THE DEMOGRAPHIC DILEMMA IN DEATH QUALIFICATION OF CAPITAL JURORS

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It is important to recall what motivated Members of this Court at the genesis of our modern capital punishment case law. Furman v. Georgia *was decided in an atmosphere suffused with concern about race bias in the administration of the death penalty—particularly in Southern States.*[1]

INTRODUCTION

While the Supreme Court rejected the use of the death penalty in cases involving aggravated rape of child victims in *Kennedy v. Louisiana*[2] in 2008, there was no suggestion in the Court's decision that overall support for capital punishment within the Court and the country had significantly diminished.[3] In fact, one of the rather

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* Professor of Law, University of Arkansaas at Little Rock ("UALR") Bowen School of Law. I want to acknowledge the excellent work and support provided by Molly K. Sullivan, Assistant Federal Defender, Eastern District of Arkansas, in reviewing this Article. This is third in a series of articles examining the influence of racial or ethnic discrimination in distorting the capital sentence process. *See* J. Thomas Sullivan, *Lethal Discrimination*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 69 (2010), and *Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 113 (2010). Generous support underwriting the research and writing of this Article was provided by the UALR Bowen School of Law.

1. Graham v. Collins, 506 U.S. 461, 479 (1993) (Thomas, J., concurring) (referring to the social concerns underlying the Court's considerations in *Furman v. Georgia*, 408 U.S. 238, 240 (1972)).

2. 554 U.S. 407 (2008).

3. In fact, the Court has consistently upheld the use of capital punishment as a sentencing alternative since its decisions precluding the use of the penalty in cases involving juveniles or individuals suffering from significant developmental disabilities or mental retardation. *See generally, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002). For instance, the Court upheld the use of lethal-injection protocols against an Eighth Amendment challenge in *Baze v. Rees*, 553 U.S. 35 (2008). And more recently, it rejected a capital defendant's ineffective assistance of counsel challenge in *Smith v. Spisak*, 558 U.S. 139, 151 (2010), despite counsel's strategy in closing argument in characterizing the mentally impaired defendant

amazing aspects of the 2008 presidential election was that Democratic Party nominee Barack Obama agreed with Justice Alito's dissent,[4] expressing his belief that capital punishment should be authorized for certain rapists who have committed violent sexual offenses against child victims.[5] The effect—regardless of intent—of Obama's statement, supported by his prior writings, was to neutralize any Republican attacks that would have cast him as soft on crime, a lesson learned by Democrats in the failed 1988 candidacy of Michael Dukakis.[6] Perhaps the most interesting and undiscussed aspect of Obama's declared support for the application of capital punishment to child rape is the fact that his view contrasts so sharply with attitudes held by a majority of African Americans.

In considering the broad question of whether the administration of the death penalty is tainted, perhaps inherently so, by the continuing existence of racially discriminatory attitudes in American society,[7] a complete assessment requires that virtually all aspects of the operation of the criminal law and criminal justice system be reviewed. A comprehensive examination would almost necessarily include inquiry about the root causes of violent crime,

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as "sick," "twisted," and "demented" and reminding jurors of the defendant's admiration for Hitler. *Id.* at 150. The Court held that even this questionable line of argument did not support finding that counsel rendered ineffective assistance where the record does not support the conclusion that a "more reasonable" argument would have, within reasonable probability, led to a different result. *Id.* at 151.

4. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (Alito, J., dissenting).

5. *See, e.g.*, Lyle Davidson, *Final Brief on* Kennedy v. Louisiana, SCOTUSBLOG (Sept. 24, 2009, 2:12PM), http://www.scotusblog.com/wp/final-brief-on-kennedy-v-louisiana/ (noting that the State of Louisiana appended statements from Senators McCain and Obama opposing the majority's decision in *Kennedy* in support of its motion for rehearing); *McCain, Obama Disagree with Child Rape Ruling*, NBCNEWS.COM (June 26, 2008), http://www.nbcnews.com/id/25379987/ns/politics-decision_08/t/mccain-obama-disagree-child-rape-ruling ("'I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes,' Obama said at a news conference. 'I think that the rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution.'").

6. *McCain, Obama Disagree with Child Rape Ruling*, *supra* note 5 ("In 1988, a question about rape and capital punishment tripped up Democratic presidential nominee Michael Dukakis. Dukakis was asked during a nationally televised debate with Republican George H. W. Bush whether he'd still oppose the death penalty if his wife were raped and murdered. His unemotional, dispassionate answer was ridiculed, and gave Republicans more material to paint him as an emotionless liberal.").

7. This was the position taken by Justice Douglas in his opinion supporting the plurality decision in *Furman v. Georgia*, 408 U.S. 238, 240, 247 (1972) (Douglas, J., concurring).

persistent effects of lingering racism in social attitudes, disparate impact of certain public policies on members of ethnic minority groups, the roles of poverty and drug abuse within various communities in influencing behavioral choices, and the responses of law enforcement officials and prosecutors to violent crime—in this context murders—that may qualify for treatment as capital offenses. A thorough, overall assessment of capital punishment and its administration as it impacts ethnic minorities and American society, generally, is beyond the scope of any single discipline.[8] Perhaps more significantly, for the purposes of legal analysis, it is almost certainly beyond the expertise and scope of authority vested in the judicial system.[9] If addressed at all, it would seem to be a matter of

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8. Much of the most instructive work on issues relating to the impact of racial discrimination in the criminal justice system has been done by social scientists, rather than lawyers, although many law faculties now include scholars trained in multidisciplinary analysis. For examples of significant scholarship that goes beyond legal analysis to consider issues relating to this topic, see Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUDIES 277 (2001) (Professors Eisenberg and Garvey are members of the Cornell University Law Faculty; Wells is a Professor of Statistics in the Department of Social Statistics at Cornell); Nancy J. King & Roosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331 (2005) (using statistical analysis to demonstrate that in selected comparative samples of sentences, juries tended to impose more varied and severe sentences than those imposed by judges. King is a Professor of Law at Vanderbilt University Law School; Noble is Senior Lecturer in the Department of Sociology at Vanderbilt); Samuel Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL'Y REV. 65 (2008) (providing also a valuable bibliography on pages 97–107); and Robert Weisberg, *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*, 1 ANN. REV. LAW & SOC. SCI. 151 (2005) (reviewing reliance of social-science methodology in examining the unresolved issue of deterrent effect of capital sentencing).

9. When confronted with a claim that the death penalty was imposed in a racially discriminatory fashion in *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987), the Supreme Court rejected the claim, holding that the supporting social-science evidence showing racially imbalanced use of the death penalty relied on by the petitioner failed to demonstrate the "major systemic defects" that had led a plurality of the Court to reject then-existing capital sentencing statutes in *Furman v. Georgia*. 481 U.S. at 312–13. Thus, in light of the majority decision, an individual capital defendant must demonstrate that the death sentence imposed in his own case was the product of racial bias in order to obtain relief. The majority's focus was made apparent in its directive: "If the circumstances of a particular case indicate a significant likelihood that racial bias may influence a jury, the Constitution requires questioning as to such bias." *Id.* at 309 n.30 (citing Ristaino v. Ross, 424 U.S. 589, 596 (1976)). Justice Powell, who wrote the majority opinion in *McCleskey*, had taken a similarly limited view in his dissenting opinion in *Furman*, observing:

investigation that must be undertaken with serious commitment to fact finding by the legislative branch.[10]

This Article focuses on the disparity in support for the death penalty among black and white Americans and the dilemma created by this disparity in any meaningful effort to combat influences and perceptions of racial discrimination in the administration of the death penalty.[11] The dilemma involves a problem created when lack of support for the death penalty among African Americans compromises the composition of capital juries in such a way that the capital sentencing process threatens to become a system in which minority jurors are excluded from this critical aspect of the criminal justice process altogether.

I. DEATH SENTENCES AND THE DEMOGRAPHICS OF CAPITAL JURIES

One aspect of the criminal justice system particularly relevant to the consideration of fairness of capital sentencing, which has been especially troubling and resulted in significant litigation, involves the composition of juries. While the problem has been addressed generally with regard to criminal trial juries, it has often been raised in the context of capital prosecutions.[12] Concerns about racial fairness in the use of the death penalty have enhanced the relevance

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> Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation *might be* established.

408 U.S. at 449 (Powell, J., dissenting) (emphasis added).

10. In considering the impact of the social-science evidence offered in support of the petitioner's challenge to the death penalty in *McCleskey,* 481 U.S. at 312–13, Professor Weisberg observed that the Supreme Court did not reject the evidence as unpersuasive or insufficient, but instead, accepted the data as accurate while denying relief on the equal protection claim by holding that the research did not serve to show that his death sentence was the result of intentional discrimination. Weisberg, *supra* note 8, at 164. Moreover, the Court rejected the more generalized Eighth Amendment claim based on the influence of racial discrimination in creating disparity in the application of the death penalty, according to Weisberg, because the implications of the research would effectively serve to condemn the entire criminal justice system since the factors underlying discriminatory use of the death penalty "probably infected the entire law enforcement system." *Id.* at 164–65.

11. A significant aspect of the potential damage created by the perception of racial bias in the administration of the death penalty noted but not otherwise addressed in this Article involves the fear of black capital defendants that they will be sentenced to death because of racial discrimination in the selection of capital juries. *See infra* notes 18–21 and accompanying text.

12. *See, e.g.*, State v. Bell, 192 S.E. 852, 853 (N.C. 1937) (holding that the argument that a defendant tried by an all-white, all-male jury was not supported by the trial record).

of underlying issues that implicate sentencing decisions that involve the imposition of death sentences based on jury decision making.[13] The heart of the most serious attacks on jury composition lies in the underrepresentation of African Americans in criminal trial juries, particularly in the trial of capital cases in which the death penalty is sought.[14] And the most troubling of these scenarios involves the conviction and death sentencing imposed upon black defendants by all-white juries.[15]

The argument that the exclusion of African Americans from criminal juries violates constitutional protections has long been recognized by the Supreme Court.[16] In the celebrated case of the "Scottsboro Boys,"[17] *Norris v. Alabama*,[18] the Court reversed the convictions of the black defendants convicted of rape by an all-white jury based upon evidence unequivocally demonstrating the systematic exclusion of African Americans from service on grand and petty juries in the State over an extended period of years.[19] The Court found:

> We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson county, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids.[20]

Thirty years after the Court's clear decision in *Norris*, in *Swain v. Alabama*,[21] a black defendant challenged his capital conviction

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13. *Id.*
14. *Id.*
15. *Id.*
16. In *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879), the Court held that the statutory exclusion of African Americans from jury service is unconstitutional based upon violation of their rights as citizens.
17. The case has generated extensive commentary and coverage, including the recent retelling of the story in an acclaimed Broadway Musical, *The Scottsboro Boys*. *See The Scottsboro Boys*, SCOTTSBOROMUSICAL.COM, http://scottsboromusical.com/index.html (last visited Sept. 9, 2014). The musical premiered off Broadway in 2010, then opened on Broadway in 2010, and received twelve Tony Award nominations, but won none. *See id.*
18. 294 U.S. 587 (1935).
19. *Id.* at 599.
20. *Id.* at 596.
21. 380 U.S. 202 (1965).

and sentence of death for rape[22] on the ground that the prosecution had violated the Fourteenth Amendment by peremptorily challenging all six qualified black jurors, resulting in an all-white jury that decided his fate.[23] While recognizing the underlying merit to his claim that exclusion of prospective jurors based on race would violate constitutional protections,[24] the *Swain* majority nevertheless held that the prosecutor's motivation for the use of peremptory challenges in an individual case was insulated from inquiry,[25] and thus, constitutional attack.[26] For twenty years, the burden imposed upon criminal defendants to show that prosecutors engaged in a pattern of discriminatory use of peremptory challenges in order to sustain a constitutional challenge based on exclusion of minority jurors—the test imposed by the *Swain* majority—persisted until the Supreme Court overruled its remedy provision by permitting objections to the use of peremptory strikes in individual cases in *Batson v. Kentucky*.[27]

Even a cursory review of state court decisions demonstrates that the incidence of death sentences imposed on black defendants by all-white juries has been widespread over the course of post-*Furman* use of the death penalty.[28] While some state courts have

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22. *Id.* at 203.

23. *Id.* at 230–31.

24. *Id.* at 203–04.

25. *Id.* at 221–22.

26. The legacy of discrimination and underrepresentation of African Americans in criminal trials in Alabama courts and those of other Southern states is documented in BRIAN A. STEVENSON, EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY (2010), *available at* http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf (documenting the prevalence of death sentences imposed by all-white or nearly all-white juries in capital trials).

27. 476 U.S. 79, 89 (1986).

28. In some cases, courts have ordered relief where defendants were convicted of murder and sentenced to death by all-white juries. Typically, claims related to the exclusion of minority jurors have been raised on behalf of black defendants, often charged in cross-racial offenses in which victims were white. The sampling of reported death sentences imposed by all-white juries shows that whether or not this circumstance has been common, it has been reflected in decisions from a significant number of states. *See Alabama*: Wright v. State, 593 So. 2d 111, 118–19 (Ala. Crim. App. 1991); Jackson v. State, 516 So. 2d 726, 758 (Ala. Crim. App. 1985). *Arkansas:* Sales v. State, No. CR 10-53, 2011 WL 4492458, at *1 (Ark. Sept. 29, 2011); Wooten v. State, 931 S.W.2d 408, 410–11 (Ark. 1996) (white defendant); Ward v. State, 733 S.W.2d 728, 729–30 (Ark. 1987); *California*: Johnson v. California, 545 U.S. 162, 164 (2005); People v. Cowan, 236 P.3d 1074, 1112 (Cal. 2010); People v. Pride, 833 P.2d 643, 690 (Cal. 1992); People v. Johnson, 767 P.2d 1047, 1081 (Cal. 1989); People v. Turner, 726 P.2d 102, 103 (Cal. 1986); *Delaware*: Riley v. State, 496 A.2d 997, 1009 (Del. 1985), *relief granted*, No. 03-11094, 1988 WL 130430, at *2–3 (Del. Super. Ct. Nov. 15, 1988); *Florida*: State v. Davis, 872 So. 2d 250, 251 (Fla. 2004); McDonald v. State, 743 So. 2d 501, 502–03 (Fla. 1999); Gordon v. State,

704 So. 2d 107, 110 (Fla. 1997); Bottoson v. Singletary, 685 So. 2d 1302, 1303 (Fla. 1997); Capehart v. State, 583 So. 2d 1009, 1014 (Fla. 1991); *Georgia*: Gamble v. State, 357 S.E.2d 792, 793 (Ga. 1987); Cervi v. State, 282 S.E.2d 629, 633 (Ga. 1981); Jackson v. Hopper, 207 S.E.2d 58, 60 (Ga. 1974); *Illinois*: People v. Thomas, 647 N.E.2d 983, 988 (Ill. 1995); People v. Johnson, 499 N.E.2d 1355, 1368 (Ill. 1986) (all-white jury convicted, court sentenced black defendant to death when defendant waived jury sentencing); People v. Jones, 475 N.E.2d 832, 836–37 (Ill. 1985); People v. Gaines, 473 N.E.2d 868, 873 (Ill. 1984); People v. Lampkin, 457 N.E.2d 50, 55 (Ill. 1983); People v. Newsome, 443 N.E.2d 634, 637 (Ill. App. Ct. 1982); *Kentucky*: Bussell v. Commonwealth, 882 S.W.2d 111, 112 (Ky. 1994); *Louisiana*: State v. Snyder, 942 So. 2d 484, 486 (La. 2006), *rev'd in part*, 551 U.S. 1144 (2007), *rev'd in part*, 552 U.S. 472 (2008); State v. Weary, 931 So. 2d 297, 336 (La. 2006); State v. Hoffman, 768 So. 2d 542, 556–57 (La. 2000); State v. Wessinger, 736 So. 2d 162, 196 (La. 1999); State v. Taylor, 669 So. 2d 364, 381 (La. 1996); State v. Ford, 489 So. 2d 1250, 1263–64 (La. 1986); State v. Perry, 420 So. 2d 139, 152 (La. 1982); *Maryland*: State v. Calhoun, 511 A.2d 461, 465 (Md. 1986); *Mississippi*: Batiste v. State, 121 So. 3d 808 (Miss. 2013); Puckett v. State, 737 So. 2d 322, 333 (Miss. 1999); Carr v. State, 655 So. 2d 824, 839 (Miss. 1995); *Missouri*: State v. Anderson, 306 S.W.3d 529, 542 (Mo. 2010); Ringo v. State, 120 S.W.3d 743, 746 (Mo. 2003); State v. Taylor, 18 S.W.3d 366, 374 (Mo. 2000); *Nevada*: Moore v. State, No. 55091, 2012 WL 3139870, at *4 (Nev. Aug. 1, 2012); Nevius v. State, 699 P.2d 1053, 1057 (Nev. 1985); *New Jersey*: State v. Gilmore, 511 A.2d 1150, 1154 (N.J. 1996); *North Carolina*: State v. Rouse, 451 S.E.2d 543, 553 (N.C. 1994); *Ohio*: State v. Herring, 762 N.E.2d 940, 953 (Ohio 2002); State v. Mason, 694 N.E.2d 932, 954 (Ohio 1998); *Pennsylvania*: Commonwealth v. Crenshaw, 470 A.2d 451, 454 (Pa. 1983); *Tennessee*: State v. Johnson, 762 S.W.2d 110, 112 (Tenn. 1988); *Texas*: *Ex Parte* Williams, No. AP-76455, 2012 WL 2130951, at *20, *26 (Tex. Crim. App. June 13, 2012); *Ex parte* Brandley, 781 S.W.2d 886, 929–30 (Tex. Crim. App. 1989); and *Virginia*: Satcher v. Commonwealth, 421 S.E.2d 821, 844–45 (Va. 1992). Conventional legal research does not necessarily disclose how pervasive the experience of all-white juries in imposing death sentences may actually be. Other instances of black defendants suffering capital sentences imposed by all-white juries may simply not be reflected in published decisions, however. For instance, in *Sterling v. Dretke*, 117 F. App'x 328, 331 (5th Cir. 2004), the Fifth Circuit rejected a federal habeas claim based on trial counsel's failure to voir dire prospective jurors on racial prejudice where posttrial investigation disclosed that one of the twelve white jurors admittedly referred to African Americans as "nig**rs." Sterling had argued on direct appeal that the State had used its peremptory challenges to remove black "venirepersons" in the jury selection phase of his capital trial. Sterling v. State, 830 S.W.2d 114, 118 (Tex. Crim. App. 1992). Neither court referenced the all-white jury in its decision, a fact known to the author as one of Sterling's post-conviction attorneys. Similarly, not all death sentences imposed by all-white juries have been suffered by minority defendants. For instance, in *Reed v. Quarterman*, 555 F.3d 364, 369, 382 (5th Cir. 2009), the Fifth Circuit ordered federal habeas relief on a *Batson* claim in a case that had been pending for thirty years based on improper exclusion of black venirepersons by Dallas County, Texas, prosecutors. Reed is white, but was entitled to the protection of *Batson* under *Powers v. Ohio*, 499 U.S. 400 (1991) because the claim was based, in part, on the exclusion of jurors based on their race or ethnic background under the Fourteenth Amendment. *Reed*, 555 F.3d at 368. Consequently, the accused's race or ethnicity may be an important factor in considering the nature of potential racial animus on the part of jurors considering sentencing a convicted defendant to death—

addressed the potential prejudice by affording relief, more typically, reviewing courts have rejected claims that death sentences imposed by all-white juries, even when the accused is black, represent too great a threat of constitutional taint in upholding those sentences.[29]

Not only does the imposition of an all-white jury's death sentence or death recommendation threaten the integrity of the punishment decisions in circumstances in which black defendants suffer the sentence, but the potential for infliction of death due to racial or ethnic prejudice may also compromise the integrity of other dispositions. For instance, in *Samuels v. State*,[30] the state court rejected a post-conviction challenge to the defendant's guilty plea to a murder charge alleged to have resulted from his fear of the death penalty.[31] The court relayed the defendant's argument:

> I only pled guilty because my lawyer, Peter Sterling, told me that if I went to trial that I would probably get an all white jury and that because I am black and accused of killing a white man that the jury would probably find me guilty and give me the death sentence, and that even though I had a very good case that he thought that my best chance to avoid the death penalty was to accept the offer to plead guilty to second degree murder and that I did not have any chance to get the advise [sic] of others and based on what my lawyer told me and what I know about the way things work in this part of Missouri, I was convinced that my only real choices were to plead guilty for something I did not do or end up dying in the gas chamber for something I did not do.[32]

The court found that the defendant failed to carry his burden of proof on his post-conviction attack, explaining:

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particularly in cross-racial murders—but the constitutional violation still exists if race is not an issue directly implicated in the offense. It remains a significant factor in considering the attitudes of potential jurors to the use of the death penalty, the focus of this Article. The Fifth Circuit never mentioned that Reed was sentenced to death by an all-white jury, again a fact known to the author as one of his post-conviction attorneys.

29. *See* cases cited *supra* note 28.

30. 770 S.W.2d 717 (Mo. Ct. App. 1989).

31. *Id.* at 719.

32. *Id.*

> The movant knew the anticipated evidence against him. He knew Garner had been found guilty of first degree murder. Movant's motivation to avoid the possibility of the death penalty is not the type of fear that forms the basis for the withdrawal of a guilty plea. "Fear that the death penalty might be imposed does not render a guilty plea vulnerable to a subsequent attack on the ground that the plea was coerced."[33]

Even if the appellate court was correct in holding that fear of the death penalty does not render a guilty plea involuntary,[34] the prospect that a death sentence would be imposed as a result of racial prejudice—thus prompting a guilty plea to avoid death—cannot be disregarded in light of the history of capital sentencing in the United States.

II. RACIAL FAIRNESS AND JURORS IN THE CAPITAL SENTENCING PROCESS

The lengthy history of jury selection litigation in the Supreme Court suggests the Court's significant concern that the jury trial system in the nation's courts not be contaminated by racial discrimination.[35] Another perspective from the Court demonstrates its long-standing concern that citizens not be arbitrarily excluded from jury service based on race, ethnicity,[36] or gender.[37] That concern has been reflected in a series of decisions addressing the demographic composition of juries, particularly capital juries.[38]

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33. *Id.* at 722 (citing Hurd v. State, 735 S.W.2d 438, 440 (Mo. Ct. App. 1987)). One might argue that trial counsel improperly influenced his client to plead guilty by advising him of the potential prejudice he might suffer if sentenced by an all-white jury, perhaps scaring him into pleading guilty. But, given the realities, how could counsel have represented his client properly without explaining the potential consequences of exercising his right to jury trial, including the threat of a death sentence if convicted?

34. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 28, 38–39 (1970) (rejecting the argument that a guilty plea to a murder charge entered to avoid possibility of the death penalty at trial rendered the plea involuntary).

35. *See supra* note 28.

36. Strauder v. West Virginia, 100 U.S. 303, 305 (1879). The focus in *Strauder* was on the statutory exclusion of African Americans from jury service, a right and duty of citizenship. The right of the accused to be tried by an ethnically diverse jury, the focus of this Article, reflects a different concern.

37. In *Duren v. Missouri*, 439 U.S. 357 (1979) and *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court held that a statutory scheme or procedure effectively excluding females from service violates the fair cross-section requirement for juries under the Sixth Amendment. These rulings were not directed at the right of women to serve as jurors, but the criminal defendant's right to have a jury pool randomly drawn, reflecting the demographic makeup of the community. A system of self-exclusion that prompted women to avoid jury service undermined the Sixth Amendment's promise of a jury fairly selected from the community in which the case would be tried.

38. *See, e.g.*, cases cited *supra* note 28.

Two constitutional principles have been the focus of much of this litigation. One issue involves the necessity of attempting to identify prospective jurors whose attitudes on race might result in sentencing decisions in which the race or ethnicity of the defendant, or the victim, might improperly influence those jurors to impose a death sentence when a sentence of life imprisonment would have otherwise been their decision based on the evidence adduced in the capital trial and sentencing proceeding.[39] The problem posed by racially discriminatory attitudes held by capital jurors is particularly difficult to address because the remedy almost necessarily involves self-disclosure of racial animus by prospective jurors holding such attitudes, an often impossible objective for defense counsel engaging in even the most thoughtful and probing examination during voir dire. A second issue, discussed in Subpart II.B of this Article, involves the use of preemptory challenges to improperly exclude minorities from capital sentencing juries.

A. Addressing the Problem Posed by Racial Animus Held by Capital Jurors

One focus of the Court's jurisprudence has been directed at racial prejudice harbored by jurors themselves, particularly in the context of capital prosecutions. In 1931, in *Aldridge v. United States*,[40] the Court recognized the potential for racial prejudice to improperly influence the capital sentencing decision in a prosecution of a "negro" defendant charged with the murder of a white police officer.[41] Defense counsel noted that in a prior trial, a "Southern" "venireperson" had indicated that she might be influenced by the fact that a black defendant was charged with the murder of a white person, and requested the trial court inquire into possible racial

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39. I have previously discussed problems arising in the actual use and enforcement of mechanisms in place designed to address potential sources of racial discrimination in the capital jury's sentencing process in greater detail in *Lethal Discrimination* and *Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing*, *supra* note *. In the first article, I reviewed in depth the capital sentence of a black capital defendant from Texas, Gary L. Sterling, who was sentenced to death by an all-white, rural Texas jury that included one juror who admitted routine use of the word "nigger" when referring to African Americans. I represented Sterling throughout much of the post-conviction process. *See* Sterling v. Cockrell, 100 F. App'x 239, 242–43, (5th Cir. 2004). In the second article, I advanced general arguments for strengthening the enforcement of these mechanisms that would, admittedly, require the Supreme Court to make significant departures from its general approach in reviewing claims of constitutional error in the post-conviction process.

40. 283 U.S. 308 (1931).

41. *Id.* at 309 (the Court did not capitalize *negro* in its opinion).

prejudice on the part of prospective jurors.[42] The trial court refused the request,[43] and the Court reversed.[44]

Moreover, the Court recognized the significance of racial prejudice in capital cases, explaining: "Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding the inquiry. *And this risk becomes most grave when the issue is of life or death.*"[45]

The Court again addressed the need in cross-racial cases for inquiry into the potential for race-based bias in the attitudes in potential jurors in *Ham v. South Carolina*.[46] There, the Court recognized that the risk of racial bias infecting jury deliberations in criminal cases required an opportunity for a black defendant's trial counsel to inquire into the potential racial bias of prospective jurors as an "essential demand of fairness required by [the] Due Process Clause."[47]

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42. *Id.* at 310.

43. *Id.*

44. *Id.* at 315. The Court cited a series of decisions rendered by Southern courts authorizing inquiry into juror bias in cases involving minority defendants. *See* Pinder v. State, 8 So. 837, 838–39, 841 (Fla. 1891); Hill v. State, 72 So. 1003, 1003 (Miss. 1916); State v. McAfee, 64 N.C. 339 (1870); State v. Sanders, 88 S.E. 10, 12 (S.C. 1916) (noting juror expressed prejudice against defense counsel based on counsel's race); Fendrick v. State, 45 S.W. 589, 590–91 (Tex. Crim. App. 1898). The *Aldridge* Court also noted decisions in which prospective jurors admitting racial prejudice were sua sponte excused by trial courts. 283 U.S. at 312 & n.2; *see also, e.g.*, State v. Brown, 87 S.W. 519, 522 (Mo. 1905) (holding juror's admitted prejudice not sufficient to demonstrate ground for disqualification, but recommending seating of unbiased jurors upon retrial where case reversed and remanded on other grounds); People v. Decker, 51 N.E. 1018, 1020 (N.Y. 1898) (same). It also noted that the inquiry into juror prejudice extended to permit examination "as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character." *Aldridge*, 283 U.S. at 313 (citing Potter v. State, 216 S.W. 886, 888 (Tex. Crim. App. 1919)) (approving examination of Jewish venirepersons about bias where an accused charged with criminal libel in an attack on an individual presumed to be Jewish, having printed comments linking Jews to routine arson of their businesses); *see also* People v. Car Soy, 57 Cal. 102, 103 (1880) (authorizing the question of a prospective juror regarding the possible prejudice against a witness based on the witness's Chinese ethnicity); Watson v. Whitney, 23 Cal. 375, 379 (1863) (reversing where the trial court refused to permit voir dire based on possible prejudice against the "squatters" in a land title action); People v. Reyes, 5 Cal. 347, 349 (1855) (inquiry into juror prejudice directed toward Mexican nationals); Horst v. Silverman, 55 P. 52, 72 (Wash. 1898) (holding it was proper to inquire of prospective juror regarding a bias against persons of Jewish faith in a civil action).

45. *Aldridge*, 283 U.S. at 314 (emphasis added) (footnote omitted).

46. 409 U.S. 524 (1973).

47. *Id.* at 526.

Further, in *Turner v. Murray*,[48] the Court once again affirmed the right to voir dire on questions of racial attitudes, holding that in a death-penalty case in which the defendant and victim were of different races, the defense was entitled to question prospective jurors about their racial attitudes to ensure that the penalty is not imposed based on racially discriminatory views.[49] The Court observed that racial bias in a capital sentencing proceeding is particularly problematic:

> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner's crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, might incline a juror to favor the death penalty.[50]

Turner confirmed the Court's long-standing concerns previously identified with regard to racial prejudice in the administration of the death penalty.[51]

The Court's commitment to voir dire on the question of racial animus held by prospective jurors has been strained, in a sense, by an apparent unwillingness to concede the pervasive tendency toward racial or ethnic bias that may compromise jury decision making. In *Ristaino v. Ross*,[52] for instance, the Court declined to mandate questioning of jurors on matters of prejudice when the suggestion of potential prejudice tainting a verdict lies only in the cross-racial nature of the case.[53] In *Ham*, the circumstances suggested a potential motive for the prosecution itself where the accused, a civil rights activist, argued that his arrest and prosecution on a drug offense were being undertaken in retaliation for his community activism.[54] Absent circumstances suggesting a greater potential for racial bias to influence the jury, the *Ristaino*

48. 476 U.S. 28 (1986).
49. *Id.* at 35.
50. *Id.*
51. *Id.* at 28.
52. 424 U.S. 589 (1979).
53. *Id.* at 596–97. The case involved a cross-racial offense in which African Americans were charged with violently assaulting a white security guard, but not with a capital crime. *See id.* at 591.
54. Ham v. South Carolina, 409 U.S. 524, 525 (1973).

Court held that inquiry into bias is not required as a matter of constitutional right based only on the cross-racial nature of the offense charged.[55] Subsequently, in *Rosales-Lopez v. United States*,[56] the majority reiterated its position, holding:

> As *Ristaino* demonstrates, there is no *per se* constitutional rule in such circumstances requiring inquiry as to racial prejudice. Only when there are more substantial indications of the likelihood of racial or ethnic prejudice affecting the jurors in a particular case does the trial court's denial of a defendant's request to examine the jurors' ability to deal impartially with this subject amount to an unconstitutional abuse of discretion.[57]

The Court did not totally reverse its position regarding the importance of voir dire as a tool for discovering existence of juror attitudes on matters of race that might compromise the fairness or accuracy of their decisions, leaving the issue largely to the discretion of federal trial judges in assessing the need for specific questioning in federal trials.[58] The majority explained the scope of its concern and decision:

> *Aldridge* and *Ristaino* together, fairly imply that federal trial courts must make such an inquiry when requested by a defendant accused of a violent crime and where the defendant and the victim are members of different racial or ethnic groups. This supervisory rule is based upon and consistent with the "reasonable possibility standard" articulated above. It remains an unfortunate fact in our society that violent crimes perpetrated against members of other racial or ethnic groups often raise such a possibility. There may be other circumstances that suggest the need for such an inquiry, but the decision as to whether the total circumstances suggest a reasonable possibility that racial or ethnic prejudice will affect the jury remains primarily with the trial court, subject to case-by-case review by the appellate courts.[59]

Rosales-Lopez reflects the Court's appreciation for the fact that ethnically and racially discriminatory attitudes represent the same type of bias that may require specific inquiry, and the Court noted that the trial judge had in fact excluded two prospective jurors based on responses to the general inquiry that it made.[60]

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55. 424 U.S. at 596.
56. 451 U.S. 182 (1981).
57. *Id.* at 190.
58. *Id.* at 189.
59. *Id.* at 192.
60. *Id.* at 193 ("[T]he trial court reasonably determined that a juror's prejudice toward aliens might affect his or her ability to serve impartially in

Turner remains intact in requiring voir dire on racial or ethnic prejudice in the context of cross-racial capital prosecutions, but appears to rest on the potential for improper administration of the death penalty, rather than a more general concern for juror bias in the criminal trial process. In this sense, the greater protection, including constitutionally based protection, afforded for capital defendants may simply reflect the post-*Furman* concern that the death penalty not be imposed on the basis of race or ethnicity of the accused.[61]

But, in practice, reliance on *Turner* as an effective mechanism for assessing racial attitudes of prospective jurors is compromised by the most obviously unreliable part of the process recognized by the Court: reliance on self-disclosure of racist attitudes by prospective jurors themselves.[62] The hesitance of prospective jurors—who are drawn from the community generally and, consequently, are likely to have extremely diverse perspectives on what constitutes bias and are also likely to demonstrate substantial differences in terms of personal insight and sensitivity to issues, even so basic as race and ethnic discrimination—to provide useful information during voir dire must be recognized.[63] With regard to matters of racial and ethnic bias, moreover, changing social attitudes toward views considered unacceptable are strong inducements for those who hold discriminatory attitudes to deny or minimize this bias.[64] Trial

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this case. The court, therefore, questioned the prospective jurors as to their attitudes toward aliens. There can be no doubt that the jurors would have understood a question about aliens to at least include Mexican aliens. The trial court excused two jurors for cause, based on their responses to this question. Removing these jurors eliminated, we believe, any reasonable possibility that the remaining jurors would be influenced by an undisclosed racial prejudice toward Mexicans that would have been disclosed by further questioning.").

61. *See supra* note 1 and accompanying text.

62. In *Sterling*, the capital petitioner challenged the effectiveness of trial counsel's representation, arguing that counsel's failure to even attempt to voir dire prospective capital jurors with respect to their attitudes on race demonstrated defective performance. Sterling v. Dretke, 117 F. App'x 328, 331–32 (5th Cir. 2004). The Fifth Circuit noted, in response: "While Dunn did not question any potential jurors about racial bias, he stated this decision rested on his belief that he very seldom receives truthful answers." *Id.* at 332. Counsel's experience is not unusual because jurors are likely to be reluctant to admit racial bias, or may simply not believe that they possess racially discriminatory attitudes.

63. *Id.* at 332.

64. In contrast, it is often rather easy for capital defense counsel to identify pro-death-penalty attitudes in prospective jurors whose views may be so extreme with respect to the sentencing issue in a capital prosecution that the trial court will be compelled to exclude the juror based on his or her inability to consider the usual alternative sentencing option of life imprisonment. Overall support for capital punishment in the United States makes such a position more acceptable in the community, undoubtedly accounting for much of the

lawyers may have some success in teasing revealing answers from prospective jurors through careful and deliberate examination, but there is likely no completely reliable means to make the *Turner* remedy available for testing juror bias work effectively in practice.

Perhaps in recognition of the persistent problem of racial animus and other sources of discrimination held by some capital jurors and the ineffectiveness of the voir dire as a means for identifying potential bias compromising the fairness of the capital sentencing process, the federal capital sentencing process requires jurors to affirm that their decisions are not the product of discrimination.[65] The controlling statute provides:

> *Special precaution to ensure against discrimination.*—In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.[66]

The oath may prompt some jurors, upon reflection, to address potential bias individually and to address the problem of unfairness in the sentencing decision, but it would seem likely that jurors open to this insight would be most likely to disclose these concerns in response to questioning during voir dire. Prospective jurors whose

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willingness of many venirepersons to openly express opposition, or even hostility, to mitigation or mercy-based sentences in capital cases. Gallup polling in 2009 and 2010 (half sample) showed overall support for capital punishment at 64–65% in the United States. *See Death Penalty*, GALLUP, http://www.gallup.com/poll/1606/death-penalty.aspx (last visited Sept. 9, 2014). The Supreme Court has held that capital defendants have a right to question prospective jurors directly about predisposition with respect to the use of the death penalty. Morgan v. Illinois, 504 U.S. 719, 722, 735–36 (1992) (Illinois procedure required the trial court, rather than defense counsel, to conduct voir dire).

65. 18 U.S.C. § 3593(f) (2012).

66. *Id.*

personal prejudices are held more maliciously would seem less likely to be affected by the oath, perhaps in part because they either simply deny the existence of prejudice or rationalize it in their lives as justified. The ultimate effect of the requirement that jurors certify that their decisions have not been influenced by race, ethnicity, or other inappropriate factors may be to offer a meaningless and rather cynical basis for concluding that improper bias has not contributed to the decision to impose a death sentence.

B. Racial Discrimination in the Capital Jury Selection Process

The second issue addresses the use of peremptory challenges by the prosecution to exclude members of cognizable groups from jury service.[67] The exclusion of minority jurors from service on capital juries has been defined within the larger context of discriminatory exclusion of minorities from jury service generally.[68]

In *Batson v. Kentucky*,[69] the Court reaffirmed the basic right of citizens to participate in the civic event of jury service[70] and, by extension, recognized an implicit right of litigants not to be subjected to trial before juries from which minority citizens had been excluded through discriminatory use of peremptory challenges.[71]

However, in practice, enforcement of *Batson* has proved uneven, as evident in two important capital cases in which the Supreme Court has been forced to deal with the hesitance of lower courts to look beyond claims of nondiscriminatory intent advanced by prosecutors using peremptory challenges to exclude black jurors from service in state death-penalty cases.[72] At least in part, the discretion of trial judges to accept such claims without greater

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67. *See, e.g.*, J.E.B. v. Alabama *ex rel* T.B., 511 U.S. 127 (1994) (exclusion based on gender).

68. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986).

69. *Id.*

70. Strauder v. West Virginia, 100 U.S. 303, 305 (1879). The discriminatory exclusion of minority jurors through the exercise of peremptory challenges was similarly held unconstitutional in *Swain v. Alabama*, 380 U.S. 202, 222–24 (1965).

71. *Batson*, 476 U.S. at 85–86; *see also* Powers v. Ohio, 499 U.S. 400 (1991) (holding that a claim of discriminatory use of peremptories to exclude black jurors may be made by white defendant in criminal trial). The *Batson* principle was extended to preclude discriminatory use of peremptory challenges against prospective jurors based on gender in *J.E.B.*, 511 U.S. at 135–137, 137 n.6. The prohibition against discriminatory use of peremptory challenges was applied to criminal defendants in *Georgia v. McCollum*, 505 U.S. 42, 44 (1992). And *Batson* was extended to prohibit use of peremptories in a discriminatory manner by counsel in civil litigation in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 617 (1991).

72. *See* Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

skepticism must be traced to the Court's decision in *Purkett v. Elem*,[73] where the majority essentially insulated the prosecution's use of peremptory challenges to exclude minority jurors from aggressive scrutiny provided the prosecutor offered a race-neutral explanation for a peremptory strike, regardless of how unimpressive or insincere the reasoning supporting the explanation might be.[74]

Long-term resolution of the problems posed by discriminatory practice in the use of peremptory challenges almost certainly requires reconsideration of the role played by exclusion of jurors based on subjective perceptions of counsel with respect to the predisposition of venirepersons. In *Wilkerson v. Texas*,[75] Justice Marshall, dissenting from the denial of certiorari, explained the fundamental problem:

> *Batson*'s greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors. Assuming good faith on the part of all involved, *Batson*'s mandate requires the parties "to confront and overcome their own racism on all levels," a most difficult challenge to meet. *This flaw has rendered Batson ineffective against all but the most obvious examples of racial prejudice—the cases in which a proffered "neutral explanation" plainly betrays an underlying impermissible purpose.* To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. *Batson* would thereby become irrelevant, and racial discrimination in jury selection, perhaps the greatest embarrassment in the administration of our criminal justice system, would go undeterred. If such "smoking guns" are ignored, we have little hope of combating the more subtle forms of racial discrimination.[76]

Justice Marshall argued for elimination of all peremptory challenges, echoing his position in his concurring opinion in *Batson*.[77]

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73. 514 U.S. 765 (1995).

74. But this is not to say that the moral authority of *Batson* is wholly lacking. In *State v. McFadden*, 216 S.W.3d 673 (Mo. 2007), the Missouri Supreme Court reviewed the prosecutor's claim that juror "S.H." was peremptorily struck because of the juror's "crazy" red hair and neat appearance. Noting the trial court's initial reluctance to accept the prosecutor's explanation as *race-neutral*, the court concluded: "Viewing the totality of circumstances—the prosecution's disdain for S.H.'s red hair, his scrutiny of her lack of driver's license, and his misperception of her reaction as hostile—the prosecution's subjective assumptions about S.H. are far from neutral." *Id.* at 676.

75. 493 U.S. 924 (1989).

76. *Id.* at 928 (Marhall, J., dissenting) (emphasis added) (quoting *Batson*, 476 U.S. at 106 (Marshall, J., concurring)).

77. 476 U.S. at 103 (Marshall, J., concurring).

In both *Miller-El v. Dretke*[78] and *Snyder v. Louisiana*,[79] the Court's frustration over lower court deference to facially acceptable explanations for peremptory strikes directed against black jurors that would prove only superficial upon further scrutiny was apparent. In *Miller-El*, for instance, the Court rejected the findings of Texas courts that lower federal courts had relied upon in ruling that an apparent systematic use of peremptory challenges to exclude minority jurors from the capital trial of a minority defendant did not demonstrate racially discriminatory action by a Dallas County, Texas, prosecutor.[80] The lengthy litigation history in the case suggests the difficulty that capital litigants with meritorious claims must overcome in convincing reviewing courts that exclusion of minority jurors from capital jury service reflects prosecutors' discriminatory intent.[81]

Similarly, the extended litigation in *Snyder v. Louisiana* demonstrates the same sort of unreasoned deference to trial court fact finding or explanations offered by prosecutors in the jury-selection process during direct appeals in state courts.[82] In *Snyder*, the Court eventually rejected the conclusions of Louisiana state courts that a prosecutor's peremptory challenge excluding a minority juror from service in a capital trial was constitutionally acceptable after its original remand for reconsideration had resulted in the state supreme court maintaining its position in deferring to the trial court's rejection of the capital defendant's *Batson* challenge.[83] The state trial court had offered no subjective ground for accepting the prosecutor's purportedly race-neutral explanation for the strike, affording the *Snyder* majority the option to essentially render judgment in reversing the state court.[84]

The prosecutor's peremptory strike in *Snyder* excluded a minority juror who expressed concern that his participation as a capital juror would interfere with completion of the student teaching requirement to earn his education degree.[85] But subsequent information showed that the expected duration of the trial would not

78. 545 U.S. 231 (2005).
79. 552 U.S. 472 (2008).
80. 545 U.S. at 234.
81. *See* Miller-El v. Johnson, 261 F.3d 445 (5th Cir. 2000), *cert. denied sub nom.* Miller-El v. Cockrell, 534 U.S. 1122 (2002), *cert. granted*, 537 U.S. 322 (2003), *rev'd and remanded sub nom.* Miller-El v. Dretke, 361 F.3d 849 (5th Cir. 2004).
82. *See* State v. Snyder, 750 So. 2d 832 (La. 1999), *rev'd*, 874 So. 2d 739 (La. 2004) (vacating the judgment and remanding for reconsideration in light of the Court's decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005)), *cert. granted*, 545 U.S. 1137 (2006), *rev'd and remanded*, 552 U.S. 472 (2008).
83. 545 U.S. at 1137.
84. 552 U.S. at 484–86.
85. *Id.* at 479–80.

actually present the juror with any problem in completing the required student teaching experience.[86] A white juror, who was not struck and was subject to considerable rehabilitation by the prosecutor, advised the court that he was a contractor with two houses under construction that required completion before buyers could move in, and, additionally, he disclosed a family problem: "[M]y wife just had a hysterectomy, so I'm running the kids back and forth to school, and we're not originally from here, so I have no family in the area, so between the two things, it's kind of bad timing for me."[87] The prosecutor accepted this white juror.[88] The *Snyder* Court looked to the disparity in examination of white and black jurors and the prosecutor's decision to retain a white juror whose situation was almost identical to that of the excluded black venireperson, rejecting the explanation that the black juror appeared "nervous" as a race-neutral explanation for the exercise of its peremptory challenge.[89] Because the trial judge had made no specific finding concerning the prospective juror's demeanor,[90] the Court relied on a comparative analysis of the circumstances surrounding the prosecutor's acceptance of the white juror and exclusion of the black juror[91] in reaching its conclusion that the state courts committed clear error in accepting the prosecutor's exercise of the peremptory as racially neutral.[92]

Miller-El and *Snyder* demonstrate both the difficulty in enforcing the guarantee of *Batson* and the ultimate power resting with the Supreme Court to force state and federal courts to honor the promise of capital juries selected without racially discriminatory prosecutorial tactics designed to frustrate *Batson*,[93] which itself had

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86. *Id.* at 480–82.

87. *Id.* at 484.

88. *Id.*

89. *Id.* at 479, 485–86.

90. *Id.* at 479. The Court has routinely reviewed claims of improper exclusion of prospective jurors with deference to the findings of trial courts. *See e.g.*, Uttecht v. Brown, 551 U.S. 1, 9–10 (2007) (noting the trial court's superior position in evaluating the demeanor of prospective jurors justifying deference to the trial-court findings). The trial court's evaluation of the prospective juror's demeanor was also addressed in *Rice v. Collins*, 546 U.S. 333 (2006). There, the Court overruled the Ninth Circuit in finding the trial court's acceptance of the prosecutor's race-neutral explanation for the peremptory challenge where the trial judge stated on the record that he did not observe the juror "rolling his eyes," a basis for strike advanced by prosecutor, but nevertheless found the prosecutor's stated additional concern for the juror's youth was a credible, acceptable explanation for strike. *Id.* at 336–37.

91. *Snyder*, 552 U.S. at 483–84.

92. *Id.* at 485–86.

93. Not only do the lengthy litigation histories in *Miller-El* and *Snyder* reflect the difficulty in overcoming lower court deference to prosecution explanations for the exercise of peremptory challenges to exclude minority jurors from service on capital juries, but these are not necessarily *isolated cases.*

resulted from the failures of the Court's pronouncement in *Strauder v. West Virginia*[94] and the Court's remedy recognized in *Swain v. Alabama*.[95] Moreover, *Miller-El* and *Snyder* also highlight the problem in enforcement of *Batson* in which the Supreme Court's directive in each case has failed to drive lower court decision making; that, in itself, may illustrate the weakness of its moral authority in imposing compliance with its substantive decisions.

More recently, the Court's orders in *Thaler v. Haynes*[96] and *Felker v. Jackson*,[97] both rendered per curiam, suggest that the Court's position in *Snyder* does not herald a more aggressive approach to review of *Batson* issues than traditional deference to trial court findings. In *Thaler*, the Court's order rejected reliance on *Snyder* for the proposition that a prosecutor's explanation that the exclusion of a prospective juror was based on the juror's demeanor, rather than race, required any finding that the trial judge had personally observed and noted the demeanor concerning the prosecutor in order to be upheld.[98]

Similarly, in *Felker*, when the Ninth Circuit summarily reversed a finding that minority jurors had not been peremptorily struck based on race in a California trial,[99] the Court reversed the circuit court, pointing to its lack of reasoning in failing to defer to state court findings in the federal habeas process.[100] The Court's reversal may well be justified in light of the dearth of reasoning related in the circuit court's opinion, evidenced particularly by the lack of any dissent from any of the Justices who had joined in reversing the lower courts in *Miller-El* and *Snyder*.[101] Nevertheless,

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For instance, in another case arising in Dallas County, Texas, *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. 2009), the Fifth Circuit granted federal habeas relief, ordering a new trial for a Texas inmate who had spent thirty years on death row based on his claim that prosecutors had discriminatorily removed minority jurors through the exercise of their peremptory challenges during the selection of his capital trial jury. *Id.* at 365 ("This case has spent three decades winding its way through the state and federal court systems. Today, we add to that lengthy history by concluding that Reed is entitled to habeas corpus relief for his *Batson* claim.").

94. In 100 U.S. 303, 305 (1879). In *Strauder*, the Court held the statutory exclusion of African Americans from jury service unconstitutional. *Id.* at 303. The discriminatory exclusion of minority jurors through exercise of peremptory challenges was similarly held unconstitutional in *Swain v. Alabama*, 380 U.S. 202, 222–24 (1965).

95. *Swain*, 380 U.S. at 223–24.

96. 559 U.S. 43 (2010).

97. 131 S. Ct. 1305 (2011).

98. 559 U.S. at 47.

99. Jackson v. Felker, 389 F. App'x. 640, 641 (9th Cir. 2010).

100. *Felker*, 131 S. Ct. at 1307–08. The Court observed that the Ninth Circuit's "decision is as inexplicable as it is unexplained." *Id.* at 1307.

101. *See* Snyder v. Louisiana, 552 U.S. 472 (2008); Miller-El v. Dretke, 545 U.S. 231 (2005).

it stands as a harsh reminder to lower courts that federal habeas court interference in state proceedings is likely to be scrutinized unfavorably. This suggests that the deferential posture criticized by the Court with respect to the Fifth Circuit's hesitance to reject the findings of Texas courts in *Miller-El* still remains a somewhat safer road in decision making,[102] given the likelihood that the Court will not expand its certiorari docket in significant numbers necessary to review the cases in which racially discriminatory use of peremptory challenges could almost certainly be claimed.

The issues raised by the *Turner v. Murray* and *Batson* lines of cases reflect the problem of addressing actual prejudice likely to result from racism and racial discrimination, respectively, in the trial process. The remedies recognized by the Court in addressing racial bias held by individual jurors and the institutional discrimination that results when jury selection tactics employed by prosecutors are designed to reduce the potential influence of minority jurors' service in the capital trial process demonstrate that the Supreme Court has been aware of the threat to the integrity of the criminal justice process generally, and capital sentencing, specifically, over much of the nation's post–Civil War history. Yet, the continuing rounds of litigation with regard to both problems also serve to demonstrate that the Court's efforts have often proved inadequate to address the ongoing problems of racial discrimination as they infect the criminal trial process and compromise fairness in capital sentencing.

III. DEATH QUALIFICATION OF CAPITAL JURORS

In the context of capital prosecutions, the Court has not only traditionally been concerned with the often interrelated goals of ensuring that African Americans not be excluded from jury service, an act of citizenship, on the basis of racial attitudes and eliminating the influence of racial animus or discrimination from infecting the capital sentencing process.[103] It has also addressed the general fairness of capital sentencing in terms of the attitudes of individual venirepersons toward the death penalty.[104] The issue arose in *Witherspoon v. Illinois*[105] in the context of a capital prosecution in which opposition to the death penalty resulted in the exclusion of a prospective juror from service on a capital trial jury.[106] The majority

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102. *See supra* note 90 and accompanying text (highlighting the Court's preference for deference to trial court decision making in *Uttecht v. Brown* and *Rice v. Collins*).

103. *See, e.g.*, *Snyder*, 552 U.S. at 476–77; State v. Brown, 188 Mo. 451 (1905).

104. Turner v. Murray, 476 U.S. 28 (1986).

105. 391 U.S. 510 (1968).

106. *Id.* at 513–14.

drew a rather fluid line in determining when a juror's attitudes or beliefs with regard to the death penalty would serve, constitutionally, to warrant their exclusion from service as a matter of law, rather than as a matter of trial tactics.[107] It concluded that blanket preclusion from service is not justified in every instance in which the prospective juror expresses general opposition or reservations about use of the penalty, or service on a jury that might be called upon to consider imposition of a death sentence.[108]

But the *Witherspoon* majority also recognized that a juror's opposition to a legislatively authorized and constitutional penalty option could readily jeopardize the prosecution's good faith reliance on the penalty as a sentencing option, when appropriate on the facts of a given case.[109] Consequently, the majority fashioned a rule attempting to balance the State's interest in empanelling a capital jury capable of considering the death penalty as a sentencing option with countervailing interests of the accused—and, presumably, the community—in not arbitrarily excluding individuals from service for whom the death penalty might prove intellectually or emotionally troubling, but whose views did not foreclose the possibility of its imposition.[110]

Exclusion of those jurors expressing opposition to capital punishment is not a simple matter. Jurors whose opposition to capital punishment will *not* impair their ability to consider either the guilt/innocence or punishment stage evidence fairly and render a decision consistent with the evidence are not subject to disqualification under *Witherspoon*.[111] This requires the trial court to carefully apply the standard imposed by the Court with respect to the many prospective capital jurors who bring seemingly inconsistent views on the death penalty to court. Moreover, the erroneous exclusion of even one prospective juror not properly excluded under *Witherspoon* has consistently been held to taint a death sentence imposed by a jury from which a *Witherspoon*-eligible juror has been excluded, requiring the death sentence to be vacated.[112] But the decision concerning the qualification of a juror

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107. *Id.* at 518.

108. *Id.* at 522–23.

109. *Id.* at 513–14.

110. *Id.* at 514–23, 514 n.7. The majority explained that "[i]t is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." *Id.* at 514 n.7.

111. *Id.* at 521.

112. Davis v. Georgia, 429 U.S. 122 (1976); Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969). When the State argued that it would have peremptorily challenged a prospective juror who expressed opposition to capital punishment, but who was not properly excluded under

to serve is committed to the discretion of the trial judge.[113] Trial judges—whether supporting capital punishment or deferring to the judgment of the legislature in adopting it and prosecutors choosing to seek it—are likely to exclude many jurors whose hesitance about imposing a death sentence suggest difficulty in serving or arriving at a verdict.[114]

Thus, the Court's *Witherspoon* rationale for qualification of capital jurors only authorizes the exclusion of a venireperson whose personal opposition to the death penalty unequivocally compromises their ability to consider either the accused's guilt or punishment in the event of conviction if a potential sentence is death. *Witherspoon* expanded upon the claim that disqualification of opponents of capital punishment was constitutionally impermissible.[115] The petitioner argued that exclusion of opponents of the death sentence would not only deny him a representative cross section of community attitudes toward capital sentencing, but also result in a jury predisposed toward conviction.[116] This argument was rejected by the majority as unsupported by the evidence offered in support of the position.[117] However, the Court subsequently recognized that a capital defendant must be entitled to inquire as to whether a prospective juror would always vote in favor of imposing a death sentence after convicting for a capital offense in *Morgan v. Illinois*.[118]

Morgan provides some protection[119] against selection of a capital sentencing jury unequivocally supportive of capital sentencing without regard to the specific facts of the offense or the

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Witherspoon using a strike not exercised at trial, the Court rejected the argument that it could retroactively correct the trial court's error. Gray v. Mississippi, 481 U.S. 648, 665 (1987).

113. *See generally* Darden v. Wainwright, 477 U.S. 168 (1986); Wainwright v. Witt, 469 U.S. 412 (1985).

114. *Witt*, 469 U.S. at 424–34 (providing that a trial judge's determination of a juror's ability to serve is entitled to deference on appeal and in federal habeas process).

115. 391 U.S. at 516–18.

116. *Id.* at 516–18. The majority rejected petitioner Witherspoon's argument that jurors qualified to serve based upon their support or acceptance of the death penalty would be more likely to ignore the presumption of innocence and convict, and instead accepted the prosecution's theory of the case, finding Witherspoon's supporting empirical evidence to be insufficient, concluding that there was an insufficient showing "that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Witherspoon*, 391 U.S. at 513.

117. *Id.* at 517 & n.10.

118. 504 U.S. 719 (1992).

119. This presupposes, of course, honest and accurate responses to capital defense counsel's inquiry concerning sentencing or punishment attitudes of venirepersons.

character of the accused.[120] In a sense, it implicitly offsets, to some extent, the lack of recognition of anti-capital punishment sentiment in the community from which the jury is selected.[121]

Justice Stevens noted in his dissenting opinion in *Uttecht v. Brown*,[122] "Millions of Americans oppose the death penalty," and that "a cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases."[123] However, those jurors who oppose capital punishment are subject to exclusion if unable to convince trial judges of their ability to serve despite that opposition, essentially putting aside personal views about the penalty, and agreeing to decide cases based solely on the evidence presented.[124] The *Uttecht* majority observed: "Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties."[125] But the majority continued: "Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror."[126]

Thus, even jurors not disqualified under the rigorous test of *Witherspoon*, or watered-down versions applied by trial judges,[127] are still subject to exclusion through the exercise of peremptory strikes by prosecutors.[128] Death-qualified capital juries arguably reflect a skewed view of capital punishment through *Witherspoon*

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120. *Morgan*, 504 U.S. at 725.
121. *See id.* at 745.
122. 551 U.S. 1 (2007).
123. *Id.* at 35 (Stevens, J., dissenting).
124. *Id.* at 38.
125. *Id.* at 22 (majority opinion).
126. *Id.*
127. The exclusion of Juror Z in *Uttecht* was based on the perceived confusion of the jury with regard to the sentencing options and the test that the juror would employ before imposing a death sentence, despite the juror's affirmance of capital punishment and explanation that he believed it should be reserved for the most serious cases. *Id.* at 13–15.
128. For example, in the Texas capital prosecution in *Sterling v. State*, 830 S.W.2d 114, 118 (Tex. Crim. App. 1992), trial counsel objected to the use of peremptory challenges to exclude two black jurors. The claimed *Batson* violation failed at trial and on appeal with respect to both excluded jurors, one of whom clearly disqualified herself from service due to her unqualified opposition to the death penalty and her concessions that she would deliberately vote in such a way to avoid its imposition. *Id.* at 118–19. Although the juror could have properly been excluded under *Witherspoon*, the State's decision to use a peremptory challenge to strike her was readily defensible as based on a race-neutral reason.

exclusion of what might be considered absolutist opponents of the death penalty or as a result of prosecution strikes based on less inflexible opposition to the penalty. Regardless, the result is that capital juries will necessarily tend to be more prosecution oriented in capital cases as a result of personal views of the death penalty by prospective jurors.

The issue of death qualification of capital jurors was addressed in *Lockhart v. McCree*,[129] where the Court held that disqualification under *Witherspoon* did not compromise the fairness of the capital sentencing process by excluding from jury service a significant population within the community evidencing a different view of the death penalty.[130] The Court rejected the argument that exclusion of capital punishment opponents resulted in a jury more prone to convict.[131] The petitioner argued that assuming that *Witherspoon* correctly held that jurors opposed to the death penalty could be properly excluded from service on capital juries because they would not or could not follow the law in considering sentencing options that would include death,[132] those qualified jurors would be unfairly predisposed toward conviction.[133]

One suggested resolution of the problem of a capital jury predisposed to convict would be the empanelling of a *Witherspoon* qualified jury for sentencing only, bifurcating not only the guilt/innocence and punishment phases of the capital trial, but also requiring that each be tried before a different jury.[134] In this scenario, the jury selected for the guilt/innocence trial would not be death qualified under *Witherspoon*.[135] This alternative was unacceptable to the majority as a constitutional requirement.[136]

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129. 476 U.S. 162 (1986).

130. *Id.* at 173.

131. *Id.* at 167.

132. *Id.* at 170 & n.7.

133. The Eighth Circuit accepted this premise and the social-science evidence offered in support of this claim. Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985). During the course of litigation in the lower courts, McCree's claim had been consolidated with a prior case, but the petitioner, Grigsby, died during the course of litigation. *Id.* at 229. Lockhart was substituted in as respondent once he was appointed Director of the Arkansas Department of Corrections. *Id.* at 226.

134. *See Lockhart*, 476 U.S. at 184, 204–05 (1986) (Marshall, J., dissenting) (explaining the use of separate juries for guilt/innocence and punishment determinations in capital cases). The *Witherspoon* Court anticipated the argument in favor of the use of separate juries. Witherspoon v. Illinois, 391 U.S. 510, 520 & n.18 (1968).

135. *Lockhart*, 476 U.S. at 204–05. However, since the jury charged with sentencing would be entitled to consider the facts of the offense in assessing the propriety of imposing the death penalty, the State would arguably find it necessary to present its case on guilt/innocence to a second jury, and the defense would presumably elect to respond with any defense asserted at trial if

Possibly the most critical factor in the prosecutor's decision in exercising her peremptory challenges in a capital trial is the attitudes toward the death penalty expressed by prospective jurors who are not excluded from service based on *Witherspoon*.[137] Many jurors may have reservations about personally being involved in the imposition of a death sentence, yet support it as a matter of policy and personal belief.[138] These jurors, reticent about actual service, were targeted by the Texas statute reviewed by the Court in *Adams v. Texas*,[139] which required exclusion of prospective jurors who could not "take an oath that the mandatory penalty of death or imprisonment for life would not 'affect [their] deliberations on any issue of fact.'"[140] The Court held that this requirement violated *Witherspoon*.[141]

Thus, while *Witherspoon* disqualification itself may skew juries in favor of imposition of the death penalty, as well as resulting in capital juries predisposed toward conviction, qualification itself actually represents only the first step in reducing minority juror participation in capital cases. Not only does the qualification process promote compliance with the law in terms of ensuring that jurors selected for service on capital cases are prepared to enforce the law adopted by the legislature by voting on the basis of evidence that will lead to execution, but it opens the door to a secondary concern. Prosecutors are not only interested in qualification of capital juries under *Witherspoon*, but also in learning about the attitudes of prospective jurors and using that information as a basis

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material to the question of sentence, even though the judgment of conviction would bar reconsideration of the actual issue of the accused's guilt.

136. The *Lockhart* Court noted that it had upheld the Georgia statute against a challenge based upon the statutory requirement that the same jury serve both in the guilt/innocence and punishment phases of the capital trial. *Id.* at 180 (majority opinion) (citing Gregg v. Georgia, 428 U.S. 153, 158 (1976)). The majority then noted that Arkansas had made a similar policy choice for the use of unitary juries in criminal cases that decide all issues relating to guilt and punishment. *Id.* Arkansas subsequently changed its approach, requiring bifurcation of the trial process. *See* Buckley v. State, 76 S.W.3d 825, 829 (Ark. 2002) ("Since 1993, Arkansas law has provided for a bifurcated-sentencing procedure, with guilt and sentence being determined by a jury at separate phases. Arkansas Code Annotated § 16-97-101 (Supp. 2001) governs this procedure.").

137. *See, e.g.*, Brown v. North Carolina, 479 U.S. 940, 941 (1986) (O'Connor, J., concurring in denial of certiorari) ("Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon*.").

138. *Id.* at 943.

139. 448 U.S. 38 (1980).

140. *Id.* at 38, 40, 42 & n.1 (quoting TEX. PENAL CODE ANN. § 12.31(b) (West 1974)).

141. *Id.* at 40.

for further peremptory challenges in assembling capital juries. Both death qualification and legitimate exercise of peremptory challenges—that being, the use of peremptory challenges to exclude jurors based on legitimate factors, meaning factors not based on racial or ethnic stereotyping or active bias—serve as a basis for disqualifying potential jurors.

IV. THE DEMOGRAPHIC DILEMMA POSED BY DEATH QUALIFICATION

The goal of seating racially diverse and unbiased juries charged with the determination of whether to impose a death sentence in a capital case is designed to ensure that the capital sentencing process is free from both actual taint and the perception of taint attributable to racial or ethnic characteristics of capital crimes or individuals either charged with capital offenses or their victims. One factor of particular significance in assessing the likely impact of racial discrimination in the operation of the death penalty lies in the demographic characteristics of those jurisdictions in which capital sentencing is an option. For instance, one study suggests that use of the death penalty is associated with two significant factors for the fair use of capital sentencing, a relatively high percentage of black and Hispanic minority populations and economic inequality within the state's population.[142] Thus, while the potential pool of minority jurors should be favorable in terms of ensuring fairness in representation on capital jury panels, the same demographic factors may also increase disparity in the use of the penalty against minority defendants, who are also likely to reflect the lower end of the range of economic disparity. Consequently, in evaluating the death-qualification process in light of the attitudes and experiences of prospective capital jurors, it will be important to consider the impact of disparate attitudes within ethnic groups toward capital punishment in understanding why capital juries are more likely to be less representative of the demographic character of the community than population percentages might otherwise suggest. Because opposition to the death penalty is disproportionately greater within the black community that in the white community, even the greater percentage of African Americans in traditional death-penalty states may not be reflected in greater representation on capital juries.[143]

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142. *See* David Jacobs & Jason T. Carmichael, *The Political Sociology of the Death Penalty: A Pooled Time-Series Analysis*, 67 AM. SOC. REV. 1, 109–31 (2002).

143. This disparity is documented in the Equal Justice Institute study documenting racial underrepresentation in capital juries in the South. *See* STEVENSON, *supra* note 26.

A. Disparity in Support for Capital Punishment Among Majority and Minority Groups

A central problem at the heart of any attempt to eliminate the impact of race-based discrimination, particularly discrimination against African Americans, in the use of the death penalty involves the significant variance between majority and minority populations in attitudes toward the death penalty.[144] Research consistently shows that African Americans are more likely to oppose the use of capital punishment than whites.[145] A 2004 Gallup Research poll confirmed this disparity.[146]

The Gallup results show that over the period 2001–2004, support for the death penalty among whites averaged 71%, while support among African Americans surveyed stood at 44%.[147] The report notes that this disparity may have a discernible cause related to statistically significantly higher numbers of African Americans, than whites, on death row:

> This stark difference may be the result of the ongoing debate about the overrepresentation of blacks on death rows across the country. The Bureau of Justice Statistics reports that there were 3,374 prisoners on death row in 2003, of which 1,418 were black and 1,878 were white. Blacks represent 42% of the inmates on death row, but only 12% of the nation's population.[148]

Other research confirms the results[149] reported by Gallup and other polling groups.[150] These results may also reflect disparity in

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144. *See* Joseph Carroll, *Who Supports the Death Penalty?*, DEATH PENALTY INFO. CENTER (Nov. 16, 2004), *available at* http://www.deathpenaltyinfo.org/article.php?did=1266&scid.

145. *See id.*

146. *Id.* (noting that "[r]esults are based on telephone interviews with 6,498 national adults, aged 18 and older, conducted Feb. 19–21, 2001; May 10–14, 2001; Oct. 11–14, 2001; May 6–9, 2002; Oct. 14–17, 2002; May 5–7, 2003; Oct 6–9, 2003; May 2–4, 2004; and Oct. 11–14, 2004. For results based on the total sample of national adults, one can say with 95% confidence that the maximum margin of sampling error is Â±2 percentage points.").

147. *Id.*

148. *Id.*

149. *See, e.g.*, James D. Unnever & Francis T. Cullen, *Reassessing the Racial Divide in Support for Capital Punishment*, 44 J. RES. CRIME & DELINQ. 124 (2007), *available at* http://jrc.sagepub.com/cgi/content/abstract/44/1/124. The authors conclude that there is a substantial gap in support for capital punishment among black and white Americans, and that common factors that might be expected to produce more consistency in support, such as class, confidence in government, conservative politics, regional location, and religious fundamentalism, either did little to narrow the divide or had only modest effects. *Id.* at 125. Ultimately, they conclude that differences in attitudes toward capital punishment among whites and African Americans will remain a source of contention in the respective group perceptions of fairness in the

more general attitudes held by black and white Americans toward the criminal justice system.[151]

However, polling also shows that support for the death penalty fluctuates over time, including attitudes held by non-whites.[152] In the most recent Gallup poll addressing majority and minority attitudes toward the death penalty from October 2010, the results actually showed that the disparity in support has lessened when whites and non-whites were polled,[153] with 69% of whites surveyed indicating support for the death penalty and 26% opposing.[154] Among nonwhites surveyed, the figures showed 55% supporting and 37% opposing the death penalty.[155] However, these figures are not

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operation of the criminal justice system in the United States. *See id.* Similar findings were reported by John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. CRIM. JUST. 85, 85–99 (2006), *available at* http://www.sciencedirect.com/science/article/pii/S0047235205000991#.

150. *See Trends in Attitudes Toward Religion and Social Issues: 1987–2007*, PEW RES. CENTER (Mar. 21, 2007), http://pewresearch.org/pubs/614/religion-social-issues. This report showed long-term trends similar to the results reported by Gallup, concluding:

> Support for the death penalty for persons convicted of murder is somewhat lower now than it was in the late 1990s, but opinions have changed little since 2001. Currently, 64% favor the death penalty, while 29% oppose it. Support is higher among men (68%) than women (60%), and is substantially higher among whites (69%) than among African Americans (44%) and Hispanics (45%). More Republicans than Democrats favor the death penalty, but even among the latter, a small majority does so (56%, vs. 78% for Republicans).

Id. However, a more recent Pew poll showed more support for the death penalty among some Hispanics, with 57% of Hispanic Catholics and 52% generally who were surveyed in 2011, supporting the death penalty. *Continued Majority Support for the Death Penalty*, PEW RES. CENTER (Jan. 2012), *available at* http://www.people-press.org/files/legacy-pdf/1-6-12%20Death%20penalty%20release.pdf.

151. *E.g.*, *Trusting the System: Democrats v. Republicans*, FDU PUBLICMIND (Oct. 7, 2006), http://publicmind.fdu.edu/cj0610/. The report included the following observation about polling results for Delaware voters:

> Differences can also be found in the perceptions of Delaware's black and white registered voters. Blacks expressed less trust in all aspects of the criminal justice system than whites. For example, 82% of white respondents and 63% of blacks say they have "some" or "a lot" of trust in the ability of police investigators to collect and process evidence, such as DNA and fingerprints, correctly. Blacks were also more likely to say they are opposed to the death penalty. Half of all black respondents are opposed compared to around a fifth of whites.

Id.

152. *Continued Majority Support for the Death Penalty*, *supra* note 150.

153. Frank Newport, *In U.S., 64% Support Death Penalty in Cases of Murder*, GALLUP (Nov. 8, 2010), http://www.gallup.com/poll/144284/support-death-penalty-cases-murder.aspx.

154. *Id.*

155. *Id.*

based upon surveys focused only on African Americans, when compared with whites, and the closing disparity may actually indicate that other groups included in the "non-white" category of respondents, such as Latinos/Hispanics, approve of capital punishment at higher rates than African Americans.[156] This explanation for the less severe departure in support is certainly consistent with other polling over time focusing on attitudes within the black community.

The disparity in support for capital punishment between white and black Americans suggests serious potential compromise of public confidence in the death penalty, particularly in light of developments pertaining to exonerations of death row inmates based on newly available DNA evidence.[157] Within both minority and majority communities, concern that the death penalty has been discriminatorily used against minority defendants reflects the basic unfairness in the administration of the capital sentencing system.[158] This concern is understandably compounded by revelations that significant numbers of innocent individuals have suffered conviction, and exoneration of death row inmates raises the specter of imposition of the most final of punishments on innocent individuals who have already been executed.[159] The Death Penalty Information Center currently reports that "[s]ince 1973, 140 people [in 26 states] have been exonerated and freed from death row" with evidence of their innocence.[160]

In a compelling study of racial attitudes toward the death penalty,[161] political scientists Mark Peffley and Jon Hurwitz confirmed the disparity in support for capital punishment among whites and African Americans surveyed.[162] They also note that support generally fell in the late 1990s, attributed in part to the increasing disclosure of exonerations of death row inmates based on exculpating DNA evidence and declining crime rates.[163] In examining existing scholarship and interpreting their own survey

156. *See Continued Majority Support for the Death Penalty*, *supra* note 150.

157. *Trusting the System Democrats v. Republicans*, *supra* note 151.

158. Unnever & Cullen, *supra* note 149, at 130.

159. *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (last visited Sept. 7, 2014).

160. *Id.*

161. Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty in America*, 51 AM. J. POL. SCI. 996, 996 (2007).

162. *Id.* at 999.

163. *Id.* at 996–97 (citing Frank R. Baumgartner, Suzanna De Boef & Amber E. Boydstun, An Evolutionary Factor Analysis Approach to the Study of Issue Definition (May 11, 2004) (unpublished manuscript), *available at* http://www.unc.edu/~fbaum/Innocence/Baumgartner_DeBoef_Boydstun_MPSA_2004_corrected.pdf (presented at the annual meeting of the Midwest Political Science Association)).

data, however, Peffley and Hurwitz conclude that support for the death penalty among both whites and African Americans tends to drop when survey respondents were presented with the additional consideration that flaws in the system may be resulting in the execution of too many innocent people.[164] But the drop in support was substantially smaller among white respondents than among African Americans.[165]

Prior survey data found that support for the death penalty among whites tends to increase with other evidence of racially discriminatory attitudes toward African Americans,[166] much as racial prejudice among whites has been argued as correlating with more punitive attitudes.[167] Even more troubling for Peffley and Hurwitz than the minimal level of drop in support for the death penalty among whites when queried about the factor of execution of innocent individuals, was their finding that among white respondents, support for capital punishment *actually increases* when the survey included a different factor—racially disproportionate use of the death penalty against African Americans.[168] They also note their prior research, "documenting a naïve faith among whites that the criminal justice system is racially fair."[169]

The data and conclusions reached by social-science researchers are particularly devastating to any perception that attitudes toward capital punishment or the criminal justice system generally are not significant indicators of racial bias, particularly as the survey data might reasonably be viewed within the black community.[170] To the extent that significant white support for the death penalty is influenced by racially discriminatory attitudes toward African

164. *Id.* at 1002 tbl.1.

165. *Id.*

166. *See* Stevan E. Barkan & Steven F. Cohn, *Racial Prejudice and Support for the Death Penalty by Whites*, 31 J. RES. IN CRIME & DELINQ. 202, 202–09 (1994) (concluding that support for the death penalty among whites is attributable to racial prejudice against African Americans); Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DUBOIS REV. 1 (2004); Joe Soss, Laura Langbein & Alan R. Metelko, *Why Do White Americans Support the Death Penalty?*, 65 J. OF POL. 397, 397–421 (2003).

167. Soss, Langbein & Metelko, *supra* note 166, at 399. The Peffley & Hurwitz study found that, contrary to Soss, Langheim, and Metelko, survey data did *not* support the conclusion that antiblack stereotypes influence white support for the death penalty. *See* Peffley & Hurwitz, *supra* note 161, at 1005.

168. Peffley & Hurwitz, *supra* note 161, at 1002 tbl.1.

169. *Id.* at 1000 (quoting Mark Peffley & Jon Hurwitz, *The Racial Component of "Race Neutral" Crime Policy Attitudes*, 23 POL. PSYCHOL. 59, 59–75 (2002)).

170. *See, e.g.*, *id.* (documenting the changes in support for the death penalty when different races are involved).

Americans,[171] the disparity in support among whites and African Americans is particularly significant because it signifies that African Americans may correctly view the death penalty as a policy choice designed to implement an agenda of official oppression through the criminal justice system.[172] It certainly provides evidentiary support for this position. Moreover, Peffley and Hurwitz suggest that antipathy toward the death penalty in the black community may be attributed, in part, "to negative attitudes toward whites, who for some blacks, may be viewed as part of the power structure that uses the death penalty as a discriminatory tool."[173]

Perhaps even more important is that the research suggests that disparity in support for the death penalty among whites and African Americans is the possible link to overall attitudes toward crime, crime suppression, and punishment demonstrated in responses from the two groups.[174] Peffley and Hurwitz suggest that a difference in attitudes toward crime within the two communities impact their views of punishment.[175] Individuals who believe that crime is the product of deficiencies in character are generally more likely to be punitive and support capital punishment, while those who tend to view crime as the result of external conditions, such as poverty or poor economic conditions, are more likely to support a rehabilitation model of punishment.[176] Peffley and Hurwitz conclude, as have earlier researchers,[177] that while support for noncapital punishment is roughly equal between whites and African Americans, the underlying attitudinal framework differs: whites tend to view crime as the product of internal factors, for example, character deficiency, and thus, punishment is retributive; while African Americans support punishment because of fear of victimization, for example, that external factors will result in them becoming crime victims.[178]

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171. *Id.* at 999 ("There seems to be little doubt that, at least for whites, racial attitudes often affect their support for capital punishment.").

172. *Id.* at 1001 ("[T]here is abundant evidence that African Americans regard the U.S. criminal justice system as inherently unfair—i.e., that it discriminates against them on the streets and in the courts. For this reason, blacks do not need any reminder of the racially-discriminatory nature of the death penalty."); *see also* Janet L. Lauritsen & Robert J. Sampson, *Minorities, Crime, and Criminal Justice*, *in* HANDBOOK OF CRIME AND PUNISHMENT 31, 31–56 (Michael H. Tonry ed., Oxford University Press 1998).

173. Peffley & Hurwitz, *supra* note 161, at 1003. This possibility suggests the extent to which Critical Race Theory explanations of social injustice are not confined to academic thought.

174. *Id.* at 999–1000.

175. *Id.*

176. *Id.* at 999.

177. *See generally* Steven F. Cohn, Steven E. Barkan & William E. Haltman, *Punitive Attitudes Toward Criminals: Race Consensus or Racial Conflict?* 38 SOC. PROBS. 287, 287–88 (1991).

178. Peffley & Hurwitz, *supra* note 161, at 997–98.

The difference in views on the causes of crime and justification for punishment are thus seen as critical support for punitive action. Peffley and Hurwitz suggest that this explains why white support for capital punishment actually increased in their study when whites were confronted with the consideration that the death penalty is applied in a racially discriminatory fashion against African Americans, a finding they characterized as the "most startling" in their study.[179] They conclude:

> Because whites tend to fall heavily toward the dispositional end of the black causes of crime scale, it is no small wonder that when such views are activated [as when questioned about whether their support for the death penalty would be changed if shown that it is racially biased against blacks], whites are collectively highly resistant to the argument that the death penalty is racially unfair. Many whites begin with the belief that the reason blacks are punished is because they deserve it, not because the system is racially biased against them. So, when these whites are confronted with an argument against the death penalty that is based on race, they reject those arguments with such force that they end up expressing more support for the death penalty than when no argument is presented at all.[180]

The implications for the goal of a racially equitable administration of the death penalty are significant. If attitudes toward black crime vary dramatically between whites and African Americans, with whites tending to believe that black crime is primarily the product of internal, dispositional factors—predisposing African Americans to commit crime—then one must assume that these attitudes will weigh heavily in the capital sentencing process. Even within the black community, Peffley and Hurwitz conclude that support for the death penalty varies based on overall perception of the causes of black crime and attitudes toward punishment.[181] The predisposition of black jurors serving in capital cases with respect to the causes of crime committed by African Americans is likely to be an important factor in whether, in a given case, a capital jury will impose the death penalty.

Within the death-penalty context, the significance of the range of responses for support of criminalization and punishment cannot be underestimated. Thus, if whites do tend to view the sources of black crime as internal, or dispositional, they may be predisposed to favor imposition of the death penalty in cases involving black defendants, whereas a belief that crime is the product of external

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179. *Id.* at 1006.
180. *Id.*
181. *Id.* at 1004–05.

factors might well militate in favor of mitigation and imposition of a life sentence.

Consider the most critical issue in the Texas capital sentencing decision, the interrogatory regarding the probability that the convicted defendant will commit acts of criminal violence in the future. Both white and black jurors tending to view criminality as the product of internal, dispositional, factors would likely be predisposed to believe that the defendant will continue to be a threat to society, even within the penitentiary. Because this view predominates among white respondents in the Peffley and Hurwitz study,[182] their conclusions suggest that the likelihood of racial attitudes influencing actual jury deliberations in Texas capital trials is substantial, undermining the integrity of the death penalty imposed, even if reviewing courts and most observers would likely conclude that a death sentence could be appropriately imposed based on the evidence of the capital offense and the defendant's character, considering both aggravating and mitigating factors.

While this is likely the type of social-science research that the Supreme Court would find unpersuasive in fashioning capital sentencing rules,[183] these conclusions should certainly trouble the Court and legislators concerned about erosion of faith in the criminal justice system. More troubling should be the probability that many death sentences are tainted by predisposition of white jurors to impose death on black defendants based on stereotypical views about disposition of African Americans to commit criminal acts and, particularly, acts of criminal violence.

B. Death Qualification and Disparity in Attitudes Toward the Death Penalty

Even more critical than the disparity in support for the death penalty among white and black Americans is the potential impact of their opposition to capital punishment. The Gallup Organization reports that more than twice as many African Americans, 49%, are opposed to capital punishment, than whites, 24%.[184] This disparity creates a structural tension in the operation of the capital jury selection process that eventually compromises the integrity of the system of imposing the death penalty and threatens a virtually inherent discriminatory impact in its application.

The reason lies in the fact that *Witherspoon* serves as a basis for exclusion of absolute opponents of capital punishment, which,

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182. *Id.* at 1006 & fig.1.

183. *See supra* notes 9–10 for discussion of *McCleskey v. Kemp*. There, the Court rejected social-science data as unpersuasive with regard to systemic racial discrimination in capital punishment. *See* McCleskey v. Kemp, 481 U.S. 279, 294–97 (1987).

184. *See* Carroll, *supra* note 144.

according to the survey data, almost certainly results in a smaller percentage of black citizens being excluded from service on capital juries than whites.[185]

The *Lockhart* majority noted that prior jury composition cases had focused not on juror's beliefs, but on demographic characteristics, such as African Americans, women, and Mexican Americans,[186] recognizing a distinct difference in demographics and juror beliefs in exclusion of prospective jurors from service:

> Because these groups were excluded for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common sense judgment of the community.[187]

The majority then observed:

> The group of "*Witherspoon* -excludables" involved in the case at bar differs significantly from the groups we have previously recognized as "distinctive." "Death qualification," unlike the wholesale exclusion of blacks, women, or Mexican Americans from jury service, is carefully designed to serve the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial. There is very little danger, therefore, and McCree does not even argue, that "death qualification" was instituted as a means for the State to arbitrarily skew the composition of capital case juries.[188]

The *Lockhart* majority rejected McCree's attempt to equate exclusion based on ethnicity or gender with exclusion based on juror attitudes[189]. Justice Rehnquist responded to the argument by explaining that the attitude of any prospective juror to the death penalty is a matter of individual choice:

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185. *See id.*
186. Lockhart v. McCree, 476 U.S. 162, 175 (1986).
187. *Id.*
188. *Id.* at 175–76.
189. *Id.*

> [U]nlike blacks, women, and Mexican-Americans, "*Witherspoon* -excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Because the group of "*Witherspoon* -excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."[190]

The effect of death qualification of capital jurors on the racial composition of capital juries had been noted even before *Lockhart*.[191] Following *Lockhart*, Professor Thomas Schornhorst observed:

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190. *Id.* at 176.

191. *See e.g.*, Bruce J. Winnick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982). Professor Winnick, in evaluating the competing constitutional goals of death qualification and protection against racially based exclusion of prospective jurors, observed: "The studies of demographic characteristics found that exclusion of capital punishment objectors results in the disproportionate exclusion of blacks and women." *Id.* (citing Hovey v. Superior Court, 616 P.2d 1301, 1337–39 (Cal. 1980)).

> The state's ability to stack the jury against the accused through the death qualification process is even greater than the majority in [*Lockhart*] was willing to acknowledge. For example, in Indiana each side is accorded twenty peremptory challenges in a death penalty case, as opposed to ten in a non-capital case. The prosecutor will challenge peremptorily prospective jurors whose doubts about the death penalty are not sufficiently strong to justify exclusion by way of the *Witherspoon/Witt* criteria, thereby increasing the jury's tilt toward the state. *Since the percentage of persons disfavoring capital punishment is decreasing, and the remaining "scrupled" population is likely to include, proportionately, more women, blacks, hispanics [sic] and economically underprivileged persons, the state will not only be able to exclude most of the "soft" jurors, but also to distort the representativeness of the jury.* The defendant, on the other hand, is likely soon to run out of his or her equal number of peremptory challenges if the defendant exercises them to exclude people who favor the death penalty. The defendant will, in the end, be able to exclude only the most avid capital punishment devotees.[192]

This analysis is borne out by the studies of capital punishment in the decades since *Lockhart* that show significantly greater opposition to the death penalty among African Americans than whites.[193] Not only do smaller percentages of black jurors fit the death-qualification model imposed by *Witherspoon*, reducing the overall percentage of African Americans likely to serve on a capital jury by more than the pre-death-qualified demographic statistics would show, but those black jurors expressing reservations about capital punishment are subject to exclusion through peremptory strikes.[194] Those reservations become race-neutral explanations for strikes, further reducing the available pool of black jurors likely to actually serve on capital juries.[195]

These concerns prompted the trial court in the Eastern District of Massachusetts to order the selection and seating of two juries for guilt/innocence and punishment phases of a federal capital trial in *United States v. Green*.[196] Because of the demographic character of the district, a smaller percentage of prospective jurors who were African American would be expected to be called for service.[197] Taking into consideration polling data showing that a substantially

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192. F. Thomas Schornhorst, *Preliminary Screening of Prosecutorial Access to Death Qualified Juries: A Missing Constitutional Link*, 62 IND. L.J. 295, 322–23 (1987) (emphasis added) (citations omitted).

193. *Id.*

194. *See infra* Subpart IV.C.

195. Schornhorst, *supra* note 192, at 323 (noting the likelihood that death disqualification will "blunt" the effect of *Batson*).

196. 343 F. Supp. 2d 23 (D. Mass. 2004), *rev'd*, 407 F.3d 434 (1st Cir. 2005).

197. *Id.* at 26.

larger number of African Americans than whites oppose capital punishment and thus, would be subject to exclusion under *Witherspoon*, the court observed: "Death-qualifying a jury could significantly deplete the already paltry number of minority jurors in the Eastern District."[198] The court consequently concluded:

> These two factors—the large percentage of African-Americans who are opposed to the death penalty and the disproportionately small number of African-Americans in the Eastern District of Massachusetts jury venire—de facto exclude all or most African-Americans from a death-qualified jury.[199]

Thus, the court ordered that two juries would be empanelled, one of which would serve only in the event the case proceeded to a capital sentencing hearing.[200] However, the government petitioned the First Circuit for a writ of mandamus to reverse the trial court's order.[201] The circuit court found the trial court's action "unprecedented" and contrary to the provisions[202] of the Federal Death Penalty Act.[203] The trial court had held that the defendants had no right to a non-death-qualified capital jury.[204] Rejecting the argument that death-qualification would unconstitutionally compromise the possibility of seating a jury fairly reflecting the black population in the district, the circuit court issued an advisory mandamus[205] directing the district court to vacate its two-jury

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198. *Id.* at 33. The court also considered other factors reducing black participation in jury service in the district, including the fact that income factors influenced jury participation, reducing responses to jury summonses among minority and economically disadvantaged citizens. *See id.*

199. *Id.* at 33–34. The court also noted that its conclusions had been demonstrated in prior trials in the Eastern District of Massachusetts in *United States v. Gilbert* and *United States v. Sampson*, both trials in which no black jurors were seated where significant numbers of the relatively small number of black venirepersons opposed the death penalty. *See id.* at 33–34, 34 n.17 (citations omitted).

200. *Id.* at 35.

201. *Green*, 407 F.3d 434.

202. *Id.* at 439.

203. 18 U.S.C. § 3593(b) (2002).

204. *Green*, 407 F.3d at 436 (citations omitted).

205. *Id.* at 439. The court explained the nature of the "advisory mandamus," as opposed to the more common form of the writ:

> The second type of mandamus—known as advisory mandamus—is more apt in the circumstances at hand. Mandamus, in any form, is an extraordinary remedy, but advisory mandamus is available only in a tiny subset of cases. Such cases are those that present novel questions of great significance which, if not immediately addressed, are likely to recur and to evade effective review. The aim of advisory mandamus, then, is to settle substantial questions of law in circumstances that "would assist other jurists, parties, [and] lawyers."

order.[206] Although the court noted the trial court's reasoning in issuing its two jury order, it never addressed the constitutional conflict raised by the competing demands of death qualification and seating of a jury not unfairly distorted demographically to the potential detriment of the accused.[207] Instead, it focused solely on the statutory provisions governing the seating of the jury in a federal death-penalty trial, finding that the district court did not have authority to alter the capital sentencing process dictated by the statute.[208] In short, the circuit court observed: "The bottom line is this: where Congress has provided a specific panoply of rules that must be followed, the district court's discretionary powers simply do not come into play."[209]

Green may be procedurally correct and consistent with both the Court's decisions in *Witherspoon* and *Witt* and Congressional intent in the Federal Death Penalty Act, but the constitutional conflict underlying the district court's concern remains unaddressed and unanswered: at what point does the death-qualification process result in an enforced racial imbalance in the administration of the death penalty, regardless of the lack of discriminatory intent?

The interplay between "death qualification" under *Witherspoon/Witt* and the compelling research demonstrating the greater extent of black opposition to capital punishment than white opposition, creates the kind of systemic flaw in the administration of the death penalty that warrants serious consideration of abolition for multiple reasons.

First, capital punishment necessarily fails as a constitutionally acceptable sentencing option if it simply serves as an instrument of oppression.[210] Whether supporters intend this purpose for the death penalty is actually, in a sense, of little consequence if substantial opinion concludes that it is an instrument of oppression. Only by maintaining credibility as a reasoned response to the most heinous of homicides does it fulfill a constitutionally accepted option for

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> To obtain relief under this species of mandamus, the petitioner does not need to show irreparable harm.

Id. (citations omitted) (quoting United States v. Horn, 29 F.3d 754, 770 (1994)). A significant portion of the circuit court's opinion addressed its own jurisdiction to consider the issue raised by the government in seeking review of the district court's two-jury order. *See id.* at 438–40.

206. *Id.* at 444.

207. *Id.* at 437.

208. *Id.* at 440–44.

209. *Id.* at 443.

210. *See e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 440–42 (2008); Gregg v. Georgia, 428 U.S. 123, 182–83, 183 n.28 (1976) (recognizing primary penological goals of retribution and deterrence and noting the incapacitation of offenders as a legitimate goal).

retribution.[211] Similarly, if the punishment is not rationally responsive, but actually employed for purposes of oppression, it lacks credible deterrent value because those offenders for whom deterrence is intended will not view the punishment as an appropriate response at all. Instead, as an instrument of oppression, its lack of credibility may, in fact, prompt irrational or excessively brutal homicidal acts among offenders intent on retaliating for perceived oppression in the use of death sentences.

Second, if there is substantial belief within any segment of the population that capital punishment is serving as an instrument of oppression, it will lack credibility within that population. This is apparently now the case with respect to a substantial segment of the black community, leading to opposition to the use of the death penalty.[212] Once those opponents are officially subject to exclusion from service on capital juries, the perception that the punishment is oppressive will be reinforced by experience.

Arguably, what is significant is the need for opponents of capital punishment to still view the penalty as fairly administered, thus offering no empirical support to their conscientious objections. When the death penalty is applied inaccurately, resulting in exoneration of death row inmates, or in a racially discriminatory fashion, the perception that the death penalty is applied improperly and as an instrument of oppression does provide opponents with empirical support for their position.

In *Witherspoon*, the Court noted that the capital jury's fundamental duty is to "express the conscience of the community on the ultimate question of life or death."[213] The constitutional conflict suggested by the significantly greater opposition of African Americans than whites to the use of the death penalty means that while death qualification may be constitutionally sound as a means of administering the penalty in accord with legislative determination that capital punishment is a valid exercise of the State's authority to punish murder, it fails in another important sense. It necessarily threatens to skew the composition of the jury empanelled to express community conscience along racial lines. In so doing, it exacerbates the separation of the black and white populations within the community so that the death penalty itself

211. *Kennedy*, 554 U.S. at 411.

212. JAMES D. UNNEVER & SHAUN L. GABBIDON, A THEORY OF AFRICAN AMERICAN OFFENDING: RACE, RACISM, AND CRIME 34 (2011) (citing Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUNISHMENT & SOC'Y 51 (2009) ("[B]lacks are unwilling to embrace the death penalty . . . because they believe these severe policies will unfairly target other African Americans.")).

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

becomes an expression of the moral judgment of largely only the white community.[214]

C. Witherspoon *and* Batson *in the Capital Jury Selection Process*

Both *Witherspoon* and significant post-*Batson* decisions addressing exclusion of minority jurors have arisen in the context of capital prosecutions and continue to impact the process for selection of capital juries.[215] The interplay between the capital sentencing process and exclusion of minority jurors from capital juries is important because it raises the question of fairness of the process in light of the disparity in majority and minority views regarding support for use of the death penalty. The *Witherspoon* death-qualification test thus results in an unintended impediment for

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214. In commenting on statistical research focusing on administration of the death penalty in Philadelphia, Professor Samuel R. Gross observed:

> Professor Baldus and his colleagues also examined the effect of the racial composition of the juries on the outcomes of these capital cases. They found that juries with more black members were considerably less likely to impose the death penalty than juries with fewer black members, particularly when the defendant was black. This finding is especially striking because it is based on the decisions of those jurors who survived peremptory challenges. And it was a severe winnowing. A majority of all black venire members in the Baldus sample were excused by the prosecution, and a majority of all white venire members were excused by the defense. It is safe to assume that each side focused its fire—as best it could—on those potential jurors who were most likely to favor the opposition. That means the prosecutors removed the most predictably anti-death penalty blacks, and the defense attorneys got rid of the most clearly pro-death penalty whites. As a result, the black jurors who actually sat on these cases are likely to have been uncommonly similar to the remaining whites in their willingness to vote for death, and the whites who sat are likely to have been closer in that respect to the remaining blacks. The differences that Baldus et al. found were those remaining after the leveling effect of jury selection itself.
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> In other words, capital prosecutors and defense lawyers in Philadelphia know what they are doing. Race really is a powerful predictor of capital sentencing, especially in black-defendant cases, and it may also (as many attorneys believe) predict jurors' predispositions on guilt as well.

Samuel R. Gross, *Race, Peremptories, and Capital Jury Deliberations*, 3 U. PA. J. CONST. L. 283, 292–93 (2001) (footnotes omitted).

215. *See, e.g.*, Snyder v. Louisiana, 552 U.S. 474, 476 (2008) (*Batson* violation question in death-penalty case); Miller-El v. Dretke, 545 U.S. 231, 236 (2005) (applying *Batson* to a claim of discriminatory jury selection in a pre-*Batson* capital trial); Trevino v. Texas, 503 U.S. 562, 567 (1992) (holding that a pre-*Batson* claim of discrimination in the prosecution's use of peremptory challenges properly preserved a capital defendant's equal protection argument); Esquivel v. McCotter, 795 F.2d 350, 352 (5th Cir. 1986) (holding *Batson* only applies prospectively in a challenge to capital prosecution resulting in a death sentence).

promoting the goal of fairly representative capital juries selected to serve without regard to race or ethnicity.

1. The Witherspoon *Effect*

The inherent tension between enforcement of the *Witherspoon* requirement that jurors be able to consider the full range of punishments authorized in capital cases, including the death penalty, and the goal of fair representation of ethnic minorities in juries, compromises the likelihood that capital juries will include proportionate representation of minority jurors. In the individual case, any number of factors could produce juries reflecting the relative support or opposition to capital punishment toward a jury strongly supporting the death penalty, including purely random selection of jurors drawn to serve on any particular day. But, as a general matter, the importance of *Witherspoon* death qualification is that it necessarily reduces the potential pool of otherwise eligible jurors whose opposition to capital punishment renders them subject to disqualification. Because opposition runs higher in the black community than the white community, this generally means that the overall proportion of citizens serving as capital jurors will almost certainly not reflect population demographics in death-penalty jurisdictions having the largest percentages of minority citizens.[216]

Exclusion of jurors who are not qualified to serve under *Witherspoon* does not demonstrate a violation of the *Batson* principle even though the excluded non-qualifying jurors are members of a cognizable racial or ethnic group, such as African Americans. Courts confronted with arguments that the exclusion of *Witherspoon*-disqualified prospective jurors is impermissible because it results in exclusion of minority jurors have rejected the argument that *Witherspoon* disqualification violates *Batson* in reducing minority representation on capital juries because the basis for the exclusion is not racial or ethnic bias, but inability of the juror to apply the law providing for capital punishment.[217]

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216. The Mississippi Supreme Court noted the argument made by defense counsel in this respect in challenging the exclusion of black jurors based on *Witherspoon* as resulting in an equal protection violation in *Pitchford v. State*, 45 So. 3d 216, 228 (Miss. 2010), holding that the exclusion was proper because the focus of the trial court's action was in opposition to the death penalty precluding the prospective jurors from serving.

217. *See, e.g.*, Underwood v. State, 708 So. 2d 18, 28–29 (Miss. 1998) ("The challenges for cause are to be examined under the *Witherspoon* cases and peremptory challenges are to be examined under *Batson*. If each of the challenges is found to be constitutionally sound, then the combination is also sound. A successful *Witherspoon* challenge against a black juror is not relevant, because '. . . a defendant has no right to a petit jury composed in whole or in

2. Batson *and Capital Jury Composition*

A second factor in the capital selection process threatens exclusion of black jurors in capital juries. Because the voir dire process in a capital case typically focuses on support or opposition to capital sentencing, skillful questioning by trial counsel will lead to disclosure of the degree of support or opposition among individual prospective jurors.[218] Even though a juror may be *Witherspoon* eligible, the voir dire examination may be carefully designed to determine the extent to which the juror will hold the prosecution to a higher burden in demonstrating that death is an appropriate punishment based on the circumstances of the offense and the character of the defendant.[219] Although capital sentencing procedures vary among jurisdictions, at a minimum a court's framework for imposing death requires the sentencing authority to make determinations regarding aggravating circumstances that may warrant a death sentence and a process for balancing the prosecution's proof of aggravation against mitigating circumstances that may be developed by the defense in the case.[220] In some jurisdictions this process requires jurors to weigh aggravating circumstances against mitigating circumstances;[221] in others, jurors will respond to special issues that require consideration of these factors in assessing the punishment.[222]

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part of persons of his own race.'" (quoting Pinkney v. State, 538 So. 2d 329, 346–47 (Miss. 1998) (citations omitted))).

218. *See, e.g.*, *Death Penalty—Voir Dire Disqualification*, 99 HARV. L. REV. 120, 129 (1985) (discussing the bounds of voir dire in determining juror feelings toward the death penalty).

219. *Id.*

220. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 597–609 (1978) (requiring capital sentencing authority to have the discretion to consider mitigation evidence offered in support of the imposition of a sentence less than death not limited by statutory restrictions on mitigating circumstances).

221. *See, e.g.*, ARK. CODE ANN. § 5-4-603 (West 2014) (setting out the process for jury deliberations for the imposition of a death sentence in capital cases in which the death penalty is sought: "The jury shall impose a sentence of death if the jury unanimously returns written findings that: (1) An aggravating circumstance exists beyond a reasonable doubt; (2) Aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist; and (3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.").

222. For instance, under the Texas capital sentencing procedure the jury is initially required to decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . ." TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1) (West 2014). The statute then provides that the trial court will then instruct the jury that in deliberating on the issues submitted under subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or

The prosecutor interested in ensuring imposition of a death sentence will likely be motivated to use the *Witherspoon* qualification test for assessing which jurors who are qualified to serve would also be most hesitant in imposing a death sentence. Those jurors are prime subjects for the exercise of the prosecutor's peremptory challenges. Because African Americans are less supportive of capital sentencing than whites according to national polling, it is reasonable to assume that even African Americans supporting the death penalty may demonstrate greater hesitance in its use than whites who support the penalty more strongly. This is likely particularly true if the defendant is black, or a member of another group traditionally suffering racial or ethnic discrimination with whom black jurors might identify. If this assumption is correct, even *Witherspoon*-qualified black venirepersons are more likely to be susceptible to questioning that focuses on the degree of commitment to capital sentencing. Once identified, those jurors can be excluded through peremptory strikes with the overall goal being selection of a more death-prone jury.

The interplay between *Witherspoon* and *Batson* in this context arises when the defense accuses the prosecution of exercising peremptory challenges to exclude minority jurors based upon their attitudes toward the use of the death penalty.[223] Once the *Batson* challenge to a peremptory strike of a prospective juror is made, the proponent must respond with a race-neutral explanation for removing the juror.[224] A mere denial that race or ethnicity was

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character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.
Id. § 2(d)(1).

223. *See, e.g.*, State v. Waring, 701 S.E.2d 615, 636 (N.C. 2010).

224. Batson v. Kentucky, 476 U.S. 79, 97 (1986). For an interesting discussion of the process for testing the race-neutral explanation offered for the exercise of a peremptory challenge against a black venireperson, see *Atkins v. Easterling*, 648 F.3d 380, 386–87 (6th Cir. 2011). There, the prosecutor struck Juror D, a black female, based on her responses on her juror questionnaire form:

> (1) she indicated on the juror questionnaire that she had a relative who was charged with a crime or had been the subject of a criminal investigation; (2) she indicated that she considers herself to be politically slightly liberal; and (3) she indicated that, if she was a lawyer in this case, she would want to know how a juror felt about blacks and crime, their thoughts about blacks, and whether they had ever been robbed by a black person.

Id. at 386 (citations omitted). The trial judge rejected the prosecutor's argument that he struck Juror D based upon her self-characterization as "slightly liberal," explaining on the record: "To be perfectly honest, this is not the only case where you've excused the only black juror. It's more often that you do that than not." *Id.* (citations omitted). The Sixth Circuit then explained:

involved in the decision to strike is insufficient to comply with the requirement for a neutral explanation for the strike.[225] But a prospective juror's expressed hesitance in imposing the death penalty will typically be found to meet that requirement for a race-neutral reason for the strike.[226] Nevertheless, consistent with *Batson*, a trial judge could reject the prosecutor's explanation for the strike on this basis, finding that it was a pretext for striking based on the juror's race or ethnic background.[227] This would appear to be, at best, an extreme exception to the general tendency to find that this explanation is both race neutral and non-pretextual. For instance, in *State v. Waring*,[228] the North Carolina Supreme Court rejected the argument that exclusion of black jurors had been pretextual where its examination of the record showed that the excluded jurors had all expressed some degree of opposition to the death penalty in comparison to responses given by white jurors. The court reviewed the responses of three venirepersons, all of whom testified that they could follow the law and vote to impose a death sentence.[229] But one of the three had initially stated that she was personally opposed to the death penalty and she was eventually struck.[230] The case was interracial, with a black defendant charged with the murder of a white victim.[231] The supreme court found that the stricken juror's support for the death penalty then wavered, while the two white jurors the defense cited in comparison were affirmative in their support for the death penalty.[232] Three black

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> The trial judge conducted an individual voir dire with Juror D, in which she stated that her half-brother was convicted of selling drugs and that she believed that "race has a bearing on the outcome of a trial, in that a white juror may convict a defendant just because he is black."

Id. (citations omitted). Based on the trial court's reference to a history of approving peremptory strikes of jurors having close relatives who had been charged or convicted of crimes, the judge then permitted the prosecutor to use the strike against Juror D, even though it resulted in the seating of a jury having no black members. *Id.* at 386–87. Engaging in a comprehensive review of the record and state court jurisprudence in assessing the sufficiency of justifications as "race neutral" for purposes of *Batson* claims, the Sixth Circuit deferred to the disposition of the accused's claims by the state courts and denied relief in this non-capital trial in which Atkins was convicted of aggravated robbery in a carjacking. *See id.* at 384, 392–94.

225. *See, e.g.*, Alexander v. Louisiana, 405 U.S. 625, 632 (1972) ("The Court has squarely held, however, that affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.").

226. *See, e.g.*, State v. Waring, 701 S.E.2d 615, 646 (N.C. 2010).

227. *See Batson*, 476 U.S. 79–80.

228. 701 S.E.2d 615, 646.

229. *Id.* at 646.

230. *Id.*

231. *Id.*

232. *Id.*

jurors had previously been excluded for cause, based upon their expressions of unequivocal opposition.[233] The court concluded:

> In light of the responses of the prospective jurors to the key voir dire questions about their views on the death penalty, and considering the absence of any pattern of discrimination in the exercise of the State's peremptory challenges at the time the prosecutor peremptorily challenged prospective juror Rogers, we conclude that defendant failed to meet his burden of establishing a prima facie case that the State's action was motivated by race. Accordingly, the trial court did not err in denying this *Batson* challenge.[234]

Juror Rogers's candid responses during voir dire reflect the multiple dimensions of the death-qualification process because support or opposition to capital punishment is often not a simple matter of choice. Instead, the issues are not only matters of intellectual or abstract quality, but are complicated when the question of capital punishment is focused on the individual juror's ability or willingness to participate in a capital sentencing proceeding. And, even if so, the individual juror's sense of support for the death penalty may be compromised by facts likely to be developed in the individual case. A key factor noted by the North Carolina court involves the race or ethnicity of the accused or the victim, or both, or whether the victim might be a child or impaired individual.

Moreover, as Peffley, Hurwitz, and others have observed, the difference in philosophical views toward the causes of crime among whites and African Americans surveyed may demonstrate that some prospective jurors within either group may base their notions of the suitability of capital sentencing on the peculiar circumstances of the offense or the accused, or both.[235] In this respect, support for capital punishment as an abstract proposition, and may be affected by the perception that the death penalty is less suitable for certain capital murders.[236] The voir dire examination of individual jurors in the death-qualification phase of a capital trial thus can provide counsel greater insight into assessing which prospective jurors will prove more favorable, at least as a preliminary concern, for either side. Since venirepersons with fixed views opposing capital punishment will have been excluded for cause under *Witherspoon*, the voir dire process arguably, if not certainly, favors the prosecution in its ability to anticipate jurors who would be least favorably disposed to

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233. *Id.*

234. *Id.* at 639.

235. Peffley & Hurwitz, *supra* note 161, at 999; *see also* Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 901–02 (1996).

236. *Id.*

the State's case and remove them through peremptory strikes. For the defense, *Witherspoon*-qualified jurors whose views are less than fully explored during the prosecution's voir dire are often the most promising for defending against a death sentence, particularly when there is strong mitigation evidence for the sentencing phase of the capital trial.

The legitimacy of the prosecution's explanation for use of peremptory challenges against minority jurors is bolstered when the record demonstrates that strikes predicated on lukewarm support for the death penalty were used to remove white and non-white venirepersons alike. Unlike the situation before the Court in *Snyder v. Louisiana*,[237] where the disparity in questioning and circumstances of the prospective jurors undermined the credibility of the prosecutor's "race neutral" explanation for peremptorily striking the black juror, use of peremptory challenges to exclude both majority and minority jurors based on attitudes toward the death penalty provides effective refutation for the claim that the strikes are, in fact, predicated on race or ethnicity.

Of course, the truth may actually be far different. A prosecutor could choose to use her peremptory challenges against minority jurors based on cultural stereotyping, personal prejudice, or a concern that a minority juror will be more reluctant to impose death on a minority defendant despite a generally favorable attitude toward capital sentencing. The same prosecutor could quite logically also remove *Witherspoon*-qualified majority jurors who express some reservation about the death penalty with the goal of achieving a jury more favorable, at least from the prosecutor's perspective, to imposing death. Because the third prong of the *Batson* test—assessment of the credibility of the race-neutral explanation propounded by the striking counsel—is committed to the trial court's exercise of discretion,[238] there is little room for any reviewing court to discount the explanation when it is supported by evidence that shows both majority and minority jurors were excluded based on less rigorous support for the death penalty.[239]

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237. 552 U.S. 472 (2008); *see also supra* notes 66–74 and accompanying text.

238. Wainwright v. Witt, 469 U.S. 412, 431 (1985) (presuming the trial judge's finding correct regarding the qualification of a prospective juror to serve under *Witherspoon*).

239. Sometimes, of course, even ardent proponents of capital punishment are not themselves comfortable with personally being involved in imposing a death sentence as jurors. This is more likely true for prospective jurors who may generally support capital punishment, but who do not personally want the responsibility for sitting on a jury that could impose a death sentence. *See, e.g.*, *Waring*, 701 S.E.2d at 636–37 (N.C. 2010) (noting that juror Rogers vacillated with respect to support for the death penalty generally, but expressed personal hesitance to sit on a jury where imposition of a death sentence would be involved); *see also supra* notes 228–34 and accompanying text.

In *Lizcano v. State*,[240] for instance, the Texas Court of Criminal Appeals addressed this situation in light of the defendant's claim that the prosecutor used juror attitudes toward capital punishment as a pretext for striking black venirepersons.[241] The court explained:

> The primary reason asserted by the State for striking five of the six black venire members at issue was that they were among eight venire members who circled a specific answer to a specific question on the jury questionnaire. The answer indicated that, although they did not believe that the death penalty ever ought to be invoked, as long as the law provides for it they could assess it under the proper circumstances. A venire member's responses to a written questionnaire can be valid grounds for a peremptory challenge. Because the State struck all eight venire members who shared the characteristic of circling this answer, including three non-black venire members, the appellant has not demonstrated that the State's reason for striking those five black venire members was a pretext for discrimination.[242]

The stricken minority jurors were not disqualified under *Witherspoon*; in fact, each had indicated that they could comply with the law and impose a death sentence in a proper case.[243] The fact that prosecutors consistently struck prospective jurors responding to

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The Texas juror's oath struck down in *Adams v. Texas*, 448 U.S. 38, 40, 42 & n.1 (1980), had been designed to address this situation. Of course, the same factor may complicate a prospective juror's ability to serve when the juror can affirm support for the death penalty, but not as strongly because of hesitance to serve on a capital jury personally. *See, e.g.*, State v. Jones, 789 S.W.2d 545, 548 (Tenn. 1990). In *Jones*, the court reported the prosecutor's explanation for striking an otherwise qualified venireman:

> Of the three black jurors excused, he stated that prospective juror William Green "gave us trouble" on several of his answers. He did not favor the death penalty and while qualified under *Wainwright v. Witt* he appeared hesitant on this issue. Green's position as an elder in the Church of Christ might also compromise his role as a juror because, the prosecutor believed, he would have to explain his decision if he voted for death to his congregation under practices of the denomination. Mr. Green also seemed to be reluctant to sit on the jury for religious reasons and his answers were ambiguous on whether his religious feelings were so strong they would affect his decision-making.

Id.

240. No. AP–75879, 2010 WL 1817772 (Tex. Crim. App. June 30, 2010).

241. *Id.* at *4.

242. *Id.* Moreover, the court cited prior decisions where similar claims had been rejected when prospective jurors had responded the same way to questions propounded on pretrial jury questionnaires regarding support for capital sentencing. *Id.* at *4 n.17.

243. *Id.* at *6.

the question on the juror questionnaire without regard to race supported the conclusion that there was no pretext in using these responses as race-neutral explanations offered for peremptory challenges used on the minority jurors.

3. Reconfiguring the Capital Jury Selection Process

Not only does the *Witherspoon* death-qualification test result in an unintended impediment for promoting the goal of fairly representative capital juries selected to serve without regard to race or ethnicity. It also provides an acceptable source of race-neutral explanation for reducing racial or ethnic representation on capital juries. This occurs because courts typically uphold peremptory challenges used to remove *Witherspoon*-eligible jurors whose support for capital sentencing is, nevertheless, qualified or moderated by other concerns, such as the ability of a prospective juror to personally be involved in imposition of a death sentence as a member of a capital jury.[244] To the extent that these individuals may tend to mirror demographic tendencies with respect to support for capital punishment generally, the likelihood is that jurors who could not constitutionally be excluded under *Batson* will be excluded because of their views on the death penalty.

Alternatives to the present *Witherspoon/Batson* intersection that tends to reduce minority presence on capital juries could address the problem seemingly attributable to unintended convergence of these two lines of Supreme Court authority. The alternatives, however, suggest undesirable, unintended consequences making the goal of achieving a more representative jury for administration of the capital sentencing system quite difficult.

a. Eliminating Death Qualification Under *Witherspoon*

Effective administration of the death penalty likely requires some type of death qualification of prospective jurors. It is difficult to reconcile *Witherspoon* with any system of capital jury selection in which jurors who are irrevocably opposed to capital sentencing are allowed to serve precisely because the inclusion of those jurors would result in either the frustration of the prosecution's lawful goal of securing capital sentencing for those murderers whose offenses and character warrant the death penalty. In holding those jurors qualified for service, the process would necessarily shift to the prosecution's use of its peremptories to exclude abolitionist jurors, instead of simply focusing on jurors qualified based on their abstract support for capital sentencing but whose responses during jury

244. *See, e.g.*, *Waring*, 701 S.E.2d at 636–37.

selection reflect some personal hesitance at imposing a death sentence.

At first blush, this might appear a valid way to address the problem of death qualification by eliminating this aspect of the process altogether. But, it might also lead to disparity in imposition of death sentences based solely on random factors, such as the number of abolitionist jurors who happen to be included on any given jury panel. A single juror holding anti-capital-punishment sentiments could effectively frustrate the process by voting against a death sentence unambiguously warranted by the facts of the case, meaning that sentencing decisions would be based on juror ideology or convictions, rather than on evidence. Much the same thing will happen if a juror unable to consider a sentence other than death is empowered to vote based on personal belief, rather than the evidence, even when mitigating evidence is particularly powerful. The Court recognized this possibility in *Morgan v. Illinois*,[245] when it held that the capital defendant must be entitled to inquire about a juror's potential "death only" views because:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.[246]

The rationale for the Court's decision in *Morgan* is consistent with the exclusion of jurors who cannot consider death based on personal beliefs or bias and are disqualified under *Witherspoon*. Without death qualification, the capital sentencing process would be virtually abolished with the possibility of irrational exceptions based simply on random selection of jury panels including no venirepersons opposed to capital punishment. Otherwise, a single juror unequivocally opposed to the death penalty would always be positioned to avoid the unanimous sentencing verdict typically

245. 504 U.S. 719 (1992).
246. *Id.* at 729.

required for imposition of a death sentence, resulting in mandatory imposition of a life sentence in many jurisdictions.[247]

Elimination of the automatic disqualification of jurors unequivocally opposed to capital sentencing would almost certainly effectively eviscerate capital sentencing as a viable punishment option. It might not serve to address the problem of racial discrimination in jury selection, moreover, as prosecutors concerned about obtaining death sentences would logically be inclined to consider African Americans more likely to oppose imposition of a death sentence in any individual case based on the substantial opposition to capital punishment as a general proposition within the black community. In fact, given the deference accorded trial judges in their evaluation of a prosecutor's explanation for peremptory challenges, exclusion of black jurors might persist through the use of subterfuge in race-neutral explanations given for strikes when challenged under *Batson*. This tactic would reflect the logical appreciation for statistical evidence affording a basis for stereotyping black jurors in assuming that their statistically greater likelihood for rejecting capital punishment would warrant strikes against them.

Yet, even administration of a system truly free from racially based jury selection resulting from elimination of *Witherspoon* death qualification would still produce the very arbitrariness in the imposition of death sentences that led a plurality to reject then-existing capital sentencing schemes in *Furman*.[248] Only a venire overwhelmingly favoring capital punishment such that opponents could readily be excluded from service through peremptory strikes

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247. *E.g.*, ARK. CODE ANN. § 5-4-603(c) (West 2014); LA. CODE CRIM. PROC. ANN. Art. 905.8 (2014); 42 PA. STAT. ANN. § 9711(c)(1)(iv)–(v) (West 2014), *construed in* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (providing that the inability of a capital sentencing jury to reach unanimous agreement requires the imposition of a life sentence without parole); TEX. CODE CRIM. PROC. ANN. art. 37.071(g) (West 2014); VA. CODE ANN. § 19.2-264.4(E) (West 2014); State v. Springer, 586 N.E.2d 96, 100 (Ohio 1992) (holding the imposition of a life sentence proper where the jury cannot unanimously agree on the death sentence as consistent with intent of the statute that failed to address the issue of a hung jury in a capital sentencing proceeding). *But see* OR. REV. CODE ANN. § 163.150(5) (West 2014) (providing that a mistrial ordered during a sentencing proceeding requires the trial court, at the discretion of the State, to impose a life sentence or impanel a new jury for a new sentencing proceeding); State v. Martinez, 282 P.3d 409, 418 (Ariz. 2012) (noting that a hung jury at a first capital sentencing proceeding did not bar resentencing).

248. Furman v. Georgia, 408 U.S. 238, 239–40 (1972) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.").

would likely result in the actual imposition of a death sentence in any given case, resulting in the "infrequent imposition of the death penalty" Justice Stewart noted in his concurring opinion in *Furman*: "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[249] This position was echoed by Justice White in joining the plurality: "I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."[250]

Neither Justice Stewart nor Justice White took the abolitionist position advanced by Justices Douglas,[251] Brennan,[252] and Marshall[253] in their separate opinions in *Furman*. Both would later vote to uphold capital sentencing statutes.[254]

Abolition of the *Witherspoon* test for qualification of capital jurors would aggravate the problem addressed by the Court in *Furman*, the concern that the imposition of capital sentences at that point in the nation's history was simply so infrequent as to be arbitrary and, thus, serve no legitimate punishment interest.[255] Subjecting capital defendants to a system for seating capital juries in which only some juries would be constituted such that all jurors could agree to impose a death sentence based on random selection of the venire would necessarily result in many capital defendants escaping death not based on the merits of the case. Instead, those defendants would not suffer capital sentencing because their juries included members whose philosophical, religious or other convictions would cause them to refuse to impose death regardless of the evidence presented by the prosecution. This "freakish" circumstance, like that leading Justices Stewart and White to concur in *Furman*, would address the question of minority representation only by making capital sentencing more irrational than the systems considered by the *Furman* Court.

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249. *Id.* at 306, 310 (Stewart, J., concurring).
250. *Id.* at 310, 313 (White, J., concurring)
251. *Id.* at 240 (Douglas, J., concurring).
252. *Id.* at 257, 305–06 (Brennan, J., concurring).
253. *Id.* at 315, 369–71 (Marshall, J., concurring).
254. *E.g.*, Jurek v. Texas, 428 U.S. 262, 264 (1976) (Stewart, J., concurring); *Id.* at 277 (White, J., concurring).
255. David Von Drehle, *Report: Death Penalty Use and Support Is Dropping*, TIME (Dec. 21, 2010), http://content.time.com/time/nation/article/0,8599,2039273,00.html (reporting the lessened use of the death penalty).

b. Elimination of All Peremptory Challenges

An alternative option exists for addressing the potential for racial or ethnically discriminatory exclusion of prospective jurors justified by reference to their less-than-unqualified support for capital punishment. That would be to eliminate peremptory challenges altogether, as Justice Marshall argued in his concurring opinion in *Batson*: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[256]

In the long term, resolution of the problems posed by discriminatory practice in the use of peremptory challenges almost certainly requires reconsideration of the role played by exclusion of jurors based on subjective perceptions of counsel with respect to the predisposition of venirepersons. As Justice Marshall explained in his *Wilkinson v. Texas*[257] dissent from denial of certiorari, the critical flaw in *Batson*'s rationale can be found in its simplification of the problem of racism. Even those prosecutors conscientiously attempting to avoid the effects of racial discrimination may fail to appreciate biases, predisposition, or stereotyping that may be traced to life experience or other influences in which racial animosity has been a motivating factor. This subtle racism may lead to honestly held assumptions that the effects of discriminatory attitudes have been purged from current thinking.[258] Conversely, *Batson* permits those prosecutors who intend to discriminate to do so by simply relying on racially neutral explanations for their peremptory strikes, willingly engaging in deceit to exclude minorities from participation in the criminal process as jurors. The problem with *Batson* is, then, that it rests on the notion that prosecutors, who, bound by an oath to uphold the Constitution, will obey the law. The decision itself proves that this is simply not the case.[259] Justice Marshall again urged elimination of all peremptory challenges echoing his position in his concurring opinion in *Batson*.[260]

However, elimination of *all* peremptory challenges would necessarily deprive capital defendants of any opportunity to exclude prospective jurors whose apparent bias against the accused—on any basis, not just race or ethnic prejudice—would not be sufficiently apparent to require the trial court to exclude an unfavorable juror for cause. But, because the *Batson* rationale is founded on the

256. Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

257. 493 U.S. 924, 928 (Marshall, J., dissenting); *see also supra* note 76 and accompanying text (providing Justice Marshall's observation).

258. *See* Linder, *supra* note 235, at 900–02.

259. *See Wilkinson*, 493 U.S. at 928 (Marshall, J., dissenting).

260. 476 U.S. at 101, 103 (Marshall, J., concurring).

Fourteenth Amendment's equal protection of the rights of citizens to serve on juries, as well as a party's right to a jury selected on constitutionally acceptable grounds, traceable to *Strauder,* and earlier decisions in *Neal v. Delaware*[261] and *Virginia v. Rives*,[262] there is good reason for expansion of *Batson* beyond a right recognized only for criminal defendants.[263] Thus, because the protection of the rights of prospective jurors is integral to the *Batson* rationale, discriminatory exclusion of jurors based on race or ethnicity is precluded in civil litigation in *Edmonson v. Leesville Concrete Company*.[264]

c. Elimination of the Prosecution's Peremptory Challenges

In order to harmonize Justice Marshall's preference for exclusion of peremptory challenges as the only effective means of countering discrimination in jury selection and the tactical need for capital defendants to have a meaningful remedy for countering perceived juror bias not requiring disqualification for cause, the rationale for affording defendants a right to peremptory exclusion in criminal, and particularly capital, trials must rest on a theory other than equal protection. Justice O'Connor, dissenting in *Georgia v. McCollum*,[265] recognized the purpose of *Batson* in promoting nondiscriminatory justice when the majority held that the *Batson* prohibition would also apply the exercise of peremptories by criminal defendants.[266] She argued that criminal defense counsel should not be counted as state actors[267] in applying the equal protection analysis earlier advanced in *Edmonson*.[268] Justice O'Connor described the application of the state actor characterization to include criminal defendants and their counsel as "remarkable,"[269] while Justice Scalia, also dissenting, used stronger language, calling the majority's reliance on the state actor analysis applied in *Edmonson* "terminally absurd."[270]

One answer could be to conclude, as Justice Marshall suggested, that protection against equal protection violations of rights of

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261. 103 U.S. 370 (1881).
262. 103 U.S. 313 (1880).
263. *Batson*, 476 U.S. at 104–05 (1986) (Marshall, J., concurring).
264. 500 U.S. 614, 628–31 (1991). Similarly, discrimination based on gender in the exercise of peremptory challenges was prohibited in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).
265. 505 U.S. 42 (1992).
266. *Id.* at 62 (O'Connor, J., dissenting).
267. *Id.* at 67–68.
268. 500 U.S. at 620–21, 627.
269. 505 U.S. at 62 (O'Connor, J., dissenting).
270. *Id.* at 69–70 (Scalia, J., dissenting) ("A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state.").

prospective jurors cannot be effectively guaranteed by the tools adopted in *Batson* or other trial procedures, requiring elimination of peremptory challenges as a generally accepted litigation option for all litigants.[271] However, the Court's holding in *Holland v. Illinois*,[272] that peremptory challenges in criminal trials are controlled by Fourteenth Amendment equal protection considerations, rather than Sixth Amendment fair trial guarantees, should be overruled.[273] Because criminal defendants enjoyed the right to use peremptory challenges at the common law,[274] the Court could quite reasonably conclude that criminal defendants must be permitted use of peremptory challenges as a component of the Sixth Amendment fair jury trial guarantee.[275] Changing constitutional doctrine is typically not so simple, of course, and elimination of all peremptory strikes would seem to impair the rights of some civil litigants to fair trials unless nonunanimous verdict rules in civil actions would effectively reduce the chance that predisposed jurors not subject to exclusion for cause would be able to compromise the integrity of the jury's decision making by masking bias during the selection process.

An alternative option would simply require a reassessment of the underlying rationale for use of peremptories in terms of strict reference to state actors. As a matter of Fourteenth Amendment equal protection analysis, civil litigants could be precluded from using peremptory strikes to exclude prospective jurors on the basis of race, ethnicity, or gender. The right of criminal defendants to exclude jurors as a matter of the Sixth Amendment fair jury trial right could remain intact and counsel might still be required to explain their strikes as warranted by race-neutral explanations. Yet, the State could simply be denied the option of peremptorily striking any otherwise qualified prospective juror on the ground that even race-neutral reasons for the strike would not support this exercise of state action against the individual citizen called for jury service.

An even broader reading of the Sixth Amendment right affording fair trials to criminal defendants could rest on the dissenting opinions of Justices O'Connor and Scalia in *Georgia v. McCollum*, permitting defendants to exercise peremptory strikes on any basis, including race, ethnicity or gender, because defendants are not state actors, barred from discriminatory action under the Fourteenth Amendment.

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271. *See* Batson v. Kentucky, 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring).

272. 493 U.S. 494 (1990).

273. *Id.* at at 498.

274. Swain v. Alabama, 380 U.S. 202, 218–21 (1965).

275. *See, e.g.*, *id.* (noting the importance of peremptory challenges).

Elimination of peremptory challenges in the jury selection process would not impair any explicit constitutional value. The *Swain* Court itself detailed the continued reliance on peremptory strikes not as an element of constitutional protection, but as a matter of English common law tradition.[276]

Yet, the elimination of peremptory strikes from the capital jury selection process would have another consequence in that it would deprive the defense of an opportunity to remove jurors perceived by the accused and counsel to be hostile or predisposed to convict or impose death who otherwise survived challenges for cause. In *Morgan v. Illinois*,[277] for instance, the Court recognized that the capital defendant should be afforded the opportunity to question prospective capital jurors qualified to serve based on their support for capital punishment concerning their commitment to imposing death sentences. A capital juror who believes that all murders, or murders defined as *capital* under the controlling law, should be punished by death—whether grounded in the Biblical "eye for an eye" principle or other reasons—will almost certainly be unable to give deference to mitigating circumstances supported by the evidence and, thus, will be unable to follow the law in much the same way that abolitionists or opponents of capital sentencing cannot follow the law and are subject to disqualification under *Witherspoon*.

Some jurors who hold views strongly supporting capital punishment may, however, still affirm their ability or duty to follow the law and be found qualified to serve under *Morgan*.[278] Without recourse to exclusion of such jurors through peremptories, capital defendants may be forced to present their mitigation evidence to a juror who is predisposed, but not unalterably so, to not considering life imprisonment or some lesser punishment as an appropriate sentence in the case. One can argue, of course, that this simply equalizes the selection process for the prosecution and defense since prosecutors would no longer be able to peremptorily remove *Witherspoon*-qualified jurors who express hesitance in their willingness to actually impose a death sentence or appear lukewarm in their support for the death penalty.

The peremptory strike may, consequently, afford the criminal defendant facing a death sentence the opportunity to negate deliberate misrepresentation by a prospective juror in denying a predisposition to impose death in every murder case, or to reject mitigation without having heard the defense case in the punishment phase of the capital trial. It also, frankly, affords the defense the

276. *Id.* at 211–22.
277. 504 U.S. 719 (1992).
278. *Id.* at 735.

option of excluding the lying venireperson whose denial of prejudgment—bias based on the nature of the case—or animus toward the accused as a member of a particular ethnic, social or cultural group is otherwise credited by the trial judge in rejecting a challenge made by the defense for cause.

Thus, the more sinister consequence of removing the accused's right to use peremptories in capital cases likely lies in the fact that the remedy provided in *Turner v. Murray* will effectively be compromised by the inability to use the voir dire process to tease indications of racial animus or bias from prospective jurors in the questioning process. Jurors are often unlikely to admit the existence of bias in their lives[279] for any number of reasons, including an honest desire to believe that they would not discriminate based on race or ethnicity. Skillful examination during voir dire may disclose indications of latent or suppressed racist tendencies that could result in a greater likelihood that in a cross-racial crime, or where the accused is a member of a minority group, those jurors would be more inclined to impose death. Similarly, the accused, personally, may discern evidence of animus or bias based on personal experience through facial interaction or gestures counseling in favor of exclusion through peremptory challenges.[280]

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279. *See supra* note 62 (regarding trial counsel's explanation for not inquiring about racial bias in voir dire based on experience that jurors do not answer truthfully). The Fifth Circuit accepted counsel's explanation. Sterling v. Cockrell, 100 F. App'x 239, 332 (5th Cir. 2004). Similarly, the Florida Supreme Court addressed a similar ineffective assistance challenge in the light of trial counsel's personal experience that supported his explanation for not questioning prospective jurors on the subject of racial bias:

> The record reveals that trial counsel made a strategic decision not to ask each prospective juror specific race-based questions. Trial counsel testified during the postconviction proceeding that he does not automatically ask race-related questions in interracial crimes, and that his decision to do so turns on the composition of the prospective panels and the facts of the case involved. Counsel further asserted that he did not regard Fennie's case as racially motivated, and that he wanted to avoid offending or alienating potential jurors by asking each of them questions related to race. In trial counsel's experience, the risk of jury alienation would not have been cured through the use of individual voir dire.

Fennie v. State, 855 So. 2d 597, 603 (Fla. 2003).

280. The *Swain* Court noted the use of peremptory challenges in assessing potential bias of prospective jurors in this respect, generally:

> The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice." Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the

Even when the prospective jurors do not indicate any tendency toward racial discrimination in their personal lives, peremptory challenges serve a significant function for the defense, particularly in a capital trial. For instance, a prospective juror who has personal experience in law enforcement, or relatives or close friends with law enforcement experience, will almost never be viewed as a favorable juror in a criminal trial. The reasons are rather obvious—not only will the venireperson be more inclined to identify with law enforcement in the case, but he or she will also likely tend to be favorable to testimony or evidence offered through other law enforcement officers. If the juror affirms neutrality, however, the trial judge may seize on this affirmation in holding the juror qualified to serve, perhaps being reluctant to appear too inclined to disqualify law enforcement officers from jury service. The trial judge can typically err on the side of inclusion, recognizing that defense counsel can remove the juror through use of a peremptory strike without fear of antagonizing the law enforcement community beyond that which might reasonably be expected in a system which is admittedly adversarial.

The State, as opposed to the defense, has no valid interest in excluding jurors qualified for service on capital trials who are not subject to challenge.[281] Exclusion of prospective jurors otherwise qualified to serve—even when based on race or gender neutral grounds—necessarily results in some form of exclusion that is subjective and reflects stereotyping of the juror or their attitudes that really cannot be justified as a constitutionally sound exercise of the sovereign's authority. To the extent that jury service does

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> exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.

380 U.S. at 219–220 (quoting *In re* Murchison, 340 U.S. 133, 136 (1955)). *Murchison* dealt with the authority of Michigan trial judges to conduct contempt proceedings and did not address the role of peremptory strikes at all. *See Murchison*, 340 U.S. at 136.

281. The *Swain* majority argued that according peremptory challenges to the prosecution was necessary to prevent prejudice to the prosecution. 380 U.S. at 220 (citing Hayes v. Missouri, 128 U.S. 68, 70 (1887)). In *Hayes*, the Court affirmed the right for the prosecution not to be disadvantaged in trial procedure, specifically addressing peremptory strikes:

> Experience has shown that one of the most effective means to free the jurybox from men unfit to be there is the exercise of the peremptory challenge. The public prosecutor may have the strongest reasons to distrust the character of a juror offered, from his habits and associations, and yet find it difficult to formulate and sustain a legal objection to him. In such cases, the peremptory challenge is a protection against his being accepted. The number of such challenges must necessarily depend upon the discretion of the legislature, and may vary according to the condition of different communities, and the difficulties in them of securing intelligent and impartial jurors.

128 U.S. at 70.

reflect a component of the citizenship experience, the prosecution has no greater claim to exclusion of qualified jurors from service than it would have for exclusion of qualified electors from voting. If this position is sound, or arguably sound, then the elimination of prosecutorial peremptory strikes in capital cases by the Court, through the Sixth, Eighth, and Fourteenth Amendments, would clearly be appropriate. After all, peremptory challenges are not protected under the Constitution and the Court, while recognizing their place in the tradition of litigation, has, nevertheless, restricted their use in *Batson* and its progeny.[282]

There is an additional problem in the impact of death qualification on ethnic diversity in capital juries. Substantial scholarly literature supports the commonly held perception of defense lawyers that jurors qualified for service on capital juries based on their unequivocal approval of capital punishment are also more likely to convict, or to be "conviction prone."[283] The Court itself recognized this body of literature in *Lockhart v. McCree*,[284] where the majority rejected the argument in holding that due process was not offended by the refusal to empanel separate juries for the guilt/innocence and sentencing phases of capital trials.[285] The *Lockhart* Court noted that studies finding the same predisposition of jurors qualified for service in capital cases were before the Court in *Witherspoon*, and were found to be insufficient to warrant a definitive conclusion on the claims made in opposition to the use of death qualification in selecting a jury that would also be charged

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282. *See supra* note 71 (discussing the expansion of the *Batson* principle in *Powers v. Ohio*, 499 U.S. 400 (1991) (applying *Batson* when a criminal defendant is not ethnic minority)). *See generally* J.E.B. v. Alabama, 511 U.S. 127 (1994) (extending *Batson* to bar the use of peremptory challenges based on the a juror's gender); Georgia v. McCollum, 505 U.S. 42 (1992) (extending *Batson* to the defendant's use of peremptory challenges in criminal trials); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (extending *Batson* to civil litigation).

283. *See* Lockhart v. McCree, 476 U.S. 162, 168–70 nn.4–5 (1986).

284. *Id.*

285. The majority cited the *Witherspoon* Court's characterization of the research relied upon at the time:

> The data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

Id. at 170–71 (citing Witherspoon v. Illinois, 391 U.S. 510, 517–18 (1968)).

with determining the accused's guilt on the capital charge.[286] It rejected the argument that death qualification unfairly skewed the jury in favor of conviction, holding:

> Having identified some of the more serious problems with McCree's studies, however, we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that "death qualification" in fact produces juries somewhat more "conviction-prone" than "non-death-qualified" juries. We hold, nonetheless, that the Constitution does not prohibit the States from "death qualifying" juries in capital cases.[287]

Subsequent federal decisions have included references to more scholarly studies supporting the argument that death qualification skews capital juries toward conviction.[288]

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286. *Id.* at 171 ("It goes almost without saying that if these studies were "too tentative and fragmentary" to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.").

287. *Id.* at 173.

288. *See* Buchanan v. Kentucky, 483 U.S. 402, 426 (1986), (Marshall, J., dissenting) ("As it did in [*Lockhart*], the Court today *assumes* that the accumulated scholarly studies demonstrate that death qualification produces juries abnormally prone to convict. This assumption is well-founded. The evidence is overwhelming that death-qualified juries are 'substantially more likely to convict or to convict on more serious charges than juries on which unalterable opponents of capital punishment are permitted to serve.'" (quoting *Lockhart*, 476 U.S. at 184 (Marshall, J., dissenting))); *see also* United States v. Young, 376 F. Supp. 2d 787, 797 (M.D. Tenn. 2005), *vacated*, 424 F.3d 499 (6th Cir. 2005) (providing the district court ordered the empanelling of separate juries on the questions of guilt/innocence and punishment in a federal death-penalty trial and the circuit court vacated the order on the government's interlocutory appeal). The district court's order in *Young* granting the severance of these issues included its reference to the increasing body of research on the impact of death qualification on predisposition of jurors to convict:

> The Defendants (sic) cites several studies to support these propositions. Acker, Bohm, & Lanier, AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT (2d ed. 2003); Bowers & Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing*, 39 CRIM. LAW. BULLETIN 51 (2003); Bowers, Steiner & Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors" Race and Jury Racial Composition*, U. PA. J. CONST. L. 171 (2001); Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Jurors" Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEH. 53 (1984); *Fitzgerald & Ellsworth, Due Process v. Crime Control: Death Qualification and Jury Attitudes and Attitudes*, 8 LAW & HUM. BEH. 31 (1984); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEH. 133 (1984); Craig Haney, *On the Selection of Capital Juriess: The Biasing Effects of the Death-*

Not only does the death-qualification process serve to enhance the likelihood that the capital sentencing jury will return a verdict imposing a death sentence in the capital sentencing process, but it offers prosecutors a potentially attractive alternative in securing murder convictions where the evidence of guilt may be marginal or the strength of aggravating circumstances is in doubt. By charging any murder potentially qualifying for punishment as a capital offense, a prosecutor may threaten the accused with the death penalty in order to induce a guilty plea that will result in imposition of a life sentence. But if the case demands trial, the death-qualification process provides additional assurance of conviction when the evidence may be less than overwhelming. Once the death qualified jury convicts on the capital charge—consistent with the widely held perception that death qualification produces a jury more prone to conviction—the prosecutor can elect not to pursue a death-sentence, resulting in imposition of the alternative of a life sentence, the only sentencing option for a capital conviction in many jurisdictions.[289] The process of death qualification thus may not only serve to reduce minority participation on capital juries, but also serve to advance the interests of prosecutors in securing conviction on capital charges.

When prosecutors use death qualification in selecting the capital jury and then exercise discretion in declining to seek a death sentence following conviction, defense counsel is left without recourse.[290] To object and subject the client to capital sentencing in

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Qualification Process, 8 LAW & HUM. BEH. 121 (1984); Haney, Hurtado, & Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects,* 18 LAW & HUM. BEH. 619 (1994).

Young also references the work of the Capital Jury Project ("CJP"), a program of research on the decision-making of capital jurors started in 1991 by a grant from the National Science Foundation. *See* http://www.cjp.neu.edu (last visited Apr. 6, 2005) (listing dozens of publications based on CJP research). Several courts have cited CJP research. *See, e.g.,* Strickler v. Greene, 527 U.S. 263, 305 (1999) (Souter, J., concurring in part and dissenting in part) ("common experience, supported by at least one empirical study, *see* Bowers, Sandys, & Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making,* 83 Corn. L. Rev. 1476, 1486–1496 (1998), tells us that the evidence and arguments presented during the guilt phase of a capital trial will often have a significant effect on the jurors' choice of sentence.")

Young, 376 F. Supp. 2d at 797 n.8.

289. *E.g.,* ARIZ. REV. STAT. ANN. § 13-751(A)(1) (2010); ARK. CODE ANN. § 5-4-104(b) (2013); COLO. REV. STAT. § 18-1.4-102(1)(a) (2014); FLA. STAT. ANN. 921.141(1) (West 2006); GA. CODE ANN. § 17-10-31(a) (2011); TEX. PENAL CODE ANN. § 12.31(a) (West 2011).

290. *See, e.g.,* Hurd v. State, 735 S.W.2d 438, 440 (Mo. Ct. App. 1987).

such a circumstance could only have the negative consequence of exposing the convicted defendant to a death sentence, or forcing mistrial and a second trial in which the client would still face the possibility of a death sentence. Like the tactic of charging murders as capital offenses in order to induce guilty pleas when there is no true intent to seek a death sentence, a tactic designed to impose life sentences without trial, the threat of capital sentencing to obtain the advantage of empanelling conviction-prone jurors in close cases in terms of evidence, suggests impropriety. Yet it is impropriety that likely requires the accused facing the possibility of death to proceed in light of the superior litigation posture available to the State.[291]

Elimination of the prosecution's peremptory challenges is an approach to the problem of disparity in minority representation on capital juries that preserves reliance on the death penalty as a sentencing option for states and the federal government. Of course, the demographic difference in support and opposition to capital sentencing suggests that capital juries will continue to reflect disproportional underrepresentation of black jurors because of the higher incidence of opposition to capital sentencing as long as *Witherspoon* disqualification continues to shape the composition of the capital jury.

CONCLUSION

Given the logic of the Court's approach in *Witherspoon* and its implicit recognition that death qualification will necessarily result in a jury that does not reflect the view of a substantial portion of the community—the significant opposition in the black community to capital punishment—not only does the death-qualification process exclude the expressed moral judgment on capital punishment held by this part of the community, but it serves to reduce the black presence in a symbolically important process in the criminal justice system.

The Court's decisions in *Turner v. Murray* and *Rosales-Lopez v. United States* implicitly recognize that racially discriminatory attitudes of jurors threaten to compromise the integrity of the fact-finding process. In capital cases in which the death penalty is a sentencing alternative, moreover, racial animus or bias may unfairly infect the sentencing decision with a constitutionally prohibited factor—perhaps the most important constitution prohibition at this point in our history, in fact—resulting in imposition of death sentences based on race or ethnicity, rather than on the nature of

291. *See, e.g., id.* (noting that the defendant pleaded guilty to avoid possibility of the death penalty where counsel scared him by explaining the possibility that an all-white jury might sentence him to death).

the offense, proof of aggravating circumstances warranting consideration of the death penalty, or the character of the defendant. Instead, a death sentence may be the product of racially biased judgments about the defendant's character that ignore the existence of mitigating circumstances.

If death qualification can be accomplished only at the cost of excluding African Americans or other minority citizens from this most important aspect of the civic duty of jury service, then the cost arguably outweighs any benefit of relying on capital punishment as an expression of community conscience. That is, unless we are prepared to abandon the goal of full equality within the community in which all ethnic groups are entitled to representation and whose views are respected by the entire community.

The death-qualification process represents the type of systemic flaw—not as a result of intended design, but as a reality of experience—that undermines the goal of a racially neutral and fair administration of the death penalty. Ultimately, the demographic consequence of death qualification is the legitimization of a process in which the need for expression of community attitudes on the suitability of capital punishment is compromised by limitations in defining the community through the lens of race and ethnicity.[292] It is a compromise that inherently undermines the credibility of capital sentencing as a punishment option predicated on acceptable penological goals.

Over the past several years, abolition of the death penalty has become a viable option for dealing with many of the concerns over the fairness and economic costs of its use. The problems in administering capital sentencing, including its fiscal costs, have prompted a number of states to abolish the death penalty despite its continuing viability as a constitutionally acceptable punishment option for the most heinous of offenses.[293] New Jersey,[294] New

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292. *See, e.g.*, People v. Turner, 690 P.2d 669, 686 (Cal. 1984) (Bird, C.J., concurring in part and dissenting in part), *overruled on other grounds*, People v. Anderson, 742 P.2d 1306, 1309 (Cal. 1987). The former Chief Justice observed, with respect to the prosecutor's use of peremptory challenges:

> A sentencing jury in a capital case is supposed to "express the conscience of the community on the ultimate question of life or death." A jury systematically culled of blacks and women simply cannot "speak for the community" on the question as to whether death is warranted. The underrepresentation of these important segments of the community undermines the legitimacy and reliability of any death verdict reached by such a jury.

Id. at 687 (quoting *Witherspoon*, 391 U.S. at 519, 520 (footnote omitted)).

293. DEATH PENALTY INFO. CENTER, THE DEATH PENALTY IN 2009: YEAR END REPORT (Dec. 2009), *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

294. N.J. STAT. ANN. § 2C:11–3 (West 2007) (repealing a death-penalty sentencing provision in a homicide statute). In *State v. Fortin*, 969 A.2d 1133,

Mexico,[295] Illinois,[296] Connecticut,[297] and Maryland[298] have legislatively rejected further reliance on capital sentences to address murder, while significant legislative debate has failed to result in repeal of capital sentencing in other states.[299] The New York Court of Appeals held that the state's death-penalty statute could not be

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1139–41 (N.J. 2009), the New Jersey Supreme Court held that a defendant, convicted of capital murder, could be sentenced under the life-without-parole mandatory sentence authorized under the amended statute, but only if the State could prove that aggravating circumstances outweighed mitigating circumstances. Such a finding would have resulted in a death sentence under the former provision, whereas under the amended statute the court is able to impose the less onerous sentence of life imprisonment. *See* § 2C:11–3. If the State failed to meet its burden however, the defendant would be subject to a life sentence with a possible thirty-year parole disqualifier, which remains available under the former statute. *See id.* In this way, the majority sought to avoid the ex post facto claim resting on the imposition of a retroactive sentence voided by intervening legislative action, an approach sharply criticized by dissenting Justice Albin, joined by Justice Long. *Fortin*, 969 A.2d at 1141. They maintained that the majority's decision violated the ex post facto protections afforded by both the United States and the New Jersey Constitutions. *Id.* at 1141–42 (Albin, J., dissenting).

295. N.M. STAT. ANN. § 31–20A–1 (LexisNexis 2009), *repealed by* 2009 N.M. Laws ch. 11, §§ 5–7. The repeal of the State's capital sentencing statute applied the change in the law prospectively, requiring the New Mexico Supreme Court to consider what procedure would apply to capital prosecutions pending at the time of the effective date of the amendment, for which death sentences could still be imposed. *See In re* Death Penalty Sentencing Jury Rules, 222 P.3d 674 (N.M. 2009); *In re* Death Penalty Sentencing Jury Instructions, 222 P.3d 673 (N.M. 2009). In a pre-repeal case, *State v. Fry*, the court had rejected a challenge to the State's capital sentence process on the ground that the jury sentencing procedure did not require jurors to first find that proven aggravating circumstances outweighed mitigating ones, before they could impose a sentence of death. 126 P.3d 516, 531–32 (N.M. 2005). In the post-repeal decisions, the court held that its revised rule for capital sentencing process permitted the capital defendant to elect to have separate juries empanelled for the guilt/innocence phase of the trial and the capital sentencing phase, in the event of conviction, pursuant to Rule 5–704(A) NMRA. *See, e.g.*, *In re Jury Rules*, 222 P.3d at 674–65 ("[T]his Court concludes that providing the option of having two separate juries—one to determine innocence or guilt and one to determine sentencing—for the limited number of death penalty cases that remain pending in New Mexico may address some of the concerns expressed by the Governor the Legislature, and others regarding the death penalty system in New Mexico.").

296. 725 ILL. COMP. STAT. 5/119-1 (West 2012).

297. CONN. GEN. STAT. ANN. § 53a-54b (West 2012).

298. Maryland repealed the death penalty in 2013 with the Governor signing the law on May 2, 2013. Act of May 2, 2013, ch. 156, 2013 Md. Laws; *see also* Joe Sutton, *Maryland Governor Signs Death Penalty Repeal*, CNN-US (May 2, 2013), http://www.cnn.com/2013/05/02/us/maryland-death-penalty/index.html.

299. *See* Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353, 362 n.70 (2010) (collecting news reports of repeal failures in New Hampshire, Montana and Kansas within the past four years).

constitutionally applied in decisions rendered in 2004[300] and 2007,[301] because the "deadlocked jury" instruction, deemed critical to the operation of the sentencing process, was found to be constitutionally flawed.[302] Meanwhile, the jurisdictions most actively relying on the death penalty as a punishment option continue to impose capital sentences while the actual rate of execution remains relatively low.[303]

Short of abolition, there is little way to assure minority representation on capital juries that fairly reflects community demographics. Even elimination of peremptory challenges, which

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300. People v. LaValle, 817 N.E.2d 341, 357 (N.Y. 2004).

301. People v. Taylor, 878 N.E.2d 969, 984 (N.Y. 2007) (applying *LaValle* to vacate death sentence imposed at trial).

302. In *LaValle*, the court held that the "deadlocked jury" instruction included in the capital sentencing statute was fatally flawed. 817 N.E.2d at 356–66. The instruction required the jury to be instructed that in the event it could not reach a sentencing decision unanimously, "the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life." *Id.* at 356 n.9 (quoting N.Y. CRIM. PRO. LAW § 400.27 (2004)).

The court explained the flaw in this statutorily-mandated instruction:

> Like some other states with death penalty statutes, New York recognized that jurors should know the consequences of a deadlock. However, New York's deadlock provision is unique in that the sentence required after a deadlock is less severe than the sentences the jury is allowed to consider. No other death penalty scheme in the country requires judges to instruct jurors that if they cannot unanimously agree between two choices, the judge will sentence defendant to a third, *more lenient*, choice.

Id. at 357 (emphasis added) (citations omitted). The instruction, as written and required to be given, would at least theoretically influence a capital jury to reach a sentencing verdict in order to avoid the possibility that the trial judge would impose a more lenient sentence than the death or life-without-parole options statutorily authorized, and available only, to juries upon conviction for capital murder. *Id.* Later, in *Taylor*, the court rejected the argument that it should simply "re-write the deadlock instruction," concluding that "the death penalty sentencing statute is unconstitutional on its face and it is not within our power to save the statute." 878 N.E.2d at 983–84. It held that *LaValle* compelled that Taylor's death sentence be vacated, noting, "The Legislature, mindful of our State's due process protections, may reenact a sentencing statute that is free of coercion and cognizant of a jury's need to know the consequences of its choice." *Id.* at 984. As of publication, it appears that the legislature has yet to adopt an amendment to the capital sentencing process designed to address the court's reasoning in these decisions.

303. According to the Death Penalty Information Center, as of January 1, 2014, 3070 inmates resided on death row in state and federal prisons; as of September 5, 2014, 1386 executions have been performed since 1976 when the Court upheld post-*Furman* capital sentencing statutes in *Gregg*, *Proffitt*, and *Jurek*; and a total of 27 executions have been performed in 2014. DEATH PENALTY INFO. CENTER, FACTS ABOUT THE DEATH PENALTY 1–3, *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last visited Sept. 9, 2014).

would further the goal of ensuring that jurors are not excluded due to race or ethnic bias protected by reference to hesitance about imposition of a death sentence, would provide only a partial measure of relief from the imbalance in capital jury composition that undermines the integrity of capital sentencing.