites.²⁴⁰ In more recent cases, the Court has spoken of a cognizable class as "any large and identifiable segment of the community,"²⁴¹ and any group that is "sufficiently numerous and distinct."²⁴²

These varying formulations of the cognizability test leave application of the standard somewhat unclear.²⁴³ Race and national ori-

235. 201 U.S. 638, 640 (1906) (upholding the exclusion from grand juries of certain occupational groups).

236. *Thiel v. Southern Pac. Co.*, 328 U.S. at 230. (Frankfurter, J., dissenting). See also *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (Marshall, J.) (stressing the psychological "perspective" of a group).

237. 329 U.S. 187, 193-94 (1946).

238. 329 U.S. at 193-94.

239. 347 U.S. 475, 478-79 (1954).

240. 347 U.S. at 479-80.

241. *Peters v. Kiff*, 407 U.S. 493, 503 (1972) (plurality opinion).

242. *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975). In finding women to be a cognizable class, the Court relied in part on sociological studies reporting that women brought different "perspectives and values" to jury service than men. 419 U.S. at 532 n.12.

243. See, e.g., *Zeigler, Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1057-61 (1978).

gin have easily met the standard,²⁴⁴ as has sex²⁴⁵ and religious belief.²⁴⁶ A variety of groups based on economic, occupational or social class status have met the standard,²⁴⁷ as have groups based on political beliefs and values.²⁴⁸ The cases on the cognizability of age groups, however, are inconsistent.²⁴⁹ Courts have rejected ex-

244. See, e.g., *Castaneda v. Partida*, 430 U.S. 482 (1977) (Mexican-Americans); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans); *Smith v. Texas*, 311 U.S. 128 (1940) (blacks); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799 (S.D. Fla. 1982) (Latinos); *Villafane v. Manson*, 504 F. Supp. 78 (D. Conn. 1980) (Puerto Ricans); *United States ex rel. Leguillou v. Davis*, 115 F. Supp. 392 (D.V.I. 1953), *revd. on other grounds*, 212 F.2d 681 (3d Cir. 1954) (Puerto Ricans); *United States v. Fujimoto*, 105 F. Supp. 727 (D. Hawaii 1952), *cert. denied*, 344 U.S. 852 (1953) (non-Caucasians); *International Longshoremen's Union v. Ackerman*, 82 F. Supp. 65 (D. Hawaii 1949), *revd. on other grounds*, 187 F.2d 860 (9th Cir. 1951) (Filipinos); *Montoya v. Colorado*, 141 Colo. 9, 345 P.2d 1062 (1959) ("Spanish-sounding names"); *State v. Plenty Horse*, 85 S.D. 401, 184 N.W.2d 654 (1971) (American Indians).

245. *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Ballard v. United States*, 329 U.S. 187 (1946).

246. See, e.g., *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965); *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965) (agnostics and atheists); *People v. Kagan*, 101 Misc. 2d 274, 420 N.Y.S.2d 987 (Sup. Ct. 1979) (Jews); *Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925) (Roman-Catholics); *State v. Holmstrom*, 43 Wis. 2d 465, 168 N.W.2d 574 (1969).

247. See, e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946) (daily wage earners); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comms.*, 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981) (incomes below poverty level); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970) (less educated); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (daily wage earners); *United States v. Andrews*, 342 F. Supp. 1261 (D. Mass.), *revd. on procedural grounds*, 462 F.2d 914 (1st Cir. 1972) ("paupers"); *United States v. Cohen*, 275 F. Supp. 724 (D. Md. 1967) (less educated); *International Longshoremen's Union v. Ackerman*, 82 F. Supp. 65 (D. Hawaii 1948), *revd. on other grounds*, 187 F.2d 860 (9th Cir. 1951) (laborers); *Colvin v. Commonwealth*, 570 S.W.2d 181 (Ky. 1978) (teachers); *State v. Jenison*, 405 A.2d 3 (R.I. 1979) (academic community); *but see Rawlins v. Georgia*, 201 U.S. 638 (1906) (upholding exclusion of doctors, ministers, lawyers, engineers, dentists and other occupational groups); *United States v. Potter*, 552 F.2d 901 (9th Cir. 1977) (less educated persons, i.e., high school or less, not a cognizable class); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799 (S.D. Fla. 1982) (blue-collar workers and persons with less than a high school education not cognizable classes); *Quadra v. Superior Court*, 378 F. Supp. 605 (N.D. Cal. 1974) (blue-collar workers not cognizable); *United States v. McDaniels*, 370 F. Supp. 298 (E.D. La. 1973), *affid. sub nom. United States v. Goff*, 509 F.2d 825 (5th Cir. 1975) ("poor" not a cognizable class); *State v. Porro*, 158 N.J. Super. 269, 385 A.2d 1258 (1978), *cert. denied*, 439 U.S. 1047 (1978) (students not a cognizable class); Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U. L. Rev. 198 (1977); Comment, *The Questionable Validity of the Automatic Exemption of Attorneys from Jury Service*, 14 U. RICH. L. REV. 837 (1980).

248. See *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Simmons v. Jones*, 317 F. Supp. 397, 406 (S.D. Ga. 1970), *revd. on other grounds*, 478 F.2d 321 (5th Cir. 1973) (political affiliation); *Kentucky v. Powers*, 139 F. 452 (E.D. Ky.), *revd. on other grounds*, 201 U.S. 1 (1905) (political party); *State v. McCarthy*, 76 N.J.L. 295, 69 A. 1075 (N.J. 1908) (political faction); *State v. Holmstrom*, 43 Wis. 2d 465, 168 N.W.2d 574 (1969).

249. In *Hamling v. United States*, 418 U.S. 87 (1974), the Court assumed, without deciding, that the young are a cognizable group, but then ruled that no showing of systematic exclusion was established. The lower courts are divided on the issue. Compare *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Comms.*, 622 F.2d 807 (5th Cir. 1980), *cert. denied*, 450 U.S. 964 (1981); *United States v. Butera*, 420 F.2d 564 (1st Cir. 1970); *Simmons v. Jones*, 317 F. Supp. 397 (S.D. Ga. 1970), *revd. on other grounds*, 478 F.2d 321 (5th Cir. 1973); and *Commonwealth v. Bastarache*, 409 N.E. 2d 796 (Mass. App. 1980), recognizing that cer-

felons²⁵⁰ and resident aliens²⁵¹ as cognizable classes.

Clearly, to be cognizable, a group must be identifiable in some objective sense. As one lower court put it, such a group must have a "definite composition," *i.e.*, there must be "some factor which defines and limits the group."²⁵² A cognizable group is not one "whose membership shifts from day to day or whose members can be arbitrarily selected."²⁵³ In addition, the group must have "cohesion" — there must be a "common thread which runs through the group, a basic similarity in attitudes or ideas or experience."²⁵⁴ Another court has termed this a "unifying viewpoint," a requirement that members of the group share "a common perspective arising from their life experience in the group, *i.e.*, a perspective gained precisely *because* they are members of that group . . . a common social or psychological outlook on human events."²⁵⁵ In addition, some lower courts have recently added a new and controversial requirement — "that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded."²⁵⁶ Finally, application of the concept of cognizability may differ from time to time and from place to place. "What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place."²⁵⁷

Applying these criteria to death-scrupled jurors leads to the con-

tain age groups are cognizable classes, *with* *United States v. Potter*, 552 F.2d 901 (9th Cir. 1977); *United States v. Allen*, 445 F.2d 849 (5th Cir. 1971); *United States v. Cabrera-Sarmiento*, 533 F. Supp. 799 (S.D. Fla. 1982); *and* *United States v. Guzman*, 337 F. Supp. 140 (S.D.N.Y.), *affd.*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973), holding that certain age groups are not cognizable. *See generally*, Zeigler, *supra* note 243.

250. *Rubio v. Superior Court*, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

251. *United States v. Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975); *Rubio v. Superior Court*, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1979).

252. *United States v. Guzman*, 337 F. Supp. 140, 143 (S.D.N.Y.), *affd.*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 973 (1973).

253. 337 F. Supp. at 143.

254. 337 F. Supp. at 143; *accord*, *United States v. Potter*, 552 F.2d 901, 904 (9th Cir. 1977); *Rubio v. Superior Court*, 24 Cal. 3d 93, 97-98, 593 P.2d 595, 598, 154 Cal. Rptr. 737, 737 (1979).

255. *Rubio v. Superior Court*, 24 Cal. 3d at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737.

256. 24 Cal. 3d at 98, 593 P.2d at 598, 154 Cal. Rptr. at 737; *accord*, *United States v. Potter*, 552 F.2d 901, 904 (9th Cir. 1977); *United States v. Olson*, 473 F.2d 686 (8th Cir. 1973); *Grigsby v. Mabry*, 483 F. Supp. 1372, 1382-85 (E.D. Ark.), *modified on other grounds*, 637 F.2d 525 (8th Cir. 1980); *United States v. Guzman*, 337 F. Supp. 140, 143-44 (S.D.N.Y.), *affd.*, 468 F.2d 1245 (2d Cir.), *cert. denied*, 410 U.S. 937 (1973); *State v. Brewer*, 247 N.W.2d 205 (Iowa 1977). *But see* *Rubio v. Superior Court*, 24 Cal. 3d at 105-17, 593 P.2d at 603-11, 154 Cal. Rptr. at 742-50 (dissenting opinion of Tobriner, J., joined by Bird, C.J., and Newman, J.) (criticizing this additional requirement as being unsupported by prior cases, impossible to apply and inconsistent with the policies underlying the cross-section requirement).

257. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

clusion that the cognizable class requirement has been satisfied. Those with conscientious scruples against imposition of the death penalty form a coherent and sizable group within the community. This was recognized in *Witherspoon*, where the Supreme Court, although not discussing the cross-section requirement, concluded that a jury composed exclusively of persons who believe in the death penalty "cannot speak for the community."²⁵⁸ Although at the time the Court spoke, approximately forty-seven percent of the American public opposed the death penalty,²⁵⁹ more recent polls indicate that only about twenty-five percent currently oppose it.²⁶⁰ Moreover, whether death-scrupled jurors are "sufficiently numerous" to constitute a cognizable class depends upon the extent of their representation in the community in question.²⁶¹ The study reported on in this Article indicates that about thirteen percent of the population of Florida's Fourth Judicial Circuit during the five-year period studied opposed the death penalty.²⁶² The extent of death penalty opposition in the community studied is comparable to the representation of Catholics (thirteen percent),²⁶³ Republicans (fifteen percent),²⁶⁴ and blacks (between seventeen and twenty-one percent)²⁶⁵ in the community during roughly the same period. As these three groups would undoubtedly meet the cognizability standard, the number of death-scrupled individuals in the community should certainly satisfy at least the numerical requirement for cognizability.²⁶⁶

Death-scrupled jurors also seem sufficiently identifiable to meet the cognizability standard. The group has a "definite composi-

258. *Witherspoon v. Illinois*, 391 U.S. 510, 520 (1968).

259. 391 U.S. at 520 n.16.

260. See note 97 *supra*.

261. *Taylor v. Louisiana*, 419 U.S. 522, 531, 537 (1975).

262. See Table 1 at p. 30. A survey conducted in September of 1979 in Metropolitan Jacksonville, Florida, strongly confirms the reliability of the study result that 13.17% of eligible jurors in the community are opposed to the death penalty. Research Department, Florida Publishing Company, *What Residents of Metro Jacksonville Think About Capital Punishment* (unpublished, Sept. 1979) (hereinafter referred to as "*Survey*"). The survey included Duval and four adjacent counties — Clay, Nassau, Baker and St. Johns. Although the latter two are not within the Fourth Judicial Circuit, only 9% of the respondents resided in these two counties. *Id.* at 6. The survey consisted of interviews with 3,621 men and women age 18 or over. *Id.* at 1, 2. Fifteen per cent of those interviewed responded that they were opposed to the death penalty (7% opposed "somewhat," and 8% opposed "strongly"). *Id.* at 4.

263. *Survey*, *supra* note 262, at 5.

264. *Survey*, *supra* note 262, at 6.

265. Note 75 *supra* & accompanying text.

266. See *Grigsby v. Mabry*, 483 F. Supp. 1372 (E.D. Ark.), *modified on other grounds*, 637 F.2d 525 (8th Cir. 1980) (comparing percentage of blacks in population to percentage of death penalty opponents to support conclusion that death penalty opponents are sufficiently numerous to meet the cognizability standard).

tion,"²⁶⁷ defined and limited by its members' expressed views on capital punishment. Moreover, the group seems to be cohesive in the sense that there is a "common thread which runs through the group, a basic similarity in attitudes or ideas or experiences."²⁶⁸ This "common thread" or "unifying viewpoint,"²⁶⁹ is their common perspective on the death penalty. In addition, a number of empirical studies have shown that attitudes about the death penalty are related to other social and legal attitudes and to personality variables.²⁷⁰ These studies clearly establish that an individual's attitude toward capital punishment is not an isolated phenomenon, but rather is closely related to other deeply held attitudes and values.²⁷¹ Zeisel's study found that "attitude towards the death penalty is but a part of a larger syndrome of values that are roughly characterized by being 'liberal' — or being less so."²⁷² Jurors who have scruples against the death penalty are "clearly distinguishable" from those who do not — different in "background," in "basic attitudes," and in "psychological makeup."²⁷³ Jurow concluded, based on his study as well as his review of the literature, that there is "strong evidence indicating that groups in favor and groups opposing capital punishment constitute cohesive and different classes in terms of community attitudes."²⁷⁴ Vidmar and Ellsworth reviewed several studies examining whether persons favoring the death penalty differ from persons opposing it in terms of attitudes, values and personality dispositions, and concluded that those favoring the death penalty are more conservative in their legal, social, and political views.²⁷⁵ Similarly, White's review of the studies revealed "a difference in attitudes on the part of the

267. *United States v. Guzman*, 337 F. Supp. 140, 143 (S.D. N.Y.), *aff'd.*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 973 (1973).

268. See note 254 *supra* & accompanying text.

269. *Rubio v. Superior Court*, 24 Cal. 3d 93, 98, 593 P.2d 595, 598, 154 Cal. Rptr. 734, 737 (1979).

270. See Vidmar & Ellsworth, *Public Opinion and the Death Penalty* 26 STAN. L. REV. 1245, 1258-62 (1974) (discussing studies). The propriety of relying on such studies to demonstrate cognizability was recognized in *Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975), where the Supreme Court cited social science studies, in support of its finding that women met the test, that reported that women bring to jury service "their own perspectives and values that influence both jury deliberation and result."

271. Girsh, *The Witherspoon Question: The Social Science and the Evidence*, NLADA BRIEFCASE 99, 100 (Sept. 1978); White, *supra* note 68, at 370.

272. H. ZEISEL, *supra* note 164, at 24.

273. *Id.* at 25, 51.

274. Jurow, *New Data on the Effect of a "Death-Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567, 598 (1971) (discussing studies by Boehm, Crosson, Bronson, Wilson, Goldberg and Zeisel, cited in notes 164 & 165 *supra*).

275. Vidmar & Ellsworth, *supra* note 270, at 1260 (discussing studies by Zeisel, Crosson, Jurow, and Rokeach & McLellan, cited in notes 164 & 165 *supra*).

two groups," particularly in attitudes bearing upon the adjudicatory process in criminal trials.²⁷⁶ These studies provide consistent and impressive support for the conclusion that death penalty objectors are attitudinally distinct from nonobjectors, and therefore meet the "common thread" requirement.²⁷⁷

The additional requirement applied by some lower courts — that other segments of the community cannot adequately represent the perspective of the excluded group²⁷⁸ — also seems satisfied. A federal district court recently rejected a cross-section challenge to the exclusion for cause of "automatic life imprisonment" venirepersons on the basis of this requirement.²⁷⁹ Because *Witherspoon* had authorized removal of "automatic life imprisonment" jurors but not "oppose death penalty" jurors, the district court concluded that the presence of the latter group on capital juries suffices to assure representation of the perspective of the former.²⁸⁰ A systematic use of prosecution peremptories to exclude the "oppose death penalty" group would totally undercut this conclusion. As this case dramatizes, not only is the most likely surrogate group itself excludable for cause, but in addition, the "oppose death penalty" group is already being relied on to represent it. If both groups are eliminated, there is no logical candidate group to represent the large and distinct segment of the community that opposes the death penalty.

In view of the size and distinctive character of the segment of the community opposed to capital punishment, systematic exclusion of this entire group would seem to raise a prima facie violation of the sixth amendment cross-section requirement.²⁸¹ This conclusion is

276. White, *supra* note 165, at 1192 ("For example, death qualified jurors are more likely to distrust defendants and to trust the prosecution; they are more likely to hold attitudes on the determination of guilt which reflect antipathy toward constitutional protections afforded the accused; and when faced with any kind of a simulated trial situation, they are significantly more likely to render a guilty verdict.") (footnotes omitted).

277. See note 165 *supra*.

278. See cases cited in note 256 *supra*.

279. *Grigsby v. Mabry*, 483 F. Supp. 1372, 1385 (E.D. Ark.), *modified on other grounds*, 637 F.2d 525 (8th Cir. 1980).

280. 483 F. Supp. at 1385. In two Fifth Circuit cases raising the same sixth amendment challenge, the court declined to decide whether "automatic life imprisonment" jurors comprise a cognizable class. *Smith v. Balkcom*, 660 F.2d 573, 583 n.26 (5th Cir. 1981); *Spinkellink v. Wainwright*, 578 F.2d 582, 597 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979) (assuming *arguendo* the "distinctiveness" of this group).

281. See *Witherspoon v. Illinois*, 391 U.S. 510, 524-25, 528 (1968) (separate opinion of Douglas, J.); *J. VAN DYKE*, *supra* note 25, at 48; *cf. Crawford v. Bounds*, 395 F.2d 297, 308 (4th Cir. 1968), *remanded for further consideration in light of Witherspoon*, 393 U.S. 76 (1968), *cert. denied*, 397 U.S. 936 (1970) (exclusion of capital punishment objectors "prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws").

supported by the significant social and historical policies underlying the cross-section requirement — the desire to increase public confidence in the fairness of the process,²⁸² the desire to provide an assurance of at least some degree of “diffused impartiality” among the triers of fact,²⁸³ and a desire to protect the defendant against the over-zealous prosecutor and over-conditioned judge by interposing the “common sense judgement of the community.”²⁸⁴

3. *Substantial Underrepresentation of Scrupled Jurors*

If death-scrupled jurors are considered a cognizable class, two other requirements must be met in order to establish a prima facie violation of the cross-section requirement. It must also be shown that the representation of this group “is not fair and reasonable in relation to the number of such persons in the community,” and that “this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”²⁸⁵ The study reported on in this Article would seem to satisfy both requirements.

Application of the “rule of exclusion”²⁸⁶ to the data demonstrates the substantial underrepresentation of death-scrupled jurors on capital juries. If the extent of death penalty opposition in Florida’s Fourth Judicial Circuit is estimated at 13.2% — the percentage of death penalty opposition revealed among the 1,116 venirepersons examined during the five-year period²⁸⁷ — then one would expect that of the 360 jurors actually selected in the 30 cases analyzed,²⁸⁸ about 47 or 48 of them (13.17%) would have been death penalty opponents. In fact, as Table A-3 in the appendix reveals, only 9 of the 360 jurors selected were death penalty opponents.²⁸⁹ The chances of 9 or fewer death-scrupled jurors being selected is calculated at approximately 19 in ten billion (.000,000,001,9), or the equivalent of 6.1 standard deviations. This presents an astronomical degree of statistical significance, the equivalent of flipping 30 or 31 heads in a row with an unbiased coin. When the results for total venirepersons selected — both as jurors and as alternate jurors — are analyzed, the under-representative result is equally striking. Because 426 jurors and al-

282. See note 219-20 *supra* and accompanying text.

283. See note 218 *supra* and accompanying text.

284. See note 222 *supra* and accompanying text.

285. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

286. See note 86 *supra* and accompanying text.

287. See note 262 *supra* and accompanying text.

288. Table A.3 in the appendix.

289. *Id.*

ternates were selected,²⁹⁰ one would expect that 56 or 57 of them (13.17%) would have been death penalty opponents. In fact, as Table 2 reveals, only 12 of the 426 jurors and alternates selected were death penalty opponents.²⁹¹ The chances of 12 or fewer being selected is calculated at approximately 29 in one hundred billion (.000,000,000,29), or the equivalent of 6.25 standard deviations. This too presents an astronomical degree of statistical significance, the equivalent of flipping approximately 32 or 33 heads in a row with an unbiased coin.

Thus, the study demonstrates that during the five-year period analyzed, death penalty opponents were substantially underrepresented in capital juries in Florida's Fourth Judicial Circuit.²⁹² Moreover, the study establishes that this underrepresentative result is due to the systematic use by prosecutors of their peremptory challenges to eliminate those expressing opposition to the death penalty who were not previously removed for cause.²⁹³

4. *The State's Interest in Removing Scrupled Jurors: The Attempt To Justify Substantial Underrepresentation*

In sixth amendment cross-section cases, "systematic disproportion itself demonstrates an infringement of the defendant's interest in

290. Table 2, at p. 31 *supra*.

291. *Id.*

292. It is also likely — although the study did not analyze the question — that the substantial underrepresentation of death penalty opponents on capital juries in the Fourth Judicial Circuit also produced the underrepresentation of other cognizable classes. A considerable number of studies have consistently shown that attitudes toward capital punishment are related to such demographic characteristics as race and sex. *Hovey v. Superior Court*, 28 Cal. 3d 1, 57-60, 616 P.2d 1301, 1339-41, 168 Cal. Rptr. 128, 164-66 (1980) (discussing studies). See SOURCEBOOK, *supra* note 97, at 210-11 (table showing attitudes on capital punishment by demographic characteristics for 1972-1978 and 1980). Reviewing these studies, White concluded that the exclusion of death penalty opponents results in a clear underrepresentation of "blacks, women, those with less than a high school education, and people with certain religious beliefs, especially Jews and agnostics." White, *supra* note 165, at 1193-94. Moreover, available evidence indicates that these groups are already underrepresented on juries, and that the process of death qualification thus acts to compound existing underrepresentation. Haney, *supra* note 165, 26 CRIME & DELINQUENCY at 517-18.

The survey of capital punishment attitudes in Metropolitan Jacksonville suggests that these conclusions may apply in the Fourth Circuit. The survey revealed that 40% of blacks or "others" were opposed to capital punishment compared to 10% for whites; that 18% of women were opposed compared to 12% for men; and that 16% of Jews and 20% of those listing themselves as having "no religion" were opposed, compared to 15% for Protestants and 12% for Catholics. Survey, *supra* note 262 at 8-9. Several cases have regarded as significant to their findings that various practices violated the jury trial rights of defendants that these practices had the incidental effect of excluding disproportionate numbers of minority groups. *Ballew v. Georgia*, 435 U.S. 223, 236 (1978) (five-person jury reduces minority group representation on juries); *Labat v. Bennet*, 365 F.2d 698, 720 (5th Cir. 1966) (en banc), *cert. denied*, 386 U.S. 991 (1967) (exclusion of daily wage earners results in disproportionate exclusion of blacks).

293. See text accompanying notes 107-13 *supra*.

a jury chosen from a fair community cross-section. There is no need to show particularized bias against the defendant. The only remaining question is whether there is adequate justification for this infringement."²⁹⁴ The state bears the burden of justifying the underrepresentative result "by showing attainment of a fair cross-section to be incompatible with a significant state interest."²⁹⁵ Moreover, the significant state interest asserted must be "manifestly and primarily advanced by those aspects of the jury-selection process . . . that result in the disproportionate exclusion of a distinctive group."²⁹⁶

Undoubtedly, the state has a significant interest in excluding certain sub-groups of those opposed to the death penalty. It is clear, for example, that the state interest in an impartial jury on the question of guilt justifies challenge for cause of the "automatic acquittal" group, those whose opposition to the death penalty render them unable to return a verdict of guilty.²⁹⁷ Moreover, the state's interest in enforcing its capital punishment scheme has traditionally been thought to justify the exclusion for cause of the "automatic life imprisonment" group, those who would automatically vote against death in any case.²⁹⁸ It may be, however, that the wholesale exclusion of this group will no longer be tolerated in view of the "least restrictive alternative" suggestion made in *Witherspoon* — that it may be possible to accommodate the state's interests with the defendant's interest in an impartial jury by a bifurcated trial, with one jury to assess guilt, on which "automatic life imprisonment" jurors could serve, and another jury to fix punishment, from which such jurors would be excluded.²⁹⁹ If this alternative would satisfy the

294. *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979). This contrasts with an equal protection challenge to jury selection practices, in which both a discriminatory effect and discriminatory purpose must be demonstrated. See, e.g., *Castaneda v. Partida*, 430 U.S. 482, 493-95 (1977).

295. 439 U.S. at 368-69; see *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (the sixth amendment right to a proper jury "cannot be overcome on merely rational grounds."). By contrast, in an equal protection case, the state may rebut a prima facie cross-section case by demonstrating that the jury selection practices that produced the underrepresentative result were nondiscriminatory. See, e.g., *Castaneda v. Partida*, 430 U.S. at 494 (state may rebut prima facie case "by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result."), quoting *Alexander v. Louisiana*, 405 U.S. 605, 632 (1972). Compare *Taylor v. Louisiana*, 419 U.S. 522 (jury selection practices resulting in substantial underrepresentation of women violate sixth amendment cross-section requirement), with *Hoyt v. Florida*, 368 U.S. 57 (1961) (jury selection system resulting in substantial underrepresentation of women held not to violate equal protection because there was a sufficiently rational basis for the exemption in question).

296. 439 U.S. at 367-68.

297. *Lockett v. Ohio*, 438 U.S. 586, 596 (1978).

298. *Witherspoon v. Illinois*, 391 U.S. 510, 522 n.21 (1968).

299. 391 U.S. at 520 n.18.

state's interest,³⁰⁰ then that interest is not "manifestly and primarily advanced" by the total exclusion for cause of such jurors.³⁰¹ In any event, even if the total exclusion of "automatic life imprisonment" jurors is justifiable, a substantial number of death-scrupled jurors in the "oppose death penalty" group would remain whose blanket exclusion cannot be justified.³⁰²

It might be argued that the state's interest in preserving the peremptory challenge justifies permitting the exclusion of the "oppose death penalty" group by peremptory challenge, even though their exclusion by other means would clearly be impermissible. However, as was pointed out earlier,³⁰³ *Swain* indicates that the state's interest in the peremptory challenge is not paramount. When systematically used to eliminate death-scrupled jurors who fall short of the *Witherspoon* standard, the peremptory challenge, as I have argued earlier, is inconsistent with the Supreme Court's prohibition of the exclusion of death penalty objectors on a "broader basis" than *Witherspoon* authorizes.³⁰⁴ It therefore cannot be said that the state's significant interest in securing impartial juries is "manifestly and primarily advanced"³⁰⁵ by the overbroad use of the peremptory challenge.

300. See notes 191-204 *supra* and accompanying text.

301. *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979).

302. More than one third of the venirepersons expressing opposition to the death penalty in the study were not removed for cause, and therefore can be assumed to be in the "oppose death penalty" group. Table A.1 in the appendix reveals that out of a total of 128 potential jurors expressing opposition to capital punishment, 48 (37.5%) remained after excuse for cause and defense peremptories. Table 1, on p. 30 *supra*, reveals that out of a total of 147 venirepersons (jurors and alternates) expressing opposition to capital punishment, 52 (35.3%) remained after excuse for cause and defense peremptories. These results are consistent with public opinion polls indicating that only between one half and two thirds of jurors opposed to capital punishment would be subject to challenge for cause under *Witherspoon*. A 1979 survey conducted in Alameda County, California, revealed that of the 37.8% of those surveyed who expressed opposition to the death penalty, 9% indicated that they could not be fair and impartial in determining guilt or innocence and 15.2% indicated that they could not consider imposing the death penalty in any case. Ellsworth & Fitzgerald, *Due Process vs. Crime Control: The Impact of Death Qualification on Jury Attitudes* (prepub. draft 1979), summarized in *Hovey v. Superior Court*, 28 Cal. 3d 1, 50-54, 616 P.2d 1301, 1333-37, 168 Cal. Rptr. 128, 161-64 (1980). Thus, at most 64% of those expressing death penalty opposition in the survey would be excludable under *Witherspoon* (assuming no overlap between the 9% and 15.2% groups). A similar figure was revealed by the 1971 Harris Poll, which indicated that of about 36% of the American population opposed to capital punishment at the time, 23% stated that they would absolutely refuse to vote for the imposition of the death penalty in any circumstances. See White, *supra* note 165, at 1178 n.12. 53% of those expressing opposition to the death penalty in a 1968 Gallup Poll would be excludable under *Witherspoon*, while 47% would not be. See H. ZEISEL, *supra* note 164, at 7-8 (53% stated that they would in no case vote for the death penalty; 38% would vote for the death penalty "reluctantly, if there were no mitigating circumstances," or "if it were a horrible murder and a most terrible murderer;" 9% were not certain.).

303. See notes 24-32 *supra* and accompanying text.

304. See notes 136-38 *supra* and accompanying text.

305. *Duren v. Missouri*, 439 U.S. 357, 367 (1979).

Rather, the state's peremptory challenge practices must be "appropriately tailored"³⁰⁶ to its legitimate interest in securing impartial juries.³⁰⁷ This interest would be fully protected by limiting the use of peremptories in such a way that jurors may not systematically be removed because of their views on capital punishment on "'any broader basis' than inability to follow the law or abide by their oath."³⁰⁸

And since the "cognizable class" requirement involves more than the attitudes of jurors solely with respect to the death penalty, in the absence of such a class, the lack of a fair cross-section invalidates not only the defendant's sentence, but his conviction as well.³⁰⁹

306. 439 U.S. at 370.

307. Certainly, the state's interest in an impartial jury justifies the peremptory challenge of some "oppose death penalty" jurors. However, the substantial disparity between the prosecutors' use of peremptories for nonscrupled jurors — under 30% were challenged — and their use for scrupled jurors — 81% were challenged (see Table A.3 in the Appendix) — suggests that the state is not merely exercising its peremptory challenges to secure impartial panels. The same inference is suggested by the combined data for potential jurors and potential alternates.

Absent justification, these data suggest that the state is systematically abusing the peremptory to secure juries perceived to be more conviction-prone and more death-prone than would otherwise result. To the extent that the prosecutor has a legitimate interest in using his or her peremptory challenges in this way, I have previously argued that this interest would not justify the frustration of an overriding constitutional value. See notes 144-50 *supra* and accompanying text. Surely the cross-section requirement of the sixth amendment, a fundamental constitutional right, *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975), would have predominance over the prosecutor's purely partisan interest in the peremptory challenge. *People v. Payne*, 31 CRIM. L. RPT. (BNA) 2229, 2230 (Ill. App., May 19, 1982); see *People v. Wheeler*, 22 Cal. 3d 258, 266-70, 281 n.28, 583 P.2d 758, 761-62, 768 n.28, 148 Cal. Rptr. 890, 896-97, 906 n.28 (1978) (applying state constitution cross-section requirement). However legitimate this partisan interest may be in the context of our adversary system, it should not count as a "significant state interest" sufficient to outweigh the fundamental interest in jury representativeness reflected in the cross-section requirement. See *Duren v. Missouri*, 439 U.S. 357, 368-69; note 295 *supra* and accompanying text. Table 2, on p. 31 *supra*, reveals that in selecting jurors and alternates, prosecutors used their peremptory challenges to remove 28.2% of nonscrupled potential jurors, and 76.9% of scrupled jurors. The statistical analysis in the text at note 106 *supra* demonstrates that this disparity gives rise to the inference that the prosecutors used their peremptory challenges systematically to eliminate death-scrupled jurors. Moreover, the analysis in the text accompanying notes 106-08 *supra* reveals that this systematic pattern produced a substantial underrepresentation of death-scrupled jurors on the panels selected.

308. *Adams v. Texas*, 448 U.S. 38, 48 (1980).

309. Reversal of any conviction returned by an unrepresentative jury is the traditional remedy for violation of the sixth amendment cross-section right. *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975). Indeed, as the very integrity of the fact-finding process is cast in doubt by an unrepresentative jury, the Supreme Court has applied a rule of automatic reversal for sixth amendment violations rather than examining for harmless error. See *Taylor v. Louisiana*, 419 U.S. at 538-39 (Rehnquist, J., dissenting) (criticizing the Court's reversal of a conviction "without a suggestion, much less a showing, that the appellant has been unfairly treated or prejudiced in any way by the manner in which his jury was selected."). Nor would reversal of a conviction be inconsistent with the Supreme Court's rejection of this remedy for *Witherspoon* error, see *Witherspoon v. Illinois*, 391 U.S. at 516-18, as *Witherspoon* was based on due process, rather than sixth amendment grounds. See notes 118, 206-08 *supra* and accompanying text.

C. *Systematic Exclusion of Scrupled Jurors and the Eighth Amendment*

Supreme Court jurisprudence concerning the question of when the eighth amendment's prohibition of cruel and unusual punishment forbids a sentence of death is neither certain nor consistent. Few issues of constitutional law have generated a body of decisions so characterized by plurality opinions,³¹⁰ the precarious force of applicable precedents,³¹¹ and profound tensions in underlying doctrine.³¹² But some established principles do emerge from the decided cases.

First, the process of deciding whom to execute may render a death sentence "cruel and unusual," even if capital punishment does not, by its nature, inherently deserve that description.³¹³ Second, the

310. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) set the tone for contemporary eighth amendment jurisprudence; a majority of five justices agreed upon a stark half-page per curiam decision, which was followed by five concurring and four dissenting opinions occupying two hundred and thirty additional pages. Succeeding plurality opinions include *Enmund v. Florida*, 102 S. Ct. 3368 (1982) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 599-600 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *Proffitt v. Florida*, 428 U.S. 242, 247 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 334 n.9 (1976) (plurality opinion).

As is generally the case in a field marked by plurality opinions, the lower courts are left confused, producing instability and uncertainty in the law and engendering wasteful and repetitious litigation. See Davis & Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59; Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 759 (1980). These problems are heightened in the capital punishment context given the high stakes and the resulting pressures on defense attorneys to raise all conceivable issues in an effort to save their clients' lives.

311. Compare *McGautha v. California*, 402 U.S. 183 (1971) (jury sentencing in capital cases without legal standards to guide jury discretion does not violate due process), with *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (capital punishment without legal standards to guide the discretion of the sentencing authority constitutes unconstitutional cruel and unusual punishment). See, e.g., 408 U.S. at 449 ("Having so recently reaffirmed our historic dedication to entrusting the sentencing function to the 'jury's untrammelled discretion,' it is difficult to see how the Court can now hold the entire process constitutionally defective under the Eighth Amendment") (Powell, J., dissenting) (citing *McGautha v. California*, 402 U.S. at 207).

312. Consider, for example, the essential paradox of *Furman*: "The freakish and arbitrary nature of the death penalty described in the separate concurring opinions of Justices Stewart and White in *Furman* arose not from the perception that so many capital sentences were being imposed but from the perception that so few were being imposed." *Woodson v. North Carolina*, 428 U.S. 280, 315 (1976) (Rehnquist, J., dissenting) (emphasis in original). One might reject Justice Rehnquist's perspective, but considerable tension inheres in accepting that *Furman* has come to mean that the process of deciding which convicted murderers to execute can render one death sentence more "cruel and unusual" than another, but that that process, however discretionary, will not give rise to a procedural due process claim under *McGautha*.

313. See 408 U.S. at 306-10 (Stewart, J., concurring); 408 U.S. at 310-14 (White, J., concurring). These pivotal opinions, which have become *Furman's* accepted meaning, agree that the death penalty is not inherently "cruel and unusual," but that the procedures by which the government decided to impose it in the cases at bar permitted "this unique penalty to be so wantonly and freakishly imposed." 408 U.S. at 310 (Stewart, J., concurring). See *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982); *Estelle v. Smith*, 451 U.S. 454 (1981); *Adams v. Texas*, 448

constitutionality of the sentencing process may depend upon its conformity with the values of society. Whether the eighth amendment requires jury participation in the decision to impose the death penalty has never been determined by the Supreme Court.³¹⁴ But the Court has frequently emphasized the importance of jury sentencing as an indication of community values in assessing the constitutionality of capital punishment.³¹⁵ The data presented in this study indicate that prosecutorial peremptory challenge practices result in juries that do not reflect the conscience of the community; rather, they reflect community sentiment purged of its reluctance to impose a death sentence. The jury selection process that produces such a result runs a serious risk of imposing death sentences that do not comport with society's aggregated understanding of justice. When this risk inheres in the process of deciding which offenders deserve to die, capital punishment violates the eighth amendment.

The eighth amendment values that infuse *Witherspoon* strongly support this conclusion. The Court noted that the jury from which all death penalty opponents have been excluded cannot perform the task demanded of it by states leaving the life or death decision to jury discretion. For where state law leaves capital punishment to the discretion of the jury,³¹⁶ "a jury that must choose between life imprisonment and capital punishment can do little more — and must do nothing less — than express the conscience of the community on

U.S. 38 (1980); *Beck v. Alabama*, 447 U.S. 625 (1980); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam).

314. The Court's statement in *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (plurality opinion), that the Court "has never suggested that jury sentencing is constitutionally required" is dictum. See *Gillers*, *supra* note 2, at 6 n.22. Because the death sentence in *Lockett v. Ohio*, 438 U.S. 586 (1968), was reversed on other grounds, the Court found it unnecessary to address the defendant's assertion of a constitutional right to a jury determination of penalty in capital cases. 438 U.S. at 609 n.16. Various members of the Court, however, have expressed the view that the Constitution does not require a jury in capital cases. See *Westbrook v. Balkcom*, 101 S. Ct. 541, 542 (1980) (White, J., dissenting from denial of certiorari); *Lockett v. Ohio*, 438 U.S. at 633 (Rehnquist, J., dissenting). For an extensive argument in support of such a constitutional right, see *Gillers*, *supra* note 2, at 39-74.

315. See, e.g., *Enmund v. Florida*, 102 S. Ct. 3368, 3375-76 (1982); 102 S. Ct. at 3386 (O'Connor, J., dissenting, joined by Burger, C.J., Powell, and Rehnquist, JJ.); *Coker v. Georgia*, 443 U.S. 584, 592, 596 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, at 181 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion); *Furman v. Georgia*, 498 U.S. 238, 299-300 (1972) (Brennan, J., concurring); 498 U.S. at 386 n.11 (Burger, C.J., dissenting); 498 U.S. at 439-40 (Powell, J., dissenting, joined by Burger, C.J., Blackmun, and Rehnquist, JJ.).

316. Where the jury makes a recommendation on a penalty, with the judge exercising the final discretion, the same concerns arise. Where the judge has complete discretion over sentence, and the jury plays no role, this argument fails. Whether statutes giving the judge complete discretion are prohibited by the eighth amendment is an open question. See notes 14, 314 *supra*.

the ultimate question of life or death."³¹⁷ A full measure of community participation in this vital decision is thus crucial.

The eighth amendment's proscription of cruel and unusual punishment is an evolving constitutional norm which changes over time to reflect society's changing moral judgments concerning the limits of appropriate punishment.³¹⁸ A capital jury from which all opponents of the death penalty are excluded fails to reflect the shared values of the community. Sanctioning their systematic removal would freeze the procedure for imposing death sentences in a structure that would prevent the progressive evolution of constitutional norms over time. Professor Tribe has sounded this theme in his analysis of *Witherspoon* as mandating a "structure through which Eighth Amendment principles would be linked to community sentiments."³¹⁹ In this way, a fully representative jury system, containing the full spectrum of community views on the death penalty question, would serve, through its conduct in imposing and rejecting death sentences, as a reflection of evolving community values over time.³²⁰

Indeed, the Supreme Court has repeatedly regarded jury determinations in capital cases as "a significant and reliable objective index of contemporary values,"³²¹ using the actions of juries as a basis both to uphold death penalty statutes guiding jury discretion on the life or death question,³²² and to invalidate mandatory death statutes as cruel and unusual.³²³ The *Witherspoon* Court recognized the crucial importance of juries that are representative of the community on the death penalty question by its statement that "one of the most

317. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

318. As early as 1910, the Court stated that the eighth amendment is "progressive" and "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Since the language of the prohibition is not precise and its scope is not static, "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion); *accord*, *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

319. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 294-96 (1975).

320. *Id.* at 296.

321. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976) (plurality opinion); *see Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 439-41 (1972) (Powell, J., dissenting).

322. *Gregg v. Georgia*, 428 U.S. at 182 (actions of juries in imposing 460 death sentences in less than four years after *Furman* indicated continued acceptance of capital punishment).

323. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (reluctance of American juries to convict a significant portion of those charged under mandatory death penalty statutes indicated a repudiation of automatic death sentences). *See also Enmund v. Florida*, 102 S. Ct. 3368, 3375-76 (1982); *Coker v. Georgia*, 433 U.S. 584, 592, 596-97 (1977); notes 13 & 315 *supra* and accompanying text.

important functions any jury can perform" in deciding between life and death "is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"³²⁴ A jury can perform this function only if it truly represents community attitudes on capital punishment.³²⁵

Witherspoon's approval of excluding for cause those who could not, under any circumstances, impose the death penalty does not undercut this conclusion.³²⁶ Legislatures as well as jurors express a society's collective sense of political morality;³²⁷ the state can justifiably object to representing on a jury individual viewpoints so inconsistent with majority sentiments as to preclude the good faith application of the law. But the exclusion of those who will never approve a death sentence makes the representation of those reluctant to do so imperative for the accurate reflection of community values. The systematic elimination of death-scrupled venirepersons biases jury composition, resulting in a distorted exaggeration of the community's willingness to impose the death penalty. Since it is unknowable whether a more representative jury selection process would have resulted in a different weighing of aggravating and mitigating factors in a particular case, the death sentences of those condemned by the existing system should be overturned.

To summarize this Part, the prosecution's use of the peremptory challenge to remove death-scrupled jurors is a violation of the defendant's due process rights, by analogy to *Witherspoon*, his sixth amendment fair cross-section right, and his eighth amendment right against cruel and unusual punishment. Where a pattern of systematic abuse sufficient to satisfy the *Swain* standard exists, the defendant's sentence must therefore be set aside. Where the pattern also undermines the representative character of the capital jury in viola-

324. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This language was subsequently quoted with approval in *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976), and in *Gregg v. Georgia*, 428 U.S. 153, 181 (1976). See also *Williams v. Florida*, 399 U.S. 78, 103 (1970) (where the Court, in dicta, noted that no state provides for fewer than twelve jurors in capital cases, and interpreted this fact as reflecting an "implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty").

325. See note 292 *supra*.

326. According to public opinion polls, only between one half and one third of jurors opposed to capital punishment would be subject to challenge for cause under *Witherspoon*. See note 302 *supra*.

327. See, e.g., *Gregg v. Georgia*, 428 U.S. at 179-81 (plurality opinion); *Woodson v. North Carolina*, 428 U.S. at 294-95 (plurality opinion); *Furman v. Georgia*, 408 U.S. at 436-38 (Powell, J., dissenting).

tion of the cross-section requirement, his conviction must also be reversed. Moreover, reversal would also be required as a matter of due process, even apart from considerations of representativeness where it can be demonstrated that the systematic removal of scrupled jurors produces a jury that is conviction-prone and hence not impartial in assessing guilt.

V. PREVENTING ABUSE OF THE PEREMPTORY CHALLENGE: RESTRUCTURING VOIR DIRE IN CAPITAL CASES

The preceding results clearly demonstrate that prosecutors in one Florida district systematically (and effectively) exercise their peremptory challenges to exclude death-scrupled jurors from capital juries. These results have devastating consequences for the adjudication of capital cases. As this Article has demonstrated, the systematic exclusion of death-scrupled jurors deprives capital defendants of their due process right to an impartial jury on sentence. A substantial argument can also be made that this pattern in the use of peremptory challenges, particularly in combination with the removal for cause of death penalty opponents able to assess guilt but not to impose death, produces capital juries that are significantly more prone to convict than would be neutral juries, thereby depriving the capital defendant of his due process right to an impartial jury on guilt.³²⁸

In addition, the practice distorts the representative character of capital juries by eliminating virtually all members of the community who oppose capital punishment. Death-scrupled jurors are sufficiently numerous and distinct that they may not be substantially barred from participation in the capital trial process consistent with the sixth amendment requirement that juries represent a fair cross-section of the community. Moreover, the substantial underrepresentation of capital punishment objectors on juries that try death cases prevents such juries from serving as a link to contemporary community values regarding the limits of appropriate punishment. Capital punishment is constitutional only on the assumption that its continued imposition does not violate the enlightened conscience of the community. For the jury to serve as the conscience of the community, it must decide cases the way the community would, and to do this, it must be fairly representative of the community. Prosecutorial peremptory challenge practices that frustrate the ability of capital juries to "express the conscience of the community on

328. See notes 162-205 *supra* and accompanying text.

the ultimate question of life or death,"³²⁹ are thus fundamentally inconsistent with eighth amendment values.

The result of these violations is that defendants tried before the juries in this study must be retried, at least as to sentence, unless the state can show that their particular juries did not involve the removal of any scrupled jurors by prosecutorial peremptory,³³⁰ or that even if such removal was involved, that peremptories were justified on some basis other than opposition to the death penalty.

It would seem unlikely that the pattern revealed is unique to the district studied. Although more studies of this type need to be done before generalizations concerning prosecutorial behavior can safely be made, many knowledgeable observers of the criminal process suspect that substantial numbers of prosecutors use their peremptory challenges in precisely this way. And while differences may exist among geographic regions, the determinants of prosecutorial jury selection tactics following a decision to seek a death sentence do not depend on local conditions. When the only empirical evidence yet available strongly suggests unconstitutional prosecutorial behavior, the risks of uncertainty weigh heavily against inaction. If the available evidence does not permit universal generalizations, it does suggest the widespread use of the prosecutorial peremptory to exclude death-scrupled individuals from capital juries. The government should bear the burden of proving an exception.³³¹

329. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

330. In such cases the defendant would lack standing to raise a constitutional claim.

331. The question of which party — the defendant or the state — should bear the burden of demonstration concerning possible abuse of the prosecutor's peremptory challenges is related to the general procedural problem of allocating burdens of pleading and persuasion. Professor Cleary, in an influential essay, has suggested that implicit in the case law dealing with problems of allocation are three somewhat related factors: fairness, probability, and policy. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 11 (1959). Consideration of these three factors in the peremptory challenge context leads to a persuasive case for allocating to the state the burden of demonstration concerning prosecutorial use of the peremptory, perhaps after the defendant has carried a preliminary burden of going forward to demonstrate that peremptories were used in his case to eliminate all or virtually all scrupled venirepersons.

By fairness, Professor Cleary means that, other things being equal, where evidence relating to a particular issue lies more within the control of one party, that element should in fairness be allocated to him. *Id.* at 12. Clearly, the state has greater access to evidence concerning how its prosecutors used their challenges than does the defendant, particularly as *Swain* makes the critical issue prosecutorial conduct over a significant number of cases, rather than just in the one case in which the defendant was involved.

The factor of probability, according to Professor Cleary, involves a general, nonstatistical estimate of the probabilities of the situation, with the burden allocated to the party who will be benefited by a departure from the supposed norm. *Id.* at 12-13. The general view of knowledgeable observers of the criminal processes, acknowledged by some prosecutors, is that prosecutors routinely use their peremptories in capital cases to eliminate scrupled jurors. *See* note 17 *supra*. The only empirical evidence available — this study — strongly supports the existence of a systematic pattern in the use of peremptories in this way. As a result, the factor of

Given *Swain*, which continues to be the law in the federal courts and in all but a handful of the states, studies of the kind undertaken here must be done for the defendant to raise these constitutional issues. But studies of this kind are considerably beyond the resources of the typical capital defendant. As a result, the prospect of such legal challenges may not deter the continuation of prosecutorial abuses in the use of the peremptory. Judicially or legislatively designed prophylactic measures are thus necessary.

One solution to the problem is to allow capital defendants to establish a prima facie case of systematic exclusion of death-scrupled jurors based on the prosecutor's conduct during the voir dire in the defendant's case alone. This is the approach adopted by the California Supreme Court in *People v. Wheeler*³³² for showing systematic exclusion of members of a cognizable class. Although extending to prosecutors the presumption that they are acting on the basis of legitimate considerations whenever a peremptory challenge is exercised, the court held that this presumption may be rebutted by evidence adduced in a single voir dire. Under this approach, a prima facie case of abuse of the peremptory challenge can be established by a showing that the prosecutor is disproportionately excluding members of a group from the jury, that the group is cognizable for sixth

probability argues in favor of the state bearing the burden of demonstrating what would appear to be a departure from the norm. This conclusion might seem inconsistent with *Swain's* presumption that prosecutors use their peremptories for proper, trial-related reasons. *Swain* may, however, be distinguishable based on the factor of probability; it may be the norm in capital cases for prosecutors to use their peremptories systematically to remove death penalty opponents, but not the norm in criminal cases generally for prosecutors to use their peremptories systematically to remove blacks. Indeed, the failure of the many attempts by defendants to carry the burden imposed by *Swain* for demonstrating abuse of the peremptory on racial grounds, see cases discussed in notes 49-51 & 57-59 *supra* and accompanying text, suggests that such abuse in the racial context may not be the norm. See also note 139 *supra*.

The final factor noted by Professor Cleary — policy — is more difficult to assess in this context as there are conflicting policy considerations at stake. The need to protect the utility of the peremptory, relied on by the *Swain* Court as the justification for its restrictive rule, see text at note 29 *supra*, clearly argues in favor of placing the burden of demonstration on the defendant. On the other hand, in view of the extreme social disutility of imposing the death penalty erroneously or based on unfair procedures, see notes 67-69 *supra* and accompanying text, note 161 *supra*, the scales of policy may well tip in favor of allocating the burden to the state. *Swain's* general presumption that peremptories are exercised based on trial-related factors may thus be relaxed in death penalty cases, where more in the way of due process should be required than in ordinary cases.

Considerations of fairness, probability and policy thus point decisively to the future allocation of the burden to the state to demonstrate that prosecutorial peremptories are based on acceptable trial-related considerations rather than merely on attitudes toward the death penalty, once a capital defendant has gone forward to demonstrate a prima facie case of abuse based on his case alone. Whatever the merits of the *Wheeler* approach generally, see notes 44-45 *supra* and accompanying text, it appears reasonable in the capital trial context, particularly in view of the results of this study.

332. 22 Cal. 3d 258, 583 P.2d 758, 148 Cal. Rptr. 890 (1978); see notes 40-43 *supra* and accompanying text.

amendment cross-section purposes, and that it is likely that the exclusion is based on group membership.³³³ The trial judge can be asked to find that exclusion is based on group membership if their group affiliation appears to be the only characteristic shared by the jurors excluded. Applying this approach in the death penalty context, if the trial judge "from all the circumstances in the case" concludes that there was a "strong likelihood" that a disproportionate number of venirepersons were excluded because of their opposition to capital punishment, the burden will shift to the state to show that the challenges were based on trial-related factors, rather than on death penalty attitudes.³³⁴ Jurisdictions disinclined to adopt the *Wheeler* approach for all criminal cases may consider it in the limited context of capital trials. The substantially higher degree of due process required to impose the death penalty justifies adopting more restrictive procedures in selecting a capital jury than are applied in selecting juries in ordinary cases. The approach in *Wheeler*, however, may intrude further into the state's legitimate interest in the peremptory challenge³³⁵ than many jurisdictions will be willing to accept.

An alternative solution would be to restrict the prosecutor's ability to question prospective jurors concerning their attitudes toward the death penalty. A prosecutor's ability to develop grounds for a challenge for cause should not unreasonably be restricted. But the use of voir dire to develop grounds for the improper exercise of peremptory challenges is not as worthy of protection.³³⁶ Thus, inquiry into prospective jurors' attitudes toward the death penalty could be strictly limited to determining whether they require disqualification under the standards set forth in *Witherspoon*. Rather than being permitted to ask whether a venireperson has conscientious or religious scruples against the death penalty, prosecutors could be restricted to asking whether venirepersons "would *automatically* vote against the

333. 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905.

334. See 22 Cal. 3d at 280, 583 P.2d at 764, 148 Cal. Rptr. at 905. Under the *Wheeler* approach, the prosecutor would similarly be able to challenge defense exercises of peremptory challenges based on group biases.

335. See notes 26-29 *supra* and accompanying text.

336. See *Schlinsky v. United States*, 379 F.2d 376, 381 (1st Cir.), *cert. denied*, 389 U.S. 920 (1967); *People v. Crowe*, 8 Cal. 3d 815, 819, 506 P.2d 193, 195, 106 Cal. Rptr. 369, 371 (1973). This has, however, been its tradition. See *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965) ("The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories. . . ."); *Babcock*, *supra* note 24, at 551. I do not question the propriety generally of allowing broad voir dire to explore attitudes and characteristics relevant to the informed use of peremptory challenges. The prophylactic rule suggested should apply only in the limited situation where there is concern that the information gathered at voir dire is being used in exercising peremptory challenges in an unconstitutional manner.

imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them," or would be unable to make "an impartial decision as to the defendant's *guilt*."³³⁷ If the venireperson answers in the negative, no further questions concerning attitudes on the death penalty should be permitted. The venireperson's general attitude toward the death penalty is, under *Witherspoon*, irrelevant to the determination of whether he or she is qualified for jury service.³³⁸

The trial judge can limit juror confusion concerning these inquiries by prefacing such questions with a brief explanation of the qualifications necessary to serve as a capital juror. The trial judge could explain, for example, that a prospective juror who adamantly opposes capital punishment may still be able to serve as an impartial juror if he can set aside his opposition and follow his oath as a juror to uphold the law; only if the juror's attitude toward capital punishment makes it impossible for him to follow the law must he be excused.³³⁹ The prospective jurors also could be cautioned not to volunteer their opinions about capital punishment. Only if that attitude interferes with their ability to serve as jurors is it necessary for them to speak out. Finally, it would be desirable for the trial judge to explain that jury service by persons opposed to capital punishment, provided they can follow their oath as jurors, is necessary to effectuate the constitutional requirement of a representative jury, which in death cases must reflect the values of the community on the discretionary life or death question.

After this general explanation of the basic qualifications for capital jury service, the prosecutor could be permitted simply to ask whether, in light of the judge's explanation, the prospective juror feels that he would automatically vote against the death penalty regardless of the evidence or would be unable to render an impartial decision as to guilt. Only if a prospective juror volunteers some concern with his abilities in this regard should further questioning be allowed.

Of course, voir dire questioning would be even further limited in jurisdictions using the bifurcated trial system suggested in *Wither-*

337. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 n.21 (1968) (emphasis in original). *Accord*, *Adams v. Texas*, 448 U.S. 38, 44 (1980); *Boulden v. Holman*, 394 U.S. 478, 482 (1969).

338. 391 U.S. at 522 n.21.

339. The Supreme Court has recognized that even a "juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition" might be able to "subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." *Witherspoon v. Illinois*, 391 U.S. 510, 514 n.7; *accord*, *Boulden v. Holman*, 394 U.S. 478, 484 (1969).

spoon, with one jury to determine guilt, that would include death penalty opponents able to convict but not to impose death, and a second jury to assess penalty, from which such jurors would be removed. In such jurisdictions, voir dire questioning preceding the guilt phase should be limited to inquiries about death penalty attitudes that would prevent the making of an impartial decision as to the defendant's guilt. No further inquiries concerning attitudes on the death penalty should be permitted until a second voir dire, occurring before the penalty phase.

The limited questioning suggested as a means of curtailing prosecutorial peremptory challenge abuses could be conducted either by the prosecutor or by the judge alone. In the federal system, "the court has the discretion either to conduct the examination itself or to permit counsel to do so."³⁴⁰ This is also the practice in about ten states.³⁴¹ Approximately eleven additional states provide for examination only by the judge; in twenty-two other states provision is made for questioning by both the judge and the attorneys, and in the remaining states, examination is left to counsel.³⁴² Regardless of who conducts the questioning, there is ample precedent for imposing restrictions on the scope of voir dire. The Supreme Court has consistently recognized that the conduct of voir dire is a matter within the broad discretion of the trial judge.³⁴³ For example, absent "special circumstances," such as when racial issues are "inextricably bound up with the conduct of the trial" and there are substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in the particular case, the Constitution does not require questioning prospective jurors about racial or ethnic bias.³⁴⁴ Nor is it unconstitutional to refuse inquiry about other types of possible

340. FED. R. CRIM. P. 24(a). See *Falter v. United States*, 23 F.2d 420 (2d Cir. 1928) (upholding the constitutionality of judge-conducted voir dire).

341. Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 1344 (5th ed. 1980).

342. *Id.*; J. VAN DYKE, *supra* note 25, at 164, 281-84 (App. D). For conflicting views concerning who should conduct the voir dire, compare Babcock, *supra* note 24 (voir dire should be conducted by the attorneys with little or no restriction by the court), and Gutman, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972) (same), with Braswell, *Voir Dire — Use and Abuse*, 7 WAKE FOREST L. REV. 49 (1970) (trial court should actively participate in voir dire and may severely restrict questioning by the attorneys), and Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916 (1971) (advocating the federal method of questioning by the court with the attorneys given the opportunity to submit proposed questions).

343. *E.g.*, *Rosales-Lopez v. United States*, 101 S. Ct. 1629, 1634 (1981); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976); *Ham v. South Carolina*, 409 U.S. 524, 528 (1973); *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

344. *Rosales-Lopez v. United States*, 101 S. Ct. at 1634; see *Ristaino v. Ross*, 424 U.S. at 594-96.

prejudice, such as prejudice against facial hair where the defendant wears a beard,³⁴⁵ or in an obscenity case, about whether the jurors' educational, political, and religious beliefs might affect their view on the question of obscenity.³⁴⁶ These cases permit the trial judge to restrict inquiries into bias to the ultimate disqualifying question, and to disallow more specific inquiries and detailed probing into the basis for the venireperson's answer. The trial court's broad discretion should thus include the imposition of similar limits on the prosecutor's ability to question prospective jurors regarding their attitudes on the death penalty.

Professor Haney's research on the effects of the death-qualification process on capital juries suggests an additional method of curtailing prosecutorial abuse of the peremptory challenge. Haney suggests that the typical elaborate voir dire inquiry into attitudes concerning the death penalty, generally conducted before the entire venire, may itself bias the venire in favor of death and perhaps also in favor of guilt.³⁴⁷ Prolonged discussion of the death penalty at voir dire suggests to prospective jurors that the defendant's guilt is presumed by the attorneys and the judge, desensitizes jurors to the possibility of imposing the death penalty, communicates the law's disapproval of death penalty opposition, increases the acceptability of pro-death penalty attitudes, and increases both the likelihood that jurors will convict and their willingness to vote for the death penalty.³⁴⁸ In response to testimony concerning Professor Haney's research, and to minimize the potentially prejudicial effects it revealed, the California Supreme Court has ordered that future voir dire questioning of a capital venireperson be performed outside the presence of other prospective jurors.³⁴⁹ Requiring that voir dire in capital cases concerning juror attitudes on the death penalty be done indi-

345. *Ham v South Carolina*, 409 U.S. 524, 528 (1973).

346. *Hamling v. United States*, 418 U.S. 87 (1974). *See also* *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979) (trial court's refusal to allow questioning about jurors' ethnic backgrounds or their addresses was not error); *United States v. Taylor*, 562 F.2d 1345 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977) (refusal to allow questioning about juror's educational background was not error); *Gorin v. United States*, 313 F.2d 641 (1st Cir.), *cert. denied*, 374 U.S. 829 (1963) (refusal to ask prospective jurors if they would give more weight to the testimony of a police officer was not error).

347. *See Haney, Death Penalty Rptr.* 1 (no. 10, June 1981); Haney, 26 *CRIME & DELINQUENCY*, *supra* note 199, at 525 ("Rather than simply discovering prejudice, the process of death qualification tends to create it."); *Hovey v. Superior Court*, 28 Cal. 3d 1, 69-81, 616 P.2d 1301, 1347-55, 168 Cal. Rptr. 128, 174-82 (1980) (ordering that future voir dire questioning of a venireperson be performed outside the presence of other prospective jurors "in order to minimize the potentially prejudicial effects identified by the Haney study.").

348. *See* note 347 *supra*.

349. *Hovey v. Superior Court*, 28 Cal. 3d 1, 69-81, 616 P.2d 1301, 1347-55, 168 Cal. Rptr. 128, 174-82 (1980).

vidually and in sequestration reduces some of the biasing effects of the death qualification process that Haney documented.³⁵⁰ These objectives, in addition to the curtailment of prosecutorial peremptory challenge abuse, could be accomplished by including on questionnaires that prospective jurors must fill out in advance of voir dire the limited question(s) necessary to assess whether the venireperson should be removed for cause under *Witherspoon*.³⁵¹

Limiting inquiry concerning the death penalty attitudes of prospective jurors in any of these ways would deprive prosecutors of information concerning a venireperson's opposition to the death penalty, other than to the extent that such opposition would render him excludable for cause under *Witherspoon*. Admittedly, an astute prosecutor may occasionally correctly suspect reluctance to impose capital punishment, because death-scrupled individuals share many common correlative opinions. But just as certain well-established cognizable classes of potential jurors, such as those classes defined by various religions, may share common viewpoints from which the essential trait of the class may not easily be deduced, just so death penalty opposition will rarely reveal itself through those elements of the common viewpoint shared by the class of death-scrupled individuals which the prosecutor can ascertain through other voir dire questioning.

Since the defense would similarly be denied extraneous information on death penalty attitudes, the prosecution could not claim a right to use its challenges to offset systematic defense challenges of death penalty advocates.³⁵² This would avoid the difficult question of when these two tendencies reach equipoise.

Such restructuring of the voir dire in capital cases would eliminate the ability of prosecutors to use peremptory challenges to exclude death-scrupled jurors "on any broader basis" than authorized by *Witherspoon*. Prosecutorial peremptories could continue to be used, and some no doubt would result in the removal of death-scrupled jurors not subject to removal for cause. But the virtual elimination or substantial underrepresentation of death penalty opponents

350. A recent empirical study has also suggested that examination of venirepersons while individually sequestered enables better identification of bias than other voir dire methods. Nietzel & Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 L. & HUMAN BEHAV. 1 (1982).

351. See Babcock, *supra* note 24, at 563. See also Gillers, *supra* note 2, at 97 n.446 (suggesting that voir dire on death penalty attitudes be conducted by the trial judge with the lawyers absent but with a court reporter present. The defendant, but not the prosecutor, would later be permitted to review the transcript and argue the validity of the judge's exclusionary rulings.).

352. See notes 152-56 *supra* and accompanying text.

would not continue. The result would be capital juries able to assess guilt and punishment with increased impartiality, and with an increased ability to reflect the conscience of the community. If we are to have death sentences at all, nothing less should be tolerated.

APPENDIX

This appendix presents a more detailed breakdown of the data presented in Part III of this Article. Table A.1 presents the total number of venirepersons who were examined as potential jurors, subdivided into scrupled and nonscrupled categories. Table A.1 also shows the numbers of venirepersons removed for cause, those removed by defense peremptory challenges, and those remaining and subject to the exercise of prosecutorial peremptory challenge. Table A.2 shows the equivalent data for venirepersons examined as possible alternate jurors rather than as jurors.

Table A.3 shows how the prosecutors used their peremptory challenges against potential jurors, divided into scrupled and nonscrupled categories. Table A.3 reveals that for nonscrupled potential jurors subject to exercise of prosecutorial peremptory challenge (those remaining after challenge for cause and defense peremptories), the prosecutors challenged 151 out of 502 (30.08%). For scrupled potential jurors subject to exercise of prosecutorial peremptory challenge, 39 out of 48 (81.25%) were challenged. Given that prosecutors used peremptory challenges for 30.08% of nonscrupled potential jurors, one would expect that 14 or 15 of the 48 scrupled jurors would have been challenged. The chances of 39 or more scrupled potential jurors being removed by prosecutorial peremptory challenge at random is calculated at fourteen in one hundred billion (.000,000,000,14), or the equivalent of 7.57 standard deviations. This presents an astronomical degree of statistical significance, the equivalent of flipping approximately 33 heads in a row with an unbiased coin.

Moreover, the data demonstrates that the pattern in the use of peremptories by the prosecutors produced a substantial underrepresentation of scrupled jurors on the jury panels selected. Table A.1 reveals that 128 out of 1000 (12.8%) venirepersons examined as potential jurors expressed opposition to the death penalty, and that 872 (87.2%) did not. After those excused for cause and by defense peremptory challenge were eliminated, 550 venirepersons remained. Of these, 48 (8.73%) were scrupled and 502 (91.27%) were nonscrupled. Table A.3 reveals that 360 jurors were actually selected.

TABLE A.1
VENIRE PERSONS EXAMINED AS POTENTIAL JURORS
 (Based on 30 cases)

	Venire persons examined as potential jurors	Challenged for cause by prosecutor	Challenged for cause by defense	Excused for cause by court without motion	Venire persons remaining after excuse for cause	Excused by defense peremptory challenge	Subject to exercise of prosecutorial peremptory challenge (those remaining after excuse for cause and defense peremptories)
Non-scrupled not opposed to death penalty)	872 (87.2%)	32 (35.96%)	24 (96%)	55 (74.32%)	761 (93.72%)	259 (98.85%)	502 (91.27%)
Scrupled opposed to death penalty)	128 (12.8%)	57 (64.04%)	1 (4%)	19 (25.68%)	51 (6.28%)	3 (1.15%)	48 (8.73%)
Total	1000	89	25	74	812	262	550

TABLE A.2
VENIRE PERSONS EXAMINED AS POTENTIAL ALTERNATE JURORS
 (Based on 30 cases)

	Venire persons examined as potential alternates	Challenged for cause by prosecutor	Challenged for cause by defense	Excused for cause by court without motion	Venire persons remaining after excuse for cause	Excused by defense peremptory challenge	Subject to exercise of prosecutorial peremptory challenge (those remaining after excuse for cause and defense peremptories)
Non-scrupled (not opposed to death penalty)	97 (83.62%)	4 (28.57%)	1 (100%)	5 (50%)	87 (95.6%)	12 (100%)	75 (94.94%)
Scrupled (opposed to death penalty)	19 (16.38%)	10 (71.43%)	0 (0%)	5 (50%)	4 (4.4%)	0 (0%)	4 (5.06%)
Total	116	14	1	10	91	12	79

TABLE A.3
USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
IN SELECTING JURORS
 (Based on 30 cases)

	Potential jurors subject to exercise of prosecutorial peremptory challenge (those remaining after excuse for cause and defense peremptories)	Challenged	Not challenged (those selected as jurors)
Nonscrupled (not opposed to death penalty)	502	151 (30.08%)	351 (69.92%)
Scrupled (opposed to death penalty)	48	39 (81.25%)	9 (18.75%)
Total	550	190 (34.55%)	360 (65.45%)

Given that 360 jurors were actually selected, one would expect that 31 or 32 of them (8.73%) would have been scrupled jurors. In fact, as Table A.3 reveals, only 9 scrupled jurors were selected, the remaining 39 having been removed by prosecutorial peremptory challenge. The chances of 9 or fewer scrupled jurors being selected at random is calculated at approximately 43 out of one million (.000,043), or the equivalent of 3.93 standard deviations. This presents a high degree of statistical significance, the equivalent of flipping approximately 14 heads in a row with an unbiased coin.

In addition, the *Swain* burden of attributing the underrepresentative result shown to action of the prosecution rather than the defense is met, since prosecution peremptory challenges eliminated 39 of the 48 scrupled potential jurors who but for these challenges would have served on the juries selected. Moreover, even if we consider those scrupled potential jurors who were challenged by defense peremptories — adding them to the 48 subject to possible prosecutorial peremptory challenges, Tables A.1 and A.3 demonstrate that the substantial underrepresentation of scrupled jurors that was produced is attributable overwhelmingly to prosecutorial action.³⁵³ Of the 42

353. If the above calculation of the effect of prosecutorial peremptory challenges on the representative character of juries selected is recomputed by adding back in those potential jurors subject to defense peremptory challenge, the results still indicate a statistically signifi-

potential scrupled jurors removed by either party by means of peremptory challenge, 39 (92.86%) were removed by prosecutorial peremptories and only 3 (7.14%) by defense peremptories.

TABLE A.4

**USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
IN SELECTING ALTERNATE JURORS**

(Based on 30 cases)

	Potential alternates subject to exercise of prosecutorial peremptory challenge (those remaining after excuse for cause and defense peremptories)	Challenged	Not challenged (those selected as alternate jurors)
Nonscrupled (not opposed to death penalty)	75	12 (16%)	63 (84%)
Scrupled (opposed to death penalty)	4	1 (25%)	3 (75%)
Total	79	13 (16.46%)	66 (83.54%)

Table A.4 shows the results equivalent to those shown in Table A.3, but for potential alternates, rather than potential jurors. Because of the relatively small sample size, these numbers do not provide the same degree of statistical significance conveyed by the data in Table A.3, but the trends are qualitatively the same.

Tables A.5-A.11 show the detailed data used in the multivariate analysis to show the effect of potentially confounding variables on the study results.

cant underrepresentation in the number of scrupled jurors selected. Table A.1 reveals that after those excused for cause were eliminated, 812 potential jurors remained. Fifty-one of these were scrupled potential jurors (6.28%) and 761 were non-scrupled (93.72%). Table A.3 reveals that 360 jurors were actually selected. Given that 360 jurors were actually selected, one would expect that 22 or 23 of them (6.28%) would have been scrupled jurors. In fact, as Tables A.1 and A.3 reveal, only 9 scrupled jurors were selected, the remaining 42 having been removed by peremptory challenge (39 by prosecutors and 3 by defense attorneys). The chances of 9 or fewer scrupled jurors being selected at random is approximately 22 out of 10,000 (.0022), or the equivalent of 2.85 standard deviations. Moreover, this substantial underrepresentation was produced overwhelmingly by prosecutorial peremptory challenges. Of the 42 potential scrupled jurors removed by peremptory challenge, 39 (92.86%) were removed by prosecutorial peremptories and only 3 (7.14%) by defense peremptories.

TABLE A.5

**USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY VENIREPERSON'S SEX AND DEATH
PENALTY ATTITUDES
(Based on 629 venirepersons)**

	MALE			FEMALE			TOTAL VENIRE— PERSONS
	NON- SCRUPLED	NON- SCRUPLED	TOTAL	NON- SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	17 (77.27%)	81 (29.89%)	98 (33.45%)	23 (76.67%)	82 (26.8%)	105 (31.25%)	203 (32.27%)
NOT CHALLENGED	5 (22.73%)	190 (70.11%)	195 (66.55%)	7 (23.33%)	224 (73.2%)	231 (68.75%)	426 (67.73%)
TOTAL	22	271	293	30	306	336	629

TABLE A.6

**USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY VENIREPERSON'S MARITAL STATUS AND DEATH
PENALTY ATTITUDES
(Based on 609 venirepersons)**

	MARRIED			NOT MARRIED			TOTAL VENIRE— PERSONS
	NON- SCRUPLED	NON- SCRUPLED	TOTAL	NON- SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	18 (64.29%)	76 (19.49%)	94 (22.49%)	19 (90.48%)	75 (44.12%)	94 (49.21%)	188 (30.87%)
NOT CHALLENGED	10 (35.71%)	314 (80.51%)	324 (77.51%)	2 (9.52%)	95 (55.88%)	97 (50.79%)	421 (69.13%)
TOTAL	28	390	418	21	170	191	609

TABLE A.7

USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY VENIREPERSON'S EMPLOYMENT STATUS AND
DEATH PENALTY ATTITUDES
(Based on 611 venirepersons)

	EMPLOYED			NOT EMPLOYED			TOTAL VENIRE— PERSONS
	SCRUPLED	NON- SCRUPLED	TOTAL	SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	25 (73.53%)	113 (26.46%)	138 (29.93%)	11 (84.62%)	43 (31.39%)	54 (36%)	192 (31.42%)
NOT CHALLENGED	9 (26.47%)	314 (73.54%)	323 (70.07%)	2 (15.38%)	94 (68.61%)	96 (64%)	419 (68.58%)
TOTAL	34	427	461	13	137	150	611

TABLE A.8

USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY WHETHER VENIREPERSON KNEW DEFENDANT AND
DEATH PENALTY ATTITUDES
(Based on 599 venirepersons)

	KNEW DEFENDANT			DID NOT KNOW DEFENDANT			TOTAL VENIRE— PERSONS
	SCRUPLED	NON- SCRUPLED	TOTAL	SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	0 (0%)	5 (83.33%)	5 (83.33%)	38 (76%)	151 (27.81%)	189 (31.87%)	194 (32.39%)
NOT CHALLENGED	0 (0%)	1 (16.67%)	1 (16.67%)	12 (24%)	392 (72.19%)	404 (68.13%)	405 (67.61%)
TOTAL	0	6	6	50	543	593	599

TABLE A.9

USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY WHETHER VENIREPERSON WAS UNSUCCESSFULLY
CHALLENGED FOR CAUSE BY PROSECUTOR* AND
DEATH PENALTY ATTITUDES
(Based on 629 venirepersons)

	UNSUCCESSFULLY CHALLENGED FOR CAUSE			NOT CHALLENGED FOR CAUSE			TOTAL VENIRE— PERSONS
	SCRUPLED	NON- SCRUPLED	TOTAL	SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	10 (90.91%)	7 (100%)	17 (94.44%)	30 (73.17%)	156 (27.37%)	186 (30.44%)	203 (32.27%)
NOT CHALLENGED	1 (9.09%)	0 (0%)	1 (5.56%)	11 (26.83%)	414 (72.63%)	425 (69.56%)	426 (67.73%)
TOTAL	11	7	18	41	570	611	629

*As this table includes only venirepersons subject to possible prosecutorial peremptory challenge, it excludes those successfully challenged for cause by the prosecutor (as well as those successfully challenged for cause by the defense and excused for cause by the court without motion). Table I illustrates those excused for cause.

TABLE A.10

USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY WHETHER VENIREPERSON WAS UNSUCCESSFULLY
CHALLENGED FOR CAUSE BY PROSECUTOR*
BASED ON DEATH PENALTY ATTITUDES AND DEATH
PENALTY ATTITUDES
(Based on 629 venirepersons)

	UNSUCCESSFULLY CHALLENGED FOR CAUSE BASED ON DEATH PENALTY ATTITUDES			NOT CHALLENGED FOR CAUSE BASED ON DEATH PENALTY ATTITUDES			TOTAL VENIRE— PERSONS
	SCRUPLED	NON- SCRUPLED	TOTAL	SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	10 (100%)	0 (0%)	10 (100%)	30 (71.43%)	163 (28.25%)	193 (31.18%)	203 (32.27%)
NOT CHALLENGED	0 (0%)	0 (0%)	0 (0%)	12 (28.57%)	414 (71.75%)	426 (68.82%)	426 (67.73%)
TOTAL	10	0	10	42	577	619	629

*As this table includes only venirepersons subject to possible prosecutorial peremptory challenge, it excludes those successfully challenged for cause by the prosecutor (as well as those successfully challenged for cause by the defense and excused for cause by the court without motion). Table I illustrates those excused for cause.

TABLE A.11

**USE OF PROSECUTORIAL PEREMPTORY CHALLENGES
BY WHETHER VENIREPERSON WAS QUESTIONED BY
PROSECUTOR ON ABILITY TO BE IMPARTIAL IN DECID-
ING GUILT AND DEATH PENALTY ATTITUDES
(Based on 629 venirepersons)**

	IMPARTIALITY QUESTIONED			IMPARTIALITY NOT QUESTIONED			TOTAL VENIRE— PERSONS
	SCRUPLED	NON- SCRUPLED	TOTAL	SCRUPLED	NON- SCRUPLED	TOTAL	
CHALLENGED	40 (76.92%)	149 (26.7%)	189 (30.98%)	0 (0%)	14 (73.68%)	14 (73.68%)	203 (32.27%)
NOT CHALLENGED	12 (23.08%)	409 (73.3%)	421 (69.02%)	0 (0%)	5 (26.32%)	5 (26.32%)	426 (67.73%)
TOTAL	52	558	610	0	19	19	629