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Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and Ethical Considerations

Stephen P. Lindsay

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PROSECUTORIAL ABUSE OF PEREMPTORY CHALLENGES IN DEATH PENALTY LITIGATION: SOME CONSTITUTIONAL AND ETHICAL CONSIDERATIONS

STEPHEN P. LINDSAY*

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I. INTRODUCTION

Under present North Carolina law, a defendant convicted of first degree murder may be punished by execution.1 Together with our state's decision to impose the death penalty goes an enhanced responsibility on the state to ensure that death penalty defendants' constitutional rights are meticulously preserved. Justification for this enhanced responsibility in death penalty litigation is abundant in both state and federal jurisdictions. For example, in

1. See N.C. CONST. art. XI, § 2 which provides:
The object of punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder . . . may be punishable with death, if the General Assemble shall so enact.

See also N.C. GEN. STAT. § 14-17 (1981) which provides:
A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000 . . .

N.C. GEN. STAT. § 15A-2000 (1981) provides a series of mitigating and aggravating factors which are to be considered by a jury when determining whether the death penalty should be imposed. If the jury determines that the aggravating factors substantially outweigh the mitigating factors then the jury is to recommend that the death penalty be imposed. If the jury determines that the aggravating factors, if any, do not substantially outweigh the mitigating factors then the jury is to recommend life imprisonment.
Woodson v. North Carolina, the United States Supreme Court noted:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. 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.

Put another way, “the death penalty is the ultimate punishment. It is irreversible, and once it has been exacted there is on this earth neither parole nor pardon nor other corrective possibility. Therefore, when death is a possible penalty, all constitutional safeguards should be scrupulously observed.”

Regardless of the reader’s view concerning the propriety of the death penalty, the above-quoted passages possess much truth. With North Carolinians heavily favoring the death penalty, and executions in our state becoming more frequent in recent years, our obligation as lawyers and laypersons to ensure that the constitutional rights of death penalty defendants are preserved is taking on added significance. One practice which deserves close scrutiny is prosecutorial use of peremptory challenges.

3. Id. at 305 (opinion of Stewart, Powell, and Stevens, JJ.).
5. There are very few statistical studies indicating what percentages of North Carolinians favor and oppose the death penalty. The University of North Carolina School of Journalism periodically sponsors research on this issue through polling procedures entitled The Carolina Poll. From February 17, 1984 to March 1, 1984, The Carolina Poll conducted a random sampling of North Carolinians. One thousand two hundred and nine (1,209) adults were contacted by telephone and asked, among other things, “[d]o you favor or oppose the death penalty for persons convicted of murder?” The responses indicated that 65% of North Carolinians favor the death penalty, 25% are opposed to it and 10% are undecided. A similar poll conducted by The Carolina Poll in 1977 indicated that 57% of North Carolinians favored the death penalty, 25% opposed it and 18% were undecided.
6. In 1984, North Carolina executed two death row inmates. On November 2, 1984, Margie Velma Barfield was executed for poisoning her fiancé. On March 16, 1984, James W. Hutchins was executed for murdering two law enforcement officers. The execution of Hutchins was the first execution in North Carolina since the execution of Theodore Boykin in October 1961.
7. Every state and the federal government provide for some statutory method
II. BACKGROUND

In North Carolina death penalty cases, both the prosecutor and defense counsel are permitted fourteen peremptory challenges. See J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES 281-84 (1977) (Appendix D). However, there has never been a constitutional right to provide for the peremptory challenge. Swain v. Alabama, 380 U.S. 202 (1965); Stilson v. United States, 250 U.S. 583 (1919). Presumably, therefore, a state could eliminate peremptory challenges and not violate the United States Constitution.

8. N.C. GEN. STAT. § 15A-1217 (1977), entitled Number of Peremptory Challenges, provides:
   (a) Capital cases.
      (1) Each defendant is allowed 14 challenges.
      (2) The State is allowed 14 challenges for each defendant.
   (b) Noncapital cases.
      (1) Each defendant is allowed six challenges.
      (2) The State is allowed six challenges for each defendant.
   (c) Each party is entitled to one peremptory challenge for each alternate juror in addition to any unused challenges.


10. 4 W. BLACKSTONE, COMMENTARIES 353 (15th ed. 1809).


12. To some extent this statement is ipse dixit. Authors are unusually reluctant to state unequivocally that prosecutors abuse peremptory challenges. For example, Professor Winnick, in his article entitled Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 MICH. L. REV. 1 (1982), notes that "[m]any criminal defense attor-
challenge in this manner presents very serious constitutional and ethical concerns: the constitutional right to a fair and impartial jury;\(^\text{13}\) the constitutional right to be tried by a jury drawn from a representative cross-section of the community;\(^\text{14}\) the constitutional right to be tried by a group of individuals capable of performing the purpose and function of a jury;\(^\text{15}\) the constitutional right not to be subjected to cruel and unusual punishment;\(^\text{16}\) and the professional responsibility of prosecutors\(^\text{17}\) to refrain from using peremptory challenges to intentionally create juries biased in the state's favor.

A. *Swain v. Alabama*

The most comprehensive discussion by the United States Supreme Court of the peremptory challenge occurred in *Swain v. Alabama\(^\text{18}\)* where the Court acknowledged that the challenge is subject to prosecutorial abuse.\(^\text{19}\) *Swain* involved the indictment and

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13. See infra notes 40-105 and accompanying text.
15. See infra notes 163-80 and accompanying text.
16. See infra notes 181-220 and accompanying text.
17. See infra notes 221-38 and accompanying text.
19. At least one author has suggested that the Supreme Court has indirectly acknowledged that prosecutors abuse peremptory challenges through its proposed
conviction of a black man for the crime of rape. The defendant moved that the trial court set aside the jury that was selected because the prosecutor systematically had struck all black persons within the jury pool. The defendant’s motion was denied and subsequently he was sentenced to death.

The defendant in Swain made unsuccessful timely appeals within the Alabama court system asserting a violation of his fourteenth amendment equal protection rights. The United States Supreme Court granted certiorari to decide these contentions. The defendant’s equal protection contention was essentially twofold: first, that the prosecutor’s systematic removal of all black jurors from the jury pool was a violation of the defendant’s equal protection rights; second; that as a result of deliberate and systematic actions of prosecutors over a substantial number of years, no black person had ever sat on a petit jury in either a criminal or civil case in the defendant’s county. “This [latter] systematic practice, [the defendant] claimed, [was] invidious discrimination for which the peremptory system [was] insufficient justification.”

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<td>2</td>
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Swain, 380 U.S. at 231-32 (Goldberg, J., dissenting).


21. Mr. Justice Goldberg, dissenting in Swain, articulated the defendant’s offer of proof as follows:

Petitioner, a 19-year-old Negro, was indicted in Talladega County for the rape of a 17-year-old white girl, found guilty, and sentenced to death by an all-white jury. The petitioner established by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama. Yet, of the group designated by Alabama as generally eligible for jury service in that county, 74% (12,125) were white and 26% (4,281) were Negro.

Swain, 380 U.S. at 231-32 (Goldberg, J., dissenting).

22. Id. at 223.
The Supreme Court denied the defendant relief on each of his claims. The Court was unwilling to analyze the removal of all black persons from a petit jury in any particular case. The Court’s reasoning was based on the fact that peremptory challenges are exercised for a variety of reasons. If all black persons are peremptorily challenged by the prosecutor in a particular case, this could be the end product of the prosecutor’s legitimate use of the challenge for reasons wholly unrelated to these juror’s race. In short, that all black persons were peremptorily challenged by the prosecutor in Swain did not mean that they were challenged merely because they were black. “The presumption in any particular case must be that the prosecutor is using the State’s challenges to obtain a fair and impartial jury to try the case before the court.”

The Swain defendant’s second contention, that no black person had ever been seated on a petit jury in his county, was not dealt with in such a summary fashion by the Court. In light of this additional allegation, the Court reasoned that the defendant’s “Fourteenth Amendment claim [took] on added significance.”

In these circumstances, giving even the widest leeway to operation of irrational but trial-related suspicions and antagonisms, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such 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 and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to facilitate or justify.

Despite the defendant’s extensive evidentiary showing, the Supreme Court denied him relief. His proof failed in one major aspect. The evidence showing that no black person had ever served on a petit jury in the defendant’s county failed to establish that this nonrepresentation was a result of only the prosecution’s actions. The nonrepresentation could conceivably have been caused by challenges for cause, excusals, peremptory challenges by the de-

23. Id. at 222.
24. Id. at 223.
25. Id. at 223-24.
fendant or an agreement between the prosecution and the defense attorney that no black persons would sit on the jury.26 Removal of black persons in any of these ways, the Court reasoned, would negate an equal protection claim. Therefore, the defendant’s failure to establish that nonrepresentation of black persons in his county resulted exclusively, or even in majority, from prosecutorial abuse of the peremptory challenge rendered the defendant’s proof insufficient to sustain his second equal protection contention.

B. An Insurmountable Burden of Proof

In the nearly two decades since Swain, the decision has not only been met with overwhelming criticism from legal academia,27 but also has resulted in substantial dissension among the Supreme Court Justices.28 For example, in McCray v. New York,29 a relatively recent case seeking a writ of certiorari from the Supreme Court,

five Justices indicated their view that a discriminatory exercise of prosecutorial peremptories should not be considered beyond judicial scrutiny. Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari, on the ground that “Swain was decided before this Court held that the Sixth Amendment applies to the states through the Fourteenth Amendment . . . and . . . should be reconsidered in light of Sixth Amendment principles established by our recent cases.” . . . Three Justices, in an opinion by Justice Stevens, joined by Justices Blackmun and Powell, stated that they did not disagree with Justice Marshall’s assessment of the importance of the issue. Rather, they voted to deny certiorari on the ground that “further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more widely at a later date.”30

Thus, the great majority of Swain’s criticism, including that among

26. Id. at 224-25.
27. See supra note 18 and authorities cited therein.
28. See, e.g., McCray v. New York, 103 S. Ct. 2438 (1983) (denial of certiorari). Justice Marshall, dissenting from the denial of certiorari in McCray, noted that “[i]n the nearly two decades since it was decided, Swain has been the subject of almost universal and often scathing criticism.” Id. at 2440 (Marshall, J., dissenting; footnote omitted).
the Court itself, has resulted from the virtually insurmountable burden of proving that "in all cases, in all circumstances, whoever the victim, whoever the defendant, blacks were excused from juries without cause." With but a mere two exceptions, the Swain burden of proof has never been satisfied.

In an effort to circumvent the stringent Swain burden of proof mandates, several state courts have held prosecutorial abuse of peremptory challenges to exclude black persons impermissible under their state constitutions. The rules governing peremptory challenges which these state courts have created, although having a few differences, are basically identical. The Swain presumption that the prosecution is properly using peremptory challenges remains intact. If the defendant makes a prima facie showing of prosecutorial abuse of the peremptory challenge to the trial court, the presumption ceases and the burden of proof shifts to the prosecution to justify its use of peremptory challenges for legitimate reasons. Should the prosecution fail to respond, or fail to sufficiently justify its use of peremptory challenges, the entire jury

31. Id. at 6983.
32. State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979). Brown and Washington each involved situations where the prosecutors openly admitted they had intentionally and systematically used their peremptory challenges to exclude potential black jurors.
33. See, e.g., United States v. Carter, 528 F.2d 844 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976) (defendant showed that during 1974, in 15 cases involving black defendants, 70 blacks were potential jurors and prosecutor peremptorily challenged 57 of the blacks. In the defendant's case, all five black potential jurors were peremptorily challenged by the prosecution. Equal protection argument rejected.); United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), aff'd mem., 620 F.2d 286 (2d Cir.), cert. denied, 449 U.S. 878 (1980) (Four black persons peremptorily challenged by state. Prosecutor explained to trial court that "I make it a practice to attempt to exclude as best I can all jurors ... of the same ethnic background as the defendant." Id. at 1066). North Carolina adheres to the Swain standard and has invariably denied appeals alleging prosecutorial abuse of the peremptory challenge to exclude potential black jurors. See State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980); State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).
35. The prosecution's justification for its use of the peremptory challenges need not rise to the level necessary to sustain a challenge for cause.
pool is excused, a new pool drawn and the jury selection process started anew. This modified method of using peremptory challenges has apparently met with success.  

III. THE ISSUES

Although without question the most frequently litigated peremptory challenge issue concerns its use by prosecutors to exclude all, or a large percentage, of potential black jurors, the peremptory challenge is also subject to abuse concerning groups other than racial ones. For example, in People v. Kagan, 37 although the defendant was held to have not satisfied his prima facie burden of proving prosecutorial abuse of peremptory challenges, the court noted that the prosecution could not use peremptory challenges to excuse Jewish persons merely because they were Jewish. In Commonwealth v. Reid, 38 prosecutorial abuse of peremptory challenges to exclude members of the male sex was determined to be impermissible. More recently, courts have begun to examine whether, in death penalty cases, the prosecution may use peremptory challenges to remove all potential jurors indicting some hesitancy concerning the wisdom of the death penalty, thereby creating a jury composed entirely of persons who favor execution. 39

36. In McCray v. Abrams, 750 F.2d at 1132-33 at 7009-10, the Second Circuit Court of Appeals commented:

[I]n states that have rules that the prosecution’s use of its peremptory challenges is subject to scrutiny under the state constitution, we have seen no indication in the reported authorities or the commentaries that the implementation of such scrutiny as has been required has created an undue burden for the prosecution or the courts. In People v. Hall, the California Supreme Court declined an invitation to overrule its five-year-old decision in Wheeler, stating that it had no empirical evidence that the Wheeler procedures had proven unworkable. 672 P.2d at 859 & n.11. And in the present case, the State advises us that in the two years between the decision of the New York Appellate Division in People v. Thompson, holding that the racially discriminatory use of peremptories by the prosecutor was invalid under the New York Constitution, and the implicit overruling of the decision by the New York of Appeals in People v. McCray, the Thompson rule did not create any practical problems whatever.

38. 384 Mass. 247, 424 N.E.2d 495 (1981) (Trial court held to have authority to prohibit prosecutorial use of peremptory challenges to exclude males).
39. See, e.g., Dobbert v. State, 409 So. 2d 1053 (Fla. 1982), aff’d sub nom. Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983) (prosecutorial use of peremptory challenges to create juries composed entirely of persons favoring the
use of peremptory challenges in this latter way raises some important and troublesome constitutional concerns.

A. Right To A Fair And Impartial Jury

The sixth amendment of the United States Constitution specifies that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." The right to a fair and impartial jury is a fundamental right that is also protected by the due process clause of the fourteenth amendment. When a prosecutor uses peremptory challenges to create death penalty juries composed entirely of persons favoring execution, convictions and death sentences rendered by such juries are arguably not impartial and therefore are in violation of the Constitution.

1. Conviction Impartiality

Although the United States Supreme Court has never ruled on whether juries composed entirely of persons favoring execution are impartial concerning conviction, the Court was faced with the issue in Witherspoon v. Illinois. In support of his contention that the jury which tried him was not impartial because it was composed entirely of persons favoring the death penalty, the petitioner in Witherspoon offered three incomplete sociological studies. However, the Court found that the studies were "too tentative and

40. U.S. CONST. amend VI (emphasis added).
41. See, e.g., Rideau v. Louisiana, 373 U.S. 723 (1963) (failure of trial court to grant motion for change of venue in wake of substantial pretrial publicity violated the defendant's fourteenth amendment due process right to impartial jury). See also Irvin v. Dowd, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors.").
42. 391 U.S. 510 (1968).
43. The defendant in Witherspoon failed to offer evidence to the trial court on this issue. Instead, the defendant requested that the Supreme Court take judicial notice of the studies. Specifically, the Court was referred to: (1) H. Zeisel, Some Insights into the Operation of Criminal Juries (Nov. 1957) (confidential first draft, University of Chicago); (2) W. Wilson, Belief in Capital Punishment and Jury Performance (1984) (unpublished manuscript, University of Texas); and (3) F. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Cases (undated) (unpublished manuscript, Morehouse College).
fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." As a result, the Court was left to "speculate . . . as to the precise meaning of the terms used in the studies, the accuracy of the techniques employed, and the validity of the generalizations made." Accordingly, the defendant's contentions relating to the conviction partiality of the jury were denied.

In the years following Witherspoon, the three studies presented to the Court by the petitioner have been refined. In addition, several new studies have been conducted. These studies provide valuable data which indicate that persons who favor the death penalty, and therefore juries composed entirely of those persons, are not impartial concerning conviction in death penalty cases.

a. Zeisel Study

Since Witherspoon, the Zeisel study has been refined and published. Although data gathered for the Zeisel study were collected prior to Witherspoon, the study remains highly significant because it used actual jurors as subjects rather than making use of simulations.

During 1954 and 1955, jurors in Chicago and Brooklyn were interviewed following their last day of jury service. The jurors

44. Witherspoon, 391 U.S. at 517.
45. Id. at 517 n.11.
46. The studies described herein are merely representative and are not exhaustive. For a more thorough analysis of these and other sociological studies concerning jury impartiality see 8 Law and Human Behavior (June 1984).
48. The Zeisel study was conducted by one of the leaders in forensic social science in this nation. Dr. Zeisel has been Professor of Law and Sociology at the University of Chicago since 1952. He is the co-author with Harry Kalven, Jr., of The American Jury (1966). His work has been cited by the U.S. Supreme Court, the California Supreme Court and others. Since his study used actual jurors it avoids some of the arguments (most unfounded) directed at the unreliability of simulations. So his work demonstrates that the significant differences between the conviction behavior of scrupled and nonscrupled jurors are not limited to simulated situations.
49. Jurors had been advised of the study by the Clerk of Court, the inter-
were asked: 1) whether they had scruples against the death penalty; 2) whether they had sat on a jury that actually had deliberated in a criminal case or cases; 3) if so, how they voted on the first ballot; and 4) what was the vote of the entire panel of twelve on the first ballot. Zeisel disregarded unanimous first ballot votes as those would not indicate potential juror differences. There remained 464 first ballot split votes to analyze. These were divided into eleven “constellations” ranging from one vote “guilty” and eleven votes “not guilty,” to eleven votes “guilty” and one vote “not guilty.”

Zeisel found that in nine of the eleven “constellations,” jurors without scruples against the death penalty voted to convict more often than jurors with scruples. Furthermore, in ten of the eleven “constellations,” jurors with scruples against the death penalty voted to acquit more often than jurors without such scruples. Professor Zeisel has testified that “[w]hatever the case is, if there is a split ballot, my statement is [that] jurors who have scruples against the death penalty as a group will have a lower percentage of guilt votes than jurors [who] have no scruples.”

b. Wilson Study

“The Wilson study was one of the first to show that persons without scruples against the death penalty are more likely to convict than people with such scruples. It also showed that non-scrupled jurors . . . appeared more biased in favor of the prosecution.” The Wilson study utilized sixty-one New York students and 187 University of Texas students. These students were given simulated fact descriptions of five criminal cases. On the basis of the facts, each student was asked, if he were a juror, whether he would find the defendant innocent or guilty. Wilson first indexed the tendency of each student to convict by the number of guilty responses the student gave to the hypothetical fact situations. This index was then compared to whether the student had conscientious views were anonymous, and two-thirds of the jurors contacted agreed to participate. Jurors were drawn from criminal felony trials without regard to the severity of the crime.

50. The Zeisel study is presented in greater detail in Grisby v. Mabry, 569 F. Supp. 1273, and in Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).
51. Hovey, 28 Cal. 3d at 30, 616 P.2d at 1317, 168 Cal. Rptr. at 144.
52. Grisby, 569 F. Supp. at 1295.
scruples against the death penalty.

Wilson found that a majority of both groups voted guilty on three of four occasions. However, 22 percent of the subject/jurors with conscientious scruples against the death penalty voted guilt on two or less occasions, as compared to only 9 percent of the subject/jurors without such scruples. At the other end of the spectrum, 30 percent of the jurors without conscientious scruples against capital punishment voted guilt in five of six cases, as compared to 17 percent of the jurors with such scruples. These results were statistically significant; the “p” value was less than .02.53

c. Goldberg Study

Since Witherspoon, the Goldberg study has been refined and published.54 Subjects used in this study were two hundred undergraduate students from four colleges in Atlanta, Georgia. One hundred of the students were white and attended predominantly white colleges; the remaining one hundred students were black and attended predominantly black colleges.

The experiment consisted of reading thumbnail descriptions of sixteen capital murder trials. The trials varied in “their severity, heinousness, justification, and the amount of evidence available.”55 The race of the characters was revealed. After reading each case, subjects made determinations of guilt on a four choice scale: “guilty of first degree murder, guilty of a lesser crime, acquittal on the grounds of insanity [or] acquittal for lack of evidence.”56 Where guilt was found, subjects then chose a sentence of death, life imprisonment, any number of years in prison, or probation. Finally, subjects were asked to give a yes/no response to the question: “Do you have conscientious scruples against the death penalty?” as a measure of capital punishment sentiment.

Dr. [Goldberg]57 found that subject/jurors without conscientious scruples against the death penalty voted “guilt” on some crimes (i.e., first degree murder or a lesser offense) in 75 percent of their votes, whereas subject/jurors with such scruples voted

53. Hovey, 28 Cal. 3d at 33, 616 P.2d at 1319, 168 Cal. Rptr. at 146.
55. Id. at 59.
56. Id. at 60.
57. Dr. Faye Goldberg is now Dr. Faye Girsh.
guilty 69 percent. The 6 percent difference between the groups was found to be marginally significant. \( (P = .08) \). 58

"Dr. [Goldberg] concluded that her results 'do tend to corroborate the trends found' in the studies by Dr. Zeisel and Dr. Wilson . . . ." 59

d. Jurow 1971 Study

The Jurow 1971 Study was conducted by Professor George Jurow, a lawyer and a psychologist, while serving on the faculty of the City University of New York. This study is the first post-Witherspoon controlled experiment on the relationship between juror attitudes towards the death penalty and their propensity to convict. The study has been published. 60

A mock jury pool was composed of the first two hundred fifty employees of an industrial plant who signed up on an application which described the project and invited participation. The mock jurors first completed questionnaires which collected demographic data and measured their attitudes concerning the death penalty. The subjects then listened to two audiotapes of simulated capital murder trials. 61 Scripts for each tape were prepared in order to balance the evidence equally between acquittal and conviction. The scripts included opening statements, direct and cross-examination of witnesses, closing arguments, and instructions to the jury. Subjects were given time after each tape to decide upon a verdict and to mark verdict ballots.

The testing instruments were compilations of questions developed by Professor Jurow, and questions drawn from existing scales which had previously been tested for validity and reliability. Initially, the mock jurors’ general attitudes were tested by asking them to answer the following questions:

58. Hovey, 28 Cal. 3d at 32, 616 P.2d at 1317, 168 Cal. Rptr. at 145 (footnote added).

59. Id.


61. Case I was a felony murder trial involving a liquor store robbery and murder of the proprietor. Case II involved a narcotics addict charged with robbing, raping, and murdering a college student in her home.
Assume you are on a jury to determine the sentence for a defendant who has already been convicted of a very serious crime. If the law gives you a choice of death or life imprisonment or some other penalty: (Circle only one)

Percentage Choosing

10% 1. I could not vote for the death penalty regardless of the facts and circumstances of the case.

20% 2. There are some kinds of cases in which I know I could not vote for the death penalty even if the law allowed me to but others in which I would be willing to consider voting for it.

63% 3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.

5% 4. I would usually vote for the death penalty in a case where the law allows me to.

2% 5. I would always vote for the death penalty in a case where the law allows me to. 62

Professor Jurow next asked the particular subject to vote on the defendant’s innocence or guilt in each of the two cases presented on audiotapes. The following results were obtained:

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<th>Number Voting Innocent</th>
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<tr>
<td>2</td>
<td>12</td>
<td>30</td>
<td>29% Convict</td>
</tr>
<tr>
<td>3</td>
<td>59</td>
<td>73</td>
<td>45% Convict</td>
</tr>
<tr>
<td>4</td>
<td>10</td>
<td>1</td>
<td>91% Convict</td>
</tr>
<tr>
<td>5</td>
<td>4</td>
<td>1</td>
<td>80% Convict</td>
</tr>
</tbody>
</table>

PEREMPTORY CHALLENGES

<table>
<thead>
<tr>
<th>CPAQ-B</th>
<th>Number</th>
<th>Voting</th>
<th>Number</th>
<th>Voting</th>
<th>Within-Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Statement</td>
<td>Endorsed</td>
<td>Guilty</td>
<td>Innocent</td>
<td>Majority</td>
<td>Vote</td>
</tr>
<tr>
<td>Class</td>
<td>1</td>
<td>9</td>
<td>12</td>
<td>43% Convict</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>12</td>
<td>30</td>
<td>60% Convict</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>76</td>
<td>56</td>
<td>57% Convict</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4</td>
<td>9</td>
<td>2</td>
<td>82% Convict</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>4</td>
<td>1</td>
<td>80% Convict</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Transferring these two charts into bar graph form is helpful in understanding the data as they relate to the effect of prosecutorial abuse of peremptory challenges on jury impartiality concerning conviction in death penalty cases.

CPAQ response 1 jurors are eliminated for cause under the reasoning of Witherspoon. Category 5 jurors are eliminated for cause because they are unable to render a sentence based on the facts of a particular case. This leaves categories 2, 3 and 4 as the persons eligible to sit on death penalty juries. When prosecutors

63. Id. These charts are not exact reproductions of those appearing in Grisby but are accurate based on data contained therein.
64. See infra note 84 and accompanying text.
use their peremptory challenges based on jurors' views on the death penalty, they try to obtain a jury composed entirely of persons falling into category 4. In both of Professor Jurow's simulated cases, category 4 jurors showed a significantly higher propensity to convict than jurors in categories 3 and 2. Jurow's study strongly supports the contention that death penalty juries from which all persons having any degree of scruples against the death penalty have been removed are uncommonly willing to convict.

e. Bronson Colorado Study

In 1967, Professor Edward Bronson conducted a study comparing death penalty attitudes of Colorado jurors with those jurors' propensity to convict. The results of this study confirm the findings of Zeisel, Wilson, Goldberg and Jurow and have been published.65 Professor Bronson secured jury lists from eight Colorado counties, which provided the names of 1,117 prospective jurors. Interviewers contacted about half of these persons in person, the other half by telephone. In all, 718 people participated in the survey. The participant solicitation methods provided an essentially random sample of subjects.

Capital punishment attitudes were measured by asking respondents if they "strongly favor, favor, oppose, or strongly oppose capital punishment."66 Conviction propensity was measured by asking respondents if they agreed or disagreed with five statements:

1. If the police have arrested an individual and the district attorney has brought him to trial, there is good reason to believe that the man on trial is guilty.
2. If the person on trial does not testify at his trial, there is good reason to believe that he is concealing guilt.
3. Concerning the high level of violent crime in ghetto areas, this level of violent crime could be reduced if the courts would convict alleged law-breakers more often.
4. The courts are far too technical in protecting the so-called constitutional rights of those involved in criminal activity.
5. The plea of insanity is a loophole allowing too many guilty

66. Id. at 8.
The results of Professor Bronson’s Colorado study are as follow:

<table>
<thead>
<tr>
<th>Death Penalty Attitude and Conviction Proneness (CP)</th>
<th>Percent Evincing Conviction Proneness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Death Penalty Attitude</td>
<td>Q1</td>
</tr>
<tr>
<td>Strongly Favor</td>
<td>30.9%</td>
</tr>
<tr>
<td>Favor</td>
<td>28.8</td>
</tr>
<tr>
<td>Oppose</td>
<td>20.3</td>
</tr>
<tr>
<td>Strongly Oppose</td>
<td>8.8</td>
</tr>
</tbody>
</table>

With the single exception of question two in the categories of “favor” and “oppose,” the more strongly the participants favored the death penalty, the greater the percentage became who were conviction prone. This study found that the “difference in conviction proneness between those who favor and oppose the death penalty . . . is consistent, predictable and substantial.”

f. Bronson’s California Studies

In 1981, Professor Bronson published a compilation of two studies, each similar to his Colorado study, involving potential California jurors. The survey design and instruments used were refined replications of those used by Bronson in his earlier Colorado study.

i. Butte County Study

Butte County is a rural area in northeastern California. Jury lists provided approximately 1,200 eligible jurors in this area. All of these persons were telephoned and 755 agreed to participate in the study. The survey instrument measured attitudes toward capital punishment by asking which of the following statements described the respondent’s feelings toward the death penalty:

1. I strongly favor it.

67. Id. at 7. Each statement infers conviction propensity from a juror’s willingness to ignore the constitutional and legal rights of defendants.
68. Id. at 8.
69. Id. at 31.
2. I favor it.
3. I oppose it.
4. I strongly oppose it.\textsuperscript{71}

Conviction proneness attitudes were measured by agreement or disagreement with the following statements:

1. If the police have arrested an individual and the district attorney has brought him to trial, there is good reason to believe that the man on trial is guilty.
2. A person is brought to trial on a criminal charge. If that individual has personal knowledge of the crime but refuses to testify, there is good reason to believe that person is concealing guilt.
3. The high level of violent crime in the ghetto could be reduced if the courts would convict lawbreakers more often.
4. The courts are far too technical in protecting the so-called constitutional rights of those involved in criminal activity.
5. The plea of insanity is a loophole allowing many guilty persons to go free.
6. If the facts in a trial are not clear, then jurors should believe the prosecuting attorney more often than the defense attorney, since defense attorneys are only interested in protecting their clients at all costs.
7. During a riot, the government should have absolute power to jail suspicious persons without trial or bail.\textsuperscript{72}

The results of the Bronson Butte County study are as follows:

\begin{table}[h]
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
\textbf{Death Penalty Attitude and Conviction Proneness (CP)} & \textbf{Q1} & \textbf{Q2} & \textbf{Q3} & \textbf{Q4} & \textbf{Q5} & \textbf{Q6} & \textbf{Q7} & \textbf{Total} \\
\hline
\textbf{Strongly Favor} & 47\% & 65\% & 78\% & 86\% & 90\% & 28\% & 45\% & 63\% \\
\hline
\textbf{Favor} & 28 & 54 & 78 & 75 & 80 & 21 & 35 & 53 \\
\hline
\textbf{Oppose} & 28 & 33 & 53 & 55 & 62 & 19 & 19 & 28 \\
\hline
\textbf{Strongly Oppose} & 9 & 17 & 19 & 26 & 48 & 6 & 6 & 19 \\
\hline
\end{tabular}
\end{table}

The data in this chart forms a consistent pattern: the more a juror favors the death penalty, the more likely he is to be conviction prone. Where the totals of all specific categories are calculated and percentages obtained, these results are even clearer. Jurors who "strongly favor" or "favor" the death penalty are substantially

\textsuperscript{71} Id. at 15.
\textsuperscript{72} Id. at 14-15.
\textsuperscript{73} Id. at 17.
more conviction prone than jurors who "oppose" the death penalty.

**ii. Los Angeles, Sacramento & Stockton Studies**

These studies were conducted after the Colorado and Butte County studies. With only a few exceptions, the methodology remained the same. Bronson obtained 707 participants: 414 from Los Angeles; 235 from Sacramento; and 58 from Stockton. Participant attitude towards the death penalty was gauged by participant responses to the same four categories used in the Butte County study. The seven questions were asked to determine the participant's conviction proneness. Questions 1, 3, 4 and 5 were the same as in the Butte County study. Questions 2, 6 and 7 were modified as follows:

2. A person is brought to trial on a criminal charge. If that individual has personal knowledge of the crime but refuses to testify, that is a poor reason to believe that person is concealing guilt.

6. If the facts in a trial are not clear, then jurors should believe the defense attorney more often than the prosecutor, since prosecutors are only interested in convicting defendants at all costs.

7. It is better that ten guilty men go free than one innocent man be convicted.

The results of the California studies are as follows:

<table>
<thead>
<tr>
<th>Death Penalty Attitude and Conviction Proneness (CP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent Evincing Conviction Proneness</td>
</tr>
<tr>
<td>Death Penalty Attitude</td>
</tr>
<tr>
<td>Q1</td>
</tr>
<tr>
<td>Strongly Favor</td>
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<tr>
<td>Favor</td>
</tr>
<tr>
<td>Oppose</td>
</tr>
<tr>
<td>Strongly Oppose</td>
</tr>
</tbody>
</table>

This table indicates the relative conviction proneness of the participants.

On question one, three, four and five, the comparisons are strik-
ing. Only on the badly drafted question two, and on question six, is the difference not great. Looking at the totals column, it can be seen that those who strongly favor the death penalty gave responses 11% more conviction prone than those who merely favored it; those who favored the death penalty gave responses 12% more conviction prone than those who opposed it.77

Professor Bronson concludes from his California study that “[t]his consistent stair-shaped pattern is characteristic of all the studies: as opposition to the death penalty increases, conviction proneness decreases.”78

Unlike the data available to the Witherspoon Court, sociological studies concerning juror death penalty attitude and jury impartiality are no longer “tentative and fragmentary.”79 Although these studies are not conclusive, they strongly suggest that juries void of all persons having some hesitance concerning the wisdom of the death penalty are not impartial. As a result, defendants subjected to trial by such juries should be entitled to new trials.

2. Sentencing Impartiality

Prosecutorial abuse of peremptory challenges to obtain juries composed entirely of persons favoring the death penalty, in addition to raising questions concerning conviction impartiality, also raises questions concerning sentencing impartiality. Referring again to Witherspoon v. Illinois,80 a case dealing with the relationship between challenges for cause and juries composed entirely of persons favoring the death penalty, a better understanding of sentencing impartiality is possible. In Witherspoon, the Supreme Court was faced with an Illinois statute permitting the prosecutors in death penalty cases to challenge for cause “any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.”81 As a result, the prosecutor was allowed to empanel a jury composed entirely of persons in favor of the death penalty—a practice the defendant contended was in violation of his constitutional right to a trial by a fair and impartial jury.

The Supreme Court agreed with the defendant that his consti-

77. Id. at 25.
78. Id.
79. Witherspoon, 391 U.S. at 517.
81. Id. at 512, quoting ILL. REV. STAT. ch. 38, § 743 (1959).
tutional rights were violated by the Illinois law. "[T]he jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." The Court's major concern was the composition of the jury that sentenced the defendant to death. "[W]hen [the State] swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die."

The Witherspoon Court determined that the defendant's death sentence had to be reversed. In concluding its opinion, the Court held that:

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.

3. Analysis

Three arguments for rejecting the fair and impartial jury theory can be offered. First, it can be argued that Witherspoon involved challenges for cause as opposed to peremptory challenges
and is therefore distinguishable. However, this distinction does not appear to be meaningful. If a jury composed entirely of persons favoring the death penalty, created by virtue of a prosecutor's use of challenges for cause, violates the Constitution by being a "hang-ing jury" that is "uncommonly willing to condemn a man to die," does the fact that the prosecutor "stacked the deck" in his favor through systematic use of his peremptory challenges make the jury eventually selected any more fair and impartial? Common sense dictates that the answer to this question must be "no." Regardless of whether a "hanging jury" is created by the prosecutor through challenges for cause or through peremptory challenges, the jury remains a "hanging jury."

A second argument that can be made is that the peremptory challenge, by definition, and in order to retain its effectiveness, is never subject to judicial review. Several reasons suggest that this argument has very little, if any, merit. First, Swain essentially said that, given the proper circumstances, the peremptory challenge is subject to judicial review and control. Second, it should be remembered that Swain was decided on equal protection grounds. The Supreme Court has not ruled on the role of peremptory challenges under the sixth amendment. However, a recent decision in the federal court of appeals has held that the peremptory challenge is reviewable under the sixth amendment. Finally, the peremptory challenge is not a constitutional right, but rather, is a statutory creation. One of the most fundamental principles of the

86. Witherspoon, 391 U.S. at 523.
87. Id. at 521.
88. Id. at 523.
90. Admittedly this was dictum.
91. Several members of the Court have expressed a desire to consider this issue. See, e.g., McCray v. New York, 103 S. Ct. 2438, and text accompanying note 30.
93. See supra note 7.
American criminal justice system is that when a statutory right, such as the peremptory challenge, conflicts with a constitutional right, such as the right to a fair and impartial trial, the latter must prevail. 94

Finally, it can be argued that the substantial proof requirements of Swain prevent relief for alleged prosecutorial abuse of peremptory challenges in any single case. 95 However, as with the first two arguments, this too is unpersuasive. Several reasons support this contention. First, unlike the equal protection clause of the fourteenth amendment, the sixth amendment specifically provides for jury impartiality in "all criminal prosecutions." 96 Therefore, the sixth amendment "protects each defendant who is to stand trial, not simply the last in a sequence of defendants to suffer the deprivation of an impartial jury." 97 Accordingly, the sixth amendment requires "the court to decide each case on the basis of the acts or practices complained of in that very case, and not to require the defendant to show, as Swain requires for an equal protection claim, that those acts or practices have had undesirable effects in case after case." 98

94. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Writing for the Court in Marbury, Chief Justice John Marshall commented that "an act of the legislature, repugnant to the constitution, is void." Id. at 177.

If then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law. Id. at 178. "This doctrine would subvert the very foundation of all written constitutions . . . , that a law repugnant to the Constitution is void; and the courts . . . are bound by that instrument." Id. at 178, 180 (emphasis original).

95. See, e.g. Dobbert v. State, 409 So. 2d 1053 (Fla. 1982), aff'd sub nom. Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983). In the Dobbert cases the defendant attempted to comply with the stringent proof requirements of Swain. Research was conducted over several years which determined a pattern of prosecutorial abuse of the peremptory challenge to obtain death penalty juries composed entirely of persons favoring execution. However, the research, conducted by Professor Winnick, supra note 12, was deemed insufficient to meet the Swain mandates. See also Brown v. Commonwealth, 212 Va. 515, 184 S.E.2d 786, vacated, 408 U.S. 940 (1971) (petitioner denied relief because his offer of proof was limited to his own case thereby not satisfying the mandates of Swain).

96. U.S. Const. amend. VI (emphasis added).

97. McCray, 750 F.2d at 1130.

98. Id. A defendant asserting jury impartiality need not demonstrate that he
Second, the rationale in Swain for requiring substantial proof of prosecutorial abuse of peremptory challenges does not exist regarding peremptory challenges and potential juror death penalty attitudes. A probable reason the Swain Court required an extensive showing of proof to establish a violation of the defendant's constitutional rights was the relationship between the alleged unconstitutional motive underlying the prosecutor's use of the peremptory challenge and the proof required to establish this motive. A person's race, perhaps more notably in the context of white persons and black persons, is a patent characteristic. If the prosecutor intends to misuse his peremptory challenges to remove all black persons from the jury, he does not have to ask the black jurors any questions about their race. The only thing the prosecutor needs to know is whether the juror is a black person and this can usually be determined by sight alone. As a result, there is no record in the voir dire questioning that reveals evidence of the prosecutor's underlying motives. All that exists is the mere fact that all black persons are peremptorily challenged by the prosecution and this, as noted in Swain, might be the result of the prosecution's legitimate use of its peremptory challenges for reasons other than race. By requiring defendants to establish a pattern of prosecutorial abuse of the peremptory challenge over a number of years, the existence of the pattern provides substantial assurances, arguably not present in the single case context, that the prosecution's purpose in peremptorily challenging all black persons is racially, and therefore unconstitutionally, motivated.

However, a person's view on the death penalty is a latent characteristic. To identify this characteristic the prosecutor must necessarily ask questions about the jurors' views on the death penalty. As a result, the prosecutor creates a voir dire record indicating his motive for eventually peremptorily challenging jurors based on

has actually been prejudiced. A denial of due process can result from circumstances creating the possibility for, or even the appearance of, a likelihood that bias exists. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972), overruled, Taylor v. Louisiana, 419 U.S. 522, as stated in State v. Hobbs, 282 S.E.2d 258 (W. Va. 1981). 99. Professor Winnick, in his article, supra note 12, suggests that substantial proof requirements are necessary. In fact, a majority of his study was centered on demonstrating prosecutorial abuse of peremptory challenges over a number of years. Although there is no question that such a showing would enhance the proof of prosecutorial abuse of peremptory challenges, Professor Winnick is arguably wrong about the need for substantial proof in the death-penalty-juror-attitude-on-execution setting.
their views on the death penalty. Therefore, the substantial assurances of prosecutorial misconduct found lacking in *Swain* are usually present in the death penalty view context thereby rendering the substantial proof requirements of *Swain* virtually unnecessary.

Third, the *Swain* Court was concerned that the absence of black persons on juries could have been the result of collusion between the prosecutor and the defense attorney.\(^\text{100}\) Partially because of this uncertainty, the Court required extensive proof to establish a constitutional violation. In relation to juror attitudes on the death penalty, there is no realistic possibility of a collusive effort between the prosecutor and the defense attorney to remove all persons indicating some hesitancy concerning the wisdom of the death penalty. No defense attorney who represents a client faced with the possibility of execution wants a jury composed entirely of persons favoring execution.

Finally, assuming arguendo that the strict proof requirements of *Swain* are applicable to sixth amendment analysis, relief may still be possible under the North Carolina Constitution. As noted earlier,\(^\text{101}\) several states have circumvented *Swain* by resorting to their respective constitutions. The North Carolina Constitution provides, in relevant part, that “[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court.”\(^\text{102}\) This constitutional provision has been interpreted by the North Carolina Supreme Court as requiring that juries be impartial.\(^\text{103}\) Additionally, in *State v. Honeycutt*,\(^\text{104}\) the court noted that “both the State and the defendant are entitled to a trial by an impartial jury.”\(^\text{105}\) Therefore, relief is possible under the North Carolina Constitution for prosecutorial abuse of peremptory challenges to create death penalty juries composed entirely of persons favoring execution.

**B. Representative Cross-Section**

A second constitutional concern relating to prosecutorial abuse of peremptory challenges to create death penalty juries composed

\(^{100}\) See *supra* note 26 and accompanying text.

\(^{101}\) See *supra* note 34, cases cited therein and accompanying text.

\(^{102}\) N.C. Const. art. I, § 24.

\(^{103}\) *State v. Dalton*, 206 N.C. 507, 174 S.E. 422 (1934).


\(^{105}\) Id. at 179, 203 S.E.2d at 848.
entirely of persons favoring execution is the effect of that abuse on a defendant’s constitutional right to be tried by a jury drawn from a representative cross-section of the community. The requirement that juries in criminal cases be drawn from a representative cross-section of the community stems from the sixth and fourteenth amendments to the United States Constitution as applied by numerous Supreme Court decisions. For example, in Taylor v. Louisiana, the Supreme Court specifically held that the “American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community” and that the fair cross-section requirement is “fundamental to the jury trial guaranteed by the sixth amendment.” In explaining its decision, the Taylor Court commented:

The purpose of a jury is to guard against the exercise of arbitrary power—to make available commonsense judgement of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

106. The Supreme Court has never applied cross-section analysis to the peremptory challenge, juror-death-penalty-attitude setting.
107. 419 U.S. 522 (1975). The Taylor holding was set squarely on sixth amendment grounds. However, the decision was influenced in large part by a series of other Supreme Court cases decided on grounds other than the sixth amendment which had long recognized a constitutional fair cross-section requirement. See, e.g., Peters v. Kiff, 407 U.S. 493 (1972), overruled, Taylor v. Louisiana, 419 U.S. 422 (1975) (due process clause of the fourteenth amendment); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) (exercise of Court’s supervisory powers over trials in federal courts); Strauder v. West Virginia, 100 U.S. 303 (1880) (equal protection clause of fourteenth amendment). See also Smith v. Texas, 311 U.S. 128, 130 (1940) (“It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”).
108. Taylor, 419 U.S. at 527.
109. Id. at 530.
110. Id. (citation omitted).
Thus, central to the fair cross-section requirement are notions of a jury’s historic purpose and its use as a vehicle for public input and support for the criminal justice system.

Four years after Taylor, in Duren v. Missouri, the Supreme Court established a three-part test to determine whether defendants asserting a cross-section claim have established a prima facie violation of the sixth amendment.

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in the 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.

If a defendant is successful in establishing a prima facie case, the burden of proof shifts to the state to justify its systematic exclusion of the distinctive group “by showing attainment of a fair cross-section to be incompatible with a significant state interest.” The defendant’s right to a properly constituted jury cannot be overcome “on merely rational grounds.” Rather, the significant state interest must be “manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of [the] distinctive group.”

1. Application of Duren

a. Distinct Group

The first prong of the Duren test requires that the group alleged to be excluded be a “distinctive group in the community.” The term “distinctive group” includes “economic, social, religious, racial, political, and geographical groups.” Dissenting in Thiel v. Southern Pacific Co., Mr. Justice Frankfurter articulated the test of whether a group is distinct as whether the persons excluded

112. Id. at 364.
113. Id. (emphasis added).
114. Taylor, 419 U.S. at 534.
115. Duren, 439 U.S. at 367-68.
116. Id. at 364.
118. Id.
"have a different outlook psychologically and economically," whether they "adopt a different sense of justice, and a different conception of a juror's responsibility." Other formulations of the test include: whether those excluded would "act otherwise than those who were drawn would act," whether those excluded comprise "any large and identifiable segment of the community," and whether the group excluded is "sufficiently numerous and distinct."

Applying these definitions concerning what constitutes a "distinct" group to the group of persons excluded peremptorily by prosecutors attempting to create a death penalty jury composed entirely of persons favoring execution, the first prong of the Duren test is almost certainly satisfied. This conclusion is supported by several sociological studies, many of which have been summarized herein, which strongly suggest that persons having doubts about the death penalty possess markedly different views and attitudes concerning relevant aspects of criminal litigation than persons favoring the death penalty. These studies consistently indicate that the group of persons targeted by prosecutors for peremptory

119. Id. at 230 (Frankfurter, J., dissenting).
122. Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (In determining that women comprised a cognized class, the Court partially relied on empirical data indicating that women provided different "perspectives and values" to juries than men did). Professor Winnick has summarized the various tests of group distinctiveness as follows:

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." A cognizable group is not one "whose membership shifts from day to day or whose members can be arbitrarily selected." 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." Another court has termed this "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."

Winnick, supra note 12, at 69 (footnotes omitted, emphasis original).
124. See supra notes 46-79 and accompanying text.
excusal in death penalty cases has a shared "sense of justice,"\textsuperscript{125} "social outlook"\textsuperscript{126} and "conception of a juror's responsibility,"\textsuperscript{127} all of which differ from the attitudes of persons favoring the death penalty. As one commentator has put it, "[t]hese studies provide consistent and impressive support for the conclusion that death penalty objectors are additionally distinct from nonobjectors, and therefore meet the 'common thread' [or 'distinct'] requirement."\textsuperscript{128}

Satisfaction of the "distinct group" requirement is also supported by analyzing litigation concerning \textit{Witherspoon}\textsuperscript{129} and challenges \textit{for cause}. The issue in these cases is whether the exclusion of jurors in death penalty cases who state unequivocally that they are opposed to the death penalty results in a violation of the defendant's fair cross-section rights. At least one court has denied this claim\textsuperscript{130} reasoning that the viewpoints of the excluded group were adequately represented by those jurors who were less strenuously opposed to execution and therefore not subject to excusal for cause.\textsuperscript{131} Systematic removal of the latter group through prosecutorial abuse of peremptory challenges entirely undercuts this rationale. "If both groups are eliminated, there is no logical group to represent the large and distinct segment of the community that oppose the death penalty."\textsuperscript{132}

\textbf{b. Representation Not Fair And Reasonable}

The second prong of the \textit{Duren} test requires the defendant to show that representation of the excluded group "in the venires

\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Winnick, \textit{supra} note 12, at 72.
\textsuperscript{129} 391 U.S. 510 (1968).
\textsuperscript{130} Grigsby v. Mabry, 483 F. Supp. 1372, 1385 (E.D. Ark.), \textit{modified on other grounds}, 637 F.2d 525 (8th Cir. 1980).
\textsuperscript{131} This reasoning is merely a reformulation of the test set forth by the Supreme Court in \textit{Rawlins}, \textit{supra} note 120 and accompanying text. \textit{See also} Rubio v. Superior Court, 24 Cal. 3d 93, 97-98, 593 P.2d 595, 597-98, 154 Cal. Rptr. 734, 737 (1979) (requiring that no other members of the community are capable of adequately representing the perspective of the group assertedly excluded).
\textsuperscript{132} Winnick, \textit{supra} note 12, at 72. It is virtually unquestionable that persons who favor execution do not represent the viewpoints and perspectives of persons who oppose execution. The overwhelming majority, if not totality, of sociological research conducted on this issue supports this contention. \textit{See}, e.g., \textit{supra} notes 46-79 and accompanying text.
from which juries are selected is not fair and reasonable in relation to the number of such persons in the community."\[133\] Without question, the second prong of \textit{Duren} speaks in terms of jury venires or pools as opposed to the juries actually selected to hear cases. Therefore, in order to apply cross-section requirements to prosecutorial abuse of peremptory challenges, one of two arguments must be accepted: Either the second prong of \textit{Duren} must be eliminated or it must be extended to juries actually selected.

\textbf{i. Eliminating Duren's Second Prong}

One method of "satisfying" the second prong of \textit{Duren} is to eliminate it from the test. In a recent case in the United States Court of Appeals for the Second Circuit,\[134\] the court held that when prosecutorial abuse of peremptory challenges and a defendant's cross-section rights intersect, the second prong of the \textit{Duren} test is not applicable and is therefore eliminated.

It is evident that the second factor stated by the \textit{Duren} Court, \textit{i.e.}, that the resulting group was in fact not representative of the community, is not applicable to the petit jury stage. We conclude that in order to establish a prima facie violation of his right to the possibility of a fair cross section in the petit jury, the defendant must show that in his case, (1) the group alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion have been made on the basis of the individual venirepersons' group affiliation rather than because of any indication of a possible inability to decide the case on the basis of the evidence presented.\[135\]

\begin{enumerate}
\item \textit{Duren}, 419 U.S. at 364 (emphasis added).
\item McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).
\item \textit{Id.} at 1131-32. It should be carefully noted that by eliminating the second prong of \textit{Duren}, the result is not that the defendant is entitled to a jury of a particular composition. Rather, the defendant's right is to be free from jeopardy at the hands of a jury from which the state has systematically excluded a cognizable group or groups. The Supreme Court has repeatedly acknowledged that state actions during the jury selection process which systematically eliminate jury cross-section attributes of a jury pool result in the violation of a defendant's constitutional cross-section rights.
\end{enumerate}

\textit{The American tradition of trial by jury, \ldots necessarily contemplates an impartial jury drawn from a cross-section of the community \ldots. 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 representa-
ii. Extending Duren's Second Prong to Actual Juries

Perhaps more reasonable than entirely eliminating the second prong of the Duren test when examining prosecutorial abuse of peremptory challenges and constitutional cross-section rights is to extend the second prong of the test to the juries which are actually selected. Thus the Duren test could be modified to read as follows:

In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the 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.

Extending the second prong of the Duren test to actual juries makes a certain amount of sense. "The purpose of the fair cross-section mandate is the selection of representative juries, not merely representative venires." 136 "The desired interaction of a cross-section of the community does not occur [in the venire]; it is only effectuated within the jury room itself." 137 It should not be forgotten that an essential purpose of the jury is to interpose the "commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor . . . ." 138 This purpose is most certainly not achieved "if the over-zealous prosecutor . . . can eliminate the representative character of the jury through the jury challenge system." 139 As one court has put it,

the responsibility of the state and its prosecutor is not to secure a conviction at all costs; it is to see that justice is done, and the constitutional wisdom is that justice is best served by a jury that

tion 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.

136. Winnick, supra note 12, at 64.
139. Winnick, supra note 12, at 64.
represents a cross-section of the community, not one from which cognizable groups have been systematically eliminated because of their group affiliation.140

iii. Necessary Factual Showing

Assuming that the second prong of the Duren test is not eliminated but is extended to actual juries, it is necessary to show that the representation on the jury of the group of persons excluded by prosecutorial abuse of the peremptory challenge is not fair and reasonable in relation to the number of such persons in the community.141 The most common method of proving a discrepancy between group representation on juries and group representation in the community is through statistics.142 Statistics concerning the attitude of North Carolinians on the death penalty are limited in usefulness. One poll143 conducted in 1977 determined that 57% of North Carolinians favored the death penalty, 25% opposed it and 18% were undecided. A more recent poll144 conducted in 1984 determined that 65% of North Carolinians favor the death penalty, 25% oppose it and 10% are undecided. These statistics, although helpful, are too general to determine the specific size of the group of potential jurors in death penalty cases targeted by prosecutors for removal via peremptory challenge due to their attitudes concerning execution.

Some portion of the 25% of North Carolinians who oppose the death penalty possess such strong reservations about the death penalty that they would be excused for cause pursuant to the

140. The Supreme Court, although not directly holding that the sixth amendment guarantees defendants the possibility of a petit jury composed of a fair cross-section, has suggested that such is the case. In Ballew v. Georgia, 435 U.S. 223 (1978), a case:

in which there was no suggestion that the venire was improper . . . , the Court held that the calling of only five persons from even a valid venire to form the petit jury was inconsistent with the Sixth Amendment, in part because so small a group had an unreasonably low possibility of comprising a cross-section of the community. The state was not permitted to deal with the valid venire in a way that so limited the possibility that a fair cross-section might be drawn.

McCray, 750 F.2d at 1125.

141. See supra note 112 and accompanying text.
143. See supra note 5.
144. Id.
Witherspoon and Wainwright v. Witt rationales. The remaining portion is part of the group which prosecutors target for removal via peremptory challenges in death penalty cases. The other part of the targeted group are those persons who are undecided as to their opinion of execution. The “undecided” group is peremptorily excused because the prosecutor’s goal is to obtain a jury composed only of persons who are certain they favor execution—a certainty that persons in the “undecided” group do not possess. As a result, the total percentage of North Carolinians in the group targeted by prosecutors for removal via peremptory challenges in death penalty cases is somewhere between 10% and 35%.

Failure to know the exact percentage of North Carolinians who comprise the group of persons subjected to prosecutorial abuse of the peremptory challenge is probably not fatal to a cross-section claim. The second prong of the Duren test is not based on exact percentages. Rather, the second prong is based on a comparison between members of the allegedly excluded group who are actually seated on the jury and the number of all such persons in the community. If the comparison is “not fair and reasonable” then the second prong of the Duren test is satisfied. When a prosecutor abuses the peremptory challenge to create a jury composed entirely of persons favoring the death penalty, representation of the excluded group is zero. Zero representation on the jury compared to group size in the community of between 10% and 35% is probably not “fair and reasonable,” thereby satisfying the second prong of the Duren test.

c. Systematic Exclusion of the Group

The final prong of the Duren test requires the defendant to show that the underrepresentation of the allegedly excluded group “is due to systematic exclusion of the group in the jury selection process.” It is relatively clear that a prosecutor who uses his peremptory challenges to exclude a certain group of persons does so “systematically.” The best evidence of this systematic practice, short of prosecutorial admission, is most likely the voir dire tran-

145. See supra note 84.
146. This is the percentage of North Carolinians undecided about execution.
147. This is the percentage of North Carolinians who oppose execution added to the percentage of North Carolinians who are undecided about execution.
149. Id.
scripts. In an attempt to create a jury composed entirely of persons favoring the death penalty, the prosecutor usually creates an obvious pattern of questioning centered around potential jurors' views on the death penalty. This pattern of questioning, accompanied by peremptory excusal by the prosecutor of a majority, if not all, potential jurors indicating some degree of hesitancy concerning the wisdom of execution, provides compelling evidence of systematic exclusion.\textsuperscript{150} This evidence almost certainly will satisfy the last prong of the \textit{Duren} test.

d. Shifting of the Burden of Proof

Assuming a defendant is successful in establishing a prima facie cross-section violation, the burden is shifted to the state to put forth some significant state interest that is "manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of [the] distinctive group."\textsuperscript{151} The obvious, and probably the only, justification that can be offered by a prosecutor who has systematically excluded all persons expressing some degree of hesitancy concerning the wisdom of execution is preservation of the peremptory challenge system. However, it is doubtful that this justification is sufficient to overcome a prima facie cross-section violation.

\textsuperscript{150} Professor Winnick argues that to be successful with such a claim, systematic excusal by prosecutors must be demonstrated over a substantial period of time. \textit{See} Winnick, supra note 12. Although such a showing would unquestionably strengthen a defendant's argument that a prosecutor has abused peremptory challenges to create a death penalty jury composed entirely of persons favoring execution, there is some question as to the necessity for such an extensive proof showing. \textit{See supra} note 99 and accompanying text.

\textsuperscript{151} \textit{Duren}, 419 U.S. at 367-68. As noted earlier, \textit{supra} note 34 and accompanying text, several states and at least one federal court have modified the \textit{Duren} test when the test is applied to prosecutorial abuse of peremptory challenges. These courts generally hold that "[i]f the defendant established . . . a prima facie case, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible . . . selection criteria and procedures have produced the . . . result.'" \textit{McCray}, 750 F.2d at 1132 (citation omitted). "In order to rebut the defendant's showing, the prosecutor need not show a reason rising to the level of cause." \textit{Id.} "Such reasons, if they appear to be genuine, should be accepted by the court, which will bear the responsibility of assessing the genuineness of the prosecutor's response and of being alert to reasons that are pretextual." \textit{Id.} "If the court determines that the prosecution's presentation is inadequate to rebut the defendant's proof, the court should declare a mistrial and a new jury should be selected from a new panel." \textit{Id.}
Initially, preservation of the peremptory challenge as justification for systematic excusal of a distinct group presupposes that the peremptory challenge enjoys a position of importance somewhat higher than constitutional rights. However, the peremptory challenge has never been required by the United States Constitution. The peremptory challenge is merely a statutory creation. As was argued earlier concerning fair and impartial constitutional jury rights, placing such great importance on the peremptory challenge does violence to the time-tested constitutional principles established in Marbury v. Madison—that where constitutional rights conflict with statutory rights the former must prevail.

Second, the assertion that compliance with a defendant’s cross-section rights will result in an erosion of the peremptory challenge system is unfounded. Both a defendant’s cross-section right and the state’s interest in preserving the peremptory challenge system can be provided by adopting a McCray/Wheeler type approach to peremptory challenge regulation. The McCray/Wheeler type approach allows prosecutors to use peremptory challenges for virtually any reason except, of course, to eliminate cognizable groups from serving on juries. Although without question the McCray/Wheeler type approach requires a modification of the way in which the peremptory challenge system works, the various state and federal courts which have applied the modified version have done so with success. In short, the McCray/Wheeler approach offers a less severe, more reasonable alternative to that of allowing the state to exercise peremptory challenges for whatever purpose regardless of a defendant’s constitutional rights.

Finally, an argument could be made that modification of the peremptory challenge will result in an increased burden on the judicial system. This argument is also probably unfounded. “The [proposed] modification [of the peremptory challenge system] is

153. See supra note 94 and accompanying text.
154. 5 U.S. (1 Cranch) 137 (1803).
155. See supra notes 34-36 and accompanying text.
156. See supra note 36.
157. The less-prejudicial concept is common in Supreme Court decisions. For example, in recent Supreme Court cases involving state law that encroach upon the commerce clause of the Constitution, the Court has looked to see if there was a less prejudicial way for the state to obtain its sought-after goals. See, e.g., Hughes v. Oklahoma, 441 U.S. 322 (1979).
required . . . only in those cases in which a defendant makes a prima facie showing that the prosecutor has used those challenges in a way that is inconsistent with the guarantee of the Sixth Amendment."

"[T]he number of occasions in which a defendant would be able to make out a prima facie case that the prosecutor’s use of peremptories was systematically excluding a cognizable group from the jury solely on the basis of the group’s affiliation would be few." "It should not be considered unduly burdensome, in those cases where a prima facie showing has been made, to scrutinize the prosecutor’s actions when a defendant’s life or liberty may be at stake." "[T]his limited requirement for modification of the traditional, but nonconstitutional, system is a small price to pay for the vindication of a constitutional right."

2. Summary

Convincing arguments and evidence exist which strongly suggest that prosecutorial abuse of peremptory challenges to create death penalty juries composed entirely of persons favoring the death penalty violates a defendant’s constitutional fair cross-section right guaranteed under the sixth amendment. State justification for violation of this right does not appear to be of sufficient magnitude to make the practice permissible. As a result, a conviction rendered by such a jury must be overturned and a new trial ordered.

C. Purpose And Function Of A Jury

A third constitutional concern created by prosecutorial abuse of the peremptory challenge to create death penalty juries composed entirely of persons favoring the death penalty is the defendant’s right to be tried by a jury. In Duncan v. Louisiana the Supreme Court held that all defendants charged with “serious” crimes have a constitutional right to be tried by a jury.

Because we believe that trial by jury in criminal cases is funda-
mental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in federal court—would come within the Sixth Amendment's guarantee.165

The right to be tried by a "jury" is relatively meaningless unless the term can be adequately defined.166 Supreme Court decisions struggling with the meaning of "jury" have centered around state laws seeking to modify jury size and eliminate the need for jury unanimity in verdicts.167 Although the Court has allowed substantial inroads into twelve member, unanimous verdict jury systems, the Court has refused to permit state practices which infringe upon a jury's ability to perform its constitutional and historical "purpose and function."168 Where the group of persons trying a defendant is not capable of performing the purpose and function of a jury, a conviction rendered by that group must be set aside.169 This is because the defendant has not been tried by a "jury" within the meaning of the Constitution.

In Williams v. Florida,170 the Supreme Court was faced with the issue of whether the State of Florida could reduce the number of jurors in a criminal case from twelve to six. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgement of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."171 "To be sure, the number should probably be large

165. Id. at 149.
166. For a thorough analysis of the history underlying juries see Mr. Justice White's opinion for the Court in Williams v. Florida, 399 U.S. 78 (1970).
168. It is important to realize that the "purpose and function" line of Supreme Court decisions, although drawing heavily from cross-section analysis and occasionally from impartiality analysis, is a separate and distinct line of cases.
171. Id. at 100.
enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." The Court concluded that the purpose and function of a jury could be provided by six-person juries.

Nearly a decade after Williams, the Supreme Court was confronted with a Georgia law that attempted to reduce jury size to five persons. The Court found the law unconstitutional because a jury of five persons was unable to perform the purpose and function of a jury. "Not only is the representation of racial minorities threatened in such circumstances, but also majority attitude or various minority positions may be misconstrued or misapplied . . . ."

Group theory suggests that a person in the minority will adhere to his position more frequently when he has at least one other person supporting his argument . . . . As the number diminish below six, even fewer panels would have one member with the minority viewpoint and still fewer would have two.

. . . [W]hat has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decision making, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service.

Perhaps the Supreme Court's most powerful statement concerning the purpose and function of a jury appeared in Brown v. Louisiana.

It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial—the very integrity of the fact-finding process." "The basic purpose of a trial is the determination of truth," and it is for the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determination process itself.

172. Id.
174. Id. at 242.
175. Id. at 236-37.
177. Id. at 334 (citations omitted).
Applying the purpose and function line of Supreme Court decisions to juries composed entirely of persons favoring the death penalty, it is questionable whether such juries qualify as a “jury” within the edicts of the sixth amendment. To be sure, “meaningful community participation” in death penalty jury deliberations is critically decimated, if not entirely eliminated, by a prosecutor’s peremptory removal of all persons having doubts concerning the wisdom of the death penalty. In addition, without the participation of this group in death penalty jury deliberations, it is doubtful whether a jury culled of all members of this group can undergo proper “group deliberation.” Finally, juries composed entirely of persons favoring the death penalty seriously run the risk that “minority positions may be misconstrued or misapplied,” if construed or applied at all. These considerations strongly suggest that defendants convicted by such a “jury” have not been afforded a trial by jury as guaranteed by the United States Constitution.

D. Cruel And Unusual Punishment

A fourth constitutional concern raised by prosecutorial abuse of peremptory challenges to create death penalty juries composed entirely of persons favoring the death penalty is that a sentence of death rendered by such a jury may constitute cruel and unusual punishment. The eighth amendment of the United States Constitution provides, in relevant part, that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” In 1962, the Supreme Court held that these eighth amendment guarantees are fundamental and are therefore applicable to the states through the fourteenth amendment.

The mandates of the eighth amendment apply not only to the death penalty but also to any penalty imposed by a state for violations of its laws. This latter application of eighth amendment principles is often overlooked because the majority of recent Supreme Court decisions interpreting “cruel and unusual punishment” have involved death penalty issues. “The application of the eighth

179. Williams, 399 U.S. at 100.
181. U.S. Const. amend. VIII.
amendment to death penalty cases must, however, be considered apart from all other punishments."\(^\text{184}\)

Mr. Justice Stewart explained this distinction quite well in *Furman v. Georgia*.\(^\text{185}\)

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irreversibility. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.\(^\text{186}\)

Although the Supreme Court has decided numerous eighth amendment cases, a single standard for determining what constitutes cruel and unusual punishment has not been established. However, an analysis of Supreme Court decisions on the death penalty reveal a few trends. Initially, the method used by the state to inflict the death penalty may constitute cruel and unusual punishment.\(^\text{187}\) Second, the Court has found that the method by which a state decides who to execute may render a death sentence cruel and unusual.\(^\text{188}\) Third, a death sentence may violate the Constitution because it does not conform to societal values. Commenting on the need for community participation in death penalty sentencing as it relates to prosecutorial abuse of peremptory challenges and cruel and unusual punishment, Professor Winnick notes:

> [P]rosecutorial 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 de-

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184. R. McNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE 305 (1982).

185. 408 U.S. 238 (1972).

186. *Id.* at 306 (Stewart, J., concurring). Mr. Justice Stewart also noted that the government's imposition of the death penalty in *Furman* permitted "this unique penalty to be so wantonly and freakishly imposed" that it violated the constitutional prohibition against cruel and unusual punishment. *Id.* at 310.


serve to die, capital punishment violates the eighth amendment. 189

The issue of whether prosecutorial abuse of peremptory challenges to create death penalty juries composed entirely of persons favoring execution constitutes cruel and unusual punishment becomes most troubling and of great concern when certain Supreme Court language contained in Witherspoon v. Illinois 190 is examined. In Witherspoon, the Court restated its strong preference that if the death penalty is to be imposed by a jury, the jury must be capable of expressing the conscience of the community. 191 “[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment 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.’ ”192 “[A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.”193 However, a recent Supreme Court decision has created some doubt as to whether this line of reasoning is still applicable.

In Spaziano v. Florida, 194 the Supreme Court recently elaborated on the need for community participation and societal values in the determination of the appropriate sanction in death penalty cases. Spaziano 195 involved a Florida death penalty case in which the defendant was tried by a jury and found guilty of first degree murder. The trial court held a sentencing hearing before the same jury, a majority of which eventually recommended life imprison-
ment. Under Florida law, a jury's decision concerning the penalty in capital cases is merely advisory. "The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, '[n]otwithstanding the recommendation of a majority of the jury,' is to enter a sentence of life imprisonment or death . . . ."197 The trial court determined that the jury's recommendation of life imprisonment was unacceptable and it therefore ordered that the defendant be executed. Thus the Supreme Court was faced with the rather narrow issue of whether the Florida death penalty sentencing procedure violated the eighth amendment's prohibition against cruel and unusual punishment.

The defendant in Spaziano centered his eighth amendment argument around recognition that the vast majority of states have determined that "juries, not judges, are better equipped to make reliable capital-sentencing decisions and that a jury's decision for life should be inviolate."199 The defendant argued that the reason the vast majority of states leave death penalty sentencing responsibilities solely to the jury "is that the nature of the decision whether a defendant should live or die sets capital sentencing

196. FLA. STAT. § 921.141(2) (Supp. 1982).
197. Spaziano, 104 S. Ct. at 3158.
198. The Court noted that "we need not decide whether jury sentencing in all capital cases is required; this case presents only the question whether, given a jury verdict of life, the judge may override that verdict and impose death. As counsel acknowledged at oral argument, however, his fundamental premise is that the capital sentencing decision is one that, in all cases, should be made by a jury." Id. at 3161.
199. At the time of Spaziano, twenty-nine jurisdictions, including North Carolina, allowed a death sentence only if death was recommended by the jury, unless, of course, the defendant waived his right to trial and/or sentencing by jury. See Spaziano, 104 S. Ct. at 3164-64 n.9, states and relevant statutes cited therein. The Court noted that in "Nevada, the jury is given responsibility for imposing the sentence in a capital case, but if the jury cannot agree, a panel of three judges may impose the sentence." Id. "In Arizona, Idaho, Montana and Nebraska, the court alone imposes the sentence." Id. "Besides Florida, the only States that allow a judge to override a jury’s recommendation of life are Alabama and Indiana." Id.

200. The Court pointed out that the "[p]etitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in [Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the sixth amendment trial by jury right is fundamental and therefore applicable to the states through the due process clause of the fourteenth amendment.])." Spaziano, 104 S. Ct. at 3161. "Nor does petitioner urge that this Court's recognition of the 'qualitative difference' of the death penalty requires the benefit of a jury." Id. at 3162.
apart and requires that a jury have the ultimate word." 201 The defendant reasoned that "[n]oncapital sentences are imposed for various reasons, including rehabilitation, incapacitation, and deterrence . . . [whereas,] in contrast, the primary justification for the death penalty is retribution." 202 If, as the Court has repeatedly expressed, "[t]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death," 203 then a jury, and not the judge, is required to make that decision.

The imposition of the death penalty, in other words, is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death. If the answer is no, that decision should be final. 204

Although determining that the defendant's "argument obviously [had] . . . some appeal," 205 the Court determined that the argument was flawed in several respects. First, the Court noted that in death penalty cases, it "has emphasized its pursuit of the 'twin objectives' of 'measured, consistent application and fairness to the accused.'" 206

If a state has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not . . . . It must also allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime. 207

The Court concluded that "[n]othing in those twin objectives suggests that the sentence must or should be imposed by a jury." 208

Second, the Court determined that merely because most states

201. Spaziano, 104 S. Ct. at 3163.
202. Id.
204. Spaziano, 104 S. Ct. at 3163.
205. Id.
207. Id. at 3163 (citations omitted).
208. Id.
place death penalty sentencing responsibilities solely with the jury, it does not necessarily follow that states which choose not to follow that procedure have violated the Constitution. “The fact that a majority of jurisdictions has a different practice, however, does not establish that contemporary standards of decency are offended by the jury override. The Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal law.”

Third, the Court determined that the distinction between capital and noncapital sentences was not as clear as the defendant contended. “While retribution clearly plays a more prominent role in a capital case, retribution is an element of all punishments society imposes and there is no suggestion as to any of these that the sentence may not be imposed by a judge.”

Finally, even accepting the defendant’s contention that “the retributive purpose behind the death penalty is the element that sets the penalty apart, it does not follow that the sentence must be imposed by a jury.”

Imposing the sentence in individual cases is not the sole or even the primary vehicle through which the community’s voice can be expressed. This Court’s decisions indicate that the discretion of the sentencing authority, whether judge or jury, must be limited and reviewable . . . . The sentencer is responsible for weighing the specific aggravating and mitigating circumstances the legislature has determined are necessary touchstones in determining whether death is the appropriate penalty. Thus, even if it is a jury that imposes the sentence, the “community’s voice” is not given free rein. The community’s voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined.

The Court noted that it did “not denigrate the significance of the jury’s role as a link between the community and the penal system and as a bulwark between the accused and the State.” Rather, the Court commented, “[t]he point is simply that the purpose of the death penalty is not frustrated by, or inconsistent with,
a scheme in which the imposition of the penalty in individual cases is determined by a judge. 214

In concluding that the Florida law was not unconstitutional, the Court was not convinced that putting the "responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme and give final authority to the jury to make the life or death decision." 215

In light of the fact that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital sentencing do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional. 216

1. Analysis and Applicability of Spaziano

In Spaziano, the Supreme Court reemphasized the importance of, and indeed the continued constitutional requirement for, community participation in the determination of the appropriate punishment in death penalty cases. For many years, and presently in the majority of states, 217 meaningful community participation in death penalty sentencing was and is thought to be provided through use of a jury. However, the Spaziano Court established that a jury is not the linchpin of meaningful community participation. Rather, the Court reasoned, meaningful community participation is provided when the people of a state decide through the legislative process to authorize execution as a possible penalty and when the people similarly decide under what circumstances execution will be imposed in their state. The Court determined that application of state death penalty laws, themselves a product of community participation, could competently be performed by a judge as well as by a jury.

It is very important to note that the Spaziano Court neither overruled any Supreme Court decisions concerning sentencing determinations by juries in death penalty cases nor did it establish

214. Id.
215. Id. at 3165.
216. Id.
217. See supra note 199.
any new standards for such jury participation. The Court's failure to address the jury participation issue clearly implies that prior Court decisions relating to such participation are still good law.

Furthermore, it is one thing to say that a judge can constitutionally apply community standards via state statutes and quite another to say that a jury composed entirely of persons favoring execution can do so. There can be no question but that not all trial judges are capable of adequately applying death penalty sentencing statutes. For example, were a judge to disregard the statutory framework of mitigating and aggravating factors and apply his or her own test as to whether execution of the defendant was appropriate, the final decision would be unconstitutional. A second example is where the judge is predisposed in favor of execution and therefore disregards the unique characteristics of the particular death penalty case. Such a situation, too, would unquestionably result in a violation of the defendant's constitutional rights. It necessarily follows that a judge who is incapable of applying a death penalty sentencing statute does not provide meaningful community participation—meaningful community participation being in the form of the death penalty statute as was determined in Spaziano. Without meaningful community participation in the sentencing process of death penalty litigation, the resulting sentence constitutes cruel and unusual punishment.

Applying this line of reasoning to states, such as North Carolina, which leave sentencing determinations in death penalty cases solely to juries, the same conclusion is reached. The Spaziano rationale presumes that the finder of fact is capable of fairly applying death penalty sentencing statutes and therefore of supplying the meaningful community participation necessary to prevent the sentence from violating the eighth amendment. However, as with judges, since not all juries are capable of fairly applying such statutes, and therefore of providing meaningful community participation, the jury must be properly composed. Improper jury composition results in the statutes being applied in a skewed manner thereby arguably rendering community participation virtually nonexistent, much less "meaningful." Therefore, a sentence rendered by an improperly composed jury violates the eighth amendment's

218. By "improper composition" it is meant not impartial, see supra notes 40-105 and accompanying text, not comporting with cross-section mandates, see supra notes 106-62 and accompanying text, or not capable of performing the purpose and function of a jury, see supra notes 163-80 and accompanying text.
prohibition of cruel and unusual punishment because the sentence is void of meaningful community participation.

2. **Summary**

Based on Supreme Court opinions, judicial comment and other notions of what constitutes cruel and unusual punishment, executing a defendant who has been sentenced to death by a jury composed entirely of persons favoring the death penalty arguably violates the eighth amendment. There is substantial doubt whether it can seriously be contended that an order of death rendered by such a jury is the product of the "conscience of the community." Rather, it appears that such a sentence is the product of a group of individuals, hand-picked by the prosecution because they favor the death penalty, thereby rendering a sentence of death virtually inevitable. If this is the case, death sentences issued by such juries are almost certainly being "wantonly and freakishly imposed," resulting in cruel and unusual punishment.

E. **Ethical Considerations**

A final concern created by prosecutorial abuse of the peremptory challenge to create death penalty juries composed entirely of persons favoring the death penalty is whether this practice violates legal ethics provided under the Model Code of Professional Responsibility. Although these ethical concerns do not raise constitutional issues, they do present significant questions for the legal profession and, more particularly, to prosecutors, at whom most of the Model Code provisions set forth herein are directed.

Disciplinary Rule 8-101(A)(2) provides that "[a] lawyer who holds public office shall not [u]se his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client." "The Disciplinary Rules . . . are mandatory in character. [T]hey state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." When a prosecutor uses peremptory challenges to create death penalty juries composed entirely of persons who favor execution he is arguably using his "public position" and "influence" to obtain a

219. Witherspoon, 391 U.S. at 519; see also supra note 15.
222. Id. Preliminary Statement.
“tribunal” calculated to “act in [his] favor.”

The Model Code of Professional Responsibility also contains Ethical Considerations. “The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the [legal] profession should strive.”223 Three Ethical Considerations should be of concern to prosecutors who abuse peremptory challenges in death penalty cases to obtain juries composed entirely of persons who favor execution.

First, Ethical Consideration 7-13 provides, in part, that “[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”224

The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important government powers that are pledged to the accomplishment of one objective only, that of impartial justice.225

It is highly questionable whether a prosecutor who uses his peremptory challenges to create a death penalty case jury composed entirely of persons favoring execution is “seeking justice.” “Justice,” at least in the United States and most civilized countries, means something more than having convictions and executions determined by “hanging juries”226 obviously “organized to convict.”227 Even assuming that “justice” is being sought through this type of prosecutorial abuse of peremptory challenges, can it reasonably be asserted that such justice is “impartial?” Several sociological studies, many of which have been summarized herein,228 as well as the Supreme Court’s decision in Witherspoon v. Illinois,229 strongly suggest that this is not possible.

Second, Ethical Consideration 7-14 provides, in part, that “[a] government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is

223. Id.
224. Id. EC 7-13 (emphasis added).
228. See supra notes 47-79 and accompanying text.
obviously unfair.”230 If a defendant could use his peremptory challenges to “cancel-out” the prosecutor’s peremptory challenges by challenging one potential juror favoring the death penalty for every potential juror uncertain about the death penalty challenged by the prosecutor, then prosecutorial abuse of the peremptory challenge might not fall to the level of “unfair.” However, it is impossible statistically for a defendant faced with this situation to “cancel-out” the prosecutor’s peremptory challenges. In North Carolina death penalty cases both the defendant and the prosecutor are permitted fourteen peremptory challenges.231 Common sense dictates that if the defendant has fourteen peremptory challenges to eliminate 65% of the jurors232 and the prosecution has fourteen peremptory challenges to remove 25% of the jurors233 that the prosecution enjoys a decided advantage. Not only does this appear “unfair” but it also seems quite “obviously unfair.”

Finally, Ethical Consideration 9-1 provides that “[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.”234 To this end “[e]very lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.”235

Prosecutors who select death penalty juries composed entirely of persons who favor execution arguably create an appearance of impropriety “[b]ecause the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits . . . .”236 Any action by a lawyer “attempt[ing] to circumvent those

231. See supra note 8.
232. See supra note 5 (percentage of North Carolinians favoring death penalty).
233. Id. (percentage of North Carolinians opposing death penalty).
235. Id. EC 9-6 (emphasis added).
236. Id. EC 9-4.
procedures is detrimental to the legal system and tends to undermine public confidence in it."\textsuperscript{237} We, as lawyers, and prosecutors, as lawyers and public officials, should not lose sight of the fact that "[i]ntegrity is the very breath of justice. Confidence in our law, our courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice a doubt or distrust of its integrity."\textsuperscript{238} Prosecutorial abuse of peremptory challenges is one such practice.

IV. Conclusion

Prosecutors unquestionably serve a necessary and important function in the criminal justice system. Unfortunately, a few prosecutors are engaging in questionable use of peremptory challenges in death penalty cases. Similarly, the peremptory challenge serves a necessary and important function in the criminal justice system. However, when a prosecutor uses peremptory challenges to create death penalty juries composed entirely of persons favoring execution "it would appear that the purposes of the peremptory challenge are being perverted."\textsuperscript{239}

Although there is still room for debate concerning the effect of prosecutorial abuse of peremptory challenges on a defendant’s constitutional rights, since such abuse carries severe unconstitutional and irreversible implications, meaningful judicial review and interpretation are necessary. Unfortunately, the majority of courts faced with prosecutorial abuse of peremptory challenges have refused to curtail the practice reasoning that the peremptory challenge is unassailable.

The recent judicial trend concerning prosecutorial abuse of peremptory challenges, however, has been to shed the unassailable theory and adopt measures that protect the defendant’s constitutional rights yet allow for a workable peremptory challenge system. Virtually all judicial decisions making up this recent trend have involved prosecutorial abuse of peremptory challenges to exclude certain races—primarily blacks. However, that prosecutorial peremptory exclusion of nonracial groups, such as all persons possessing some degree of hesitancy concerning the wisdom of the

\textsuperscript{237} Id.

\textsuperscript{238} Erwin M. Jennings Co. v. Di Genova, 107 Conn. 491, 499, 141 A. 866, 868 (1928).

death penalty, is a concept just appearing on the horizon of judicial thought, should not denigrate the importance of defense counsel raising the issue. Whenever defense counsel suspects that a prosecutor has targeted and is removing a particular group of individuals, he or she must object on record making specific reference to the particular constitutional provisions being violated. It is only in this way that the appellate door to the federal judiciary will remain open and that one day the Supreme Court will hopefully take the opportunity to place limitations on the abused and unbridled prosecutorial weapon—the peremptory challenge.