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***Witherspoon* in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision**

Bruce J. Winick

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Witherspoon in Florida: Reflections on the Challenge for Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision*

BRUCE J. WINICK**

As national attention focuses on the extensive imposition of the death penalty in Florida, the author questions the legitimacy of the composition of capital juries in the state. Florida courts permit the removal for cause of jurors who are so opposed to the death penalty that they could not vote to recommend it even though they could be fair and impartial in assessing guilt. The author criticizes this practice as inconsistent with the essential role of the advisory jury in the Florida capital sentencing scheme, unconstitutional, and without statutory basis. Suggesting that the removal of these jurors results in capital juries that may not be impartial in assessing guilt and do not represent a fair cross-section of the community, the author calls for a reexamination of the practice.

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I. INTRODUCTION

In Florida, as in all states, a substantial proportion of potential jurors in capital cases who have reservations about the death

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penalty are subject to challenge for cause.¹ If the potential juror "has beliefs which preclude him from finding a defendant guilty of an offense punishable by death," he may be removed for cause as a matter of statute.² The removal of these jurors, who might be called "automatic acquittal" jurors,³ is unquestionably correct. The state as well as the accused enjoys a right to an impartial jury,⁴ and given the requirement of jury unanimity,⁵ permitting persons who could never vote for guilt in a capital case to remain on the

1. In selecting juries, attorneys may exercise two types of challenges to individual jurors—challenges for cause and peremptory challenges. The challenge for cause, based on statutory grounds, is designed to permit the exclusion of potential jurors who display actual bias—an acknowledged prejudicial state of mind—or implied bias, presumed from the juror's relationships or interests in ways specified by statute. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE—STANDARDS RELATING TO TRIAL BY JURY 68-69 (Approved Draft, 1968); see, e.g., *Hopt v. Utah*, 120 U.S. 430, 433 (1887); Fla. Stat. § 913.03 (1983). See generally J. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE JURIES* 140-69 (1977). Prospective jurors are examined under oath both by the court and by the attorneys at a proceeding known as the voir dire. See FLA. R. CRIM. P. 3.300. The court without motion may excuse any prospective jurors found to be unqualified to serve. FLA. R. CRIM. P. 3.300(c). In addition, each party may orally challenge potential jurors for cause, after which the court will determine the validity of the challenge. See FLA. R. CRIM. P. 3.300(c), -.310, -.315, -.320, -.330, -.340.

In addition to challenges for cause, each party may exercise a limited number of peremptory challenges. See, e.g., FLA. STAT. § 913.08 (1983); FLA. R. CRIM. P. 3.350.

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

Swain v. Alabama, 380 U.S. 202, 220 (1965); see also *Babcock, Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1975); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 6-13 (1982).

Studies and public opinion polls have suggested that between one-half and two-thirds of jurors opposed to capital punishment are subject to removal for cause in capital cases. Winick, *supra*, at 76 n.302 (discussing studies by Ellsworth & Fitzgerald (64% excludable), Zeisel (53% excludable), and the 1971 Harris Poll (64% excludable)); *id.* at 30 (table 1) (62.58% of 147 venirepersons opposed to death penalty in five-year study in a Florida district removed for cause). A substantial portion of scrupled jurors remaining after challenge for cause are also removed by prosecutorial peremptory challenge. See Winick, *supra*, at 31 (table 2) (76.92% in Florida study).

2. FLA. STAT. § 913.13 (1983); e.g., *King v. State*, 390 So. 2d 315 (Fla. 1980), *cert. denied*, 450 U.S. 989 (1981); *Magill v. State*, 386 So. 2d 1188 (Fla. 1980), *cert. denied*, 450 U.S. 927 (1981); see also FLA. STAT. § 913.03(3) (1983) (authorizing challenge for cause of a juror who "has conscientious beliefs that would preclude him from finding the defendant guilty").

3. See *Hovey v. Superior Court*, 28 Cal. 3d 1, 20, 616 P.2d 1301, 1311, 168 Cal. Rptr. 128, 138 (1980) (typology of the spectrum of attitudes on capital punishment).

4. See *Hayes v. Missouri*, 120 U.S. 68, 70-71 (1887).

5. FLA. R. CRIM. P. 3.440.

jury would prevent the possibility of obtaining a conviction. Thus, the United States Supreme Court has held that the removal of these jurors, whatever its impact on jury representativeness, is permissible in capital cases.⁶

In addition to these "automatic acquittal" jurors, it is useful to identify a second group of potential jurors with reservations about capital punishment—those whose beliefs do not prevent them from fairly considering a verdict of guilt, but who could never recommend a sentence of death. Jurors in this second group, who might be called "automatic life imprisonment" jurors,⁷ are also subject to removal for cause in Florida,⁸ although the statutory basis for their removal is less clear. The removal of these "automatic life imprisonment" jurors is considerably more controversial. The former statutory schemes for capital punishment, mandating the death penalty upon conviction of certain offenses, have now been replaced by statutes making imposition of the extreme penalty discretionary.⁹ Under the unitary automatic death penalty schemes there may have been no reason to distinguish between "automatic acquittal" and "automatic life imprisonment" jurors, because "automatic life imprisonment" jurors had no way to assert their opposition to capital punishment other than to acquit, leading them to

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

7. See *Hovey*, 28 Cal. 3d at 20, 616 P.2d at 1311, 168 Cal. Rptr. at 138. A third category of death-scrupled jurors can be identified—the "oppose death penalty" jurors—those who have reservations about capital punishment but who can fairly consider guilt and will not automatically vote against death in every case. *Id.*

8. *E.g.*, *King v. State*, 436 So. 2d 50, 53 (Fla. 1983); *Stewart v. State*, 420 So. 2d 521 (Fla. 1982); *Smith v. State*, 407 So. 2d 894 (Fla. 1981); *Maggard v. State*, 399 So. 2d 973, 975-76 (Fla.), *cert. denied*, 454 U.S. 1059 (1981); *Gafford v. State*, 387 So. 2d 333, 334 (Fla. 1980); *Downs v. State*, 386 So. 2d 788, 790-91 (Fla.), *cert. denied*, 449 U.S. 976 (1980); *Jackson v. State*, 366 So. 2d 752, 754-55 (Fla. 1978); *Riley v. State*, 366 So. 2d 19, 21 (Fla. 1978); *Witt v. State*, 342 So. 2d 497, 499 (Fla. 1977); *Nettles v. State*, 409 So. 2d 85, 86 (Fla. 4th DCA 1982); *Herman v. State*, 396 So. 2d 222, 228 (Fla. 4th DCA 1981).

In a recent case, a Florida circuit court judge, departing from precedent, denied the prosecutor's attempt to remove an "automatic life imprisonment" juror for cause. *State v. Hooper*, Case No. 82-155-CF (Cir. Ct., Nassau County, June 20, 1983), *petition for writ of mandamus or in the alternative for a writ of prohibition denied*, Case No. 63,850 (Fla. Sup. Ct., June 22, 1983). In denying mandamus or prohibition, the Supreme Court of Florida, in a brief order, specifically indicated that "[t]he Court has not addressed the issue presented on the merits." *Id.*

9. See Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 549-50 (1961). Indeed, discretionary death penalty laws are now constitutionally required, the Supreme Court having invalidated under the eighth amendment statutes providing for mandatory death sentences upon conviction of certain crimes. *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

behave, in the main part, as "automatic acquittal" jurors. Under these statutes, the state's interest in enforcing the criminal law thus justified broad exclusion of death-scrupled jurors.¹⁰ But Florida and other jurisdictions now have bifurcated procedures in capital cases, separating the trial of guilt from the determination of life or death, and making the penalty decision discretionary.¹¹ In view of this development, the inclusion of "automatic life imprisonment" jurors at the first stage of the bifurcated trial will not frustrate the state's interest in a fair determination of guilt,¹² nor will their inclusion at the guilt determination stage frustrate the state's interest in enforcing its capital punishment scheme if these jurors do not sit at the separate proceeding on the issue of penalty.¹³ The same jury, however, is typically used in both portions of the bifurcated capital trial; thus, efficiency considerations are generally thought to justify removing the "automatic life imprisonment" jurors at the unitary voir dire that is held to select the jury that will perform both functions.¹⁴

In more than three-fourths of the states that authorize capital punishment, the jury makes the sentencing decision.¹⁵ In Florida,

10. See Oberer, *supra* note 9, at 550.

11. FLA. STAT. § 921.141 (1983). Every state authorizing the death penalty, with the partial exception of Ohio, now provides for such a bifurcated proceeding. Marshall v. Lonberger, 103 S. Ct. 843, 862 n.8 (1983) (Stevens, J., dissenting) (citing bifurcated statutes in 33 states); White, *Death-Qualified Juries: The "Prosecution-Proneness" Argument Re-examined*, 41 U. PITT. L. REV. 353, 353 n.2 (1980). Ohio has what may be characterized as a "half-bifurcated" proceeding—"guilt and aggravating circumstances are considered together in one phase, mitigating circumstances in a second." Marshall v. Lonberger, 103 S. Ct. at 862 n.8; see OHIO REV. CODE ANN. § 2929.03 (1982). It has been suggested that bifurcation may now be constitutionally required, White, *supra*, at 353 n.2; see Roberts v. Louisiana, 428 U.S. 325, 356 (1976) (White, J., concurring); Gregg v. Georgia, 428 U.S. 153, 194-95 (1976) (plurality opinion), although the Supreme Court rejected this contention in 1971. McGautha v. California, 402 U.S. 183, 220-22 (1971); see also Marshall v. Lonberger, 103 S. Ct. at 853 (upholding by five-to-four vote the Ohio "half-bifurcated" procedure).

12. See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 7-8 n.26 (1980); Oberer, *supra* note 9, at 550-51; White, *supra* note 11, at 355.

13. See White *supra* note 11, at 397-99.

14. But see Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *appeal pending*, No. 83-2113-EA (8th Cir.) (cost and efficiency considerations held insufficient to justify prejudicial impact on guilt determination and jury representativeness resulting from removal of "automatic life imprisonment" jurors from guilt phase); White, *supra* note 11, at 399-401 (cost and efficiency considerations too insubstantial to outweigh defendant's interest in including "automatic life imprisonment" jurors at guilt determination stage); Winick, *supra* note 1, at 57-59 (same).

15. Gillers, *supra* note 12, at 14, 101-19 app. I (1980). In 27 of the 35 states authorizing the death penalty at the time of Gillers' survey, the jury made the penalty determination, although in two of these the judge had discretion to reduce a death sentence to life imprisonment. *Id.* Thirty-eight states now authorize capital punishment. Anderson, *An Eye for an*

however, and in seven other states, the judge decides penalty.¹⁶ The United States Supreme Court, although invalidating challenge for cause procedures in capital cases which broadly remove venirepersons based on opposition to the death penalty, has specifically declined to disapprove of the removal of "automatic life imprisonment" jurors.¹⁷ Given the general practice of having one jury serve in both portions of the bifurcated capital proceeding—deciding both guilt and sentence—the state's interest in enforcing its capital punishment scheme without incurring the cost and delay of impaneling a second jury presumably justifies the removal of these "automatic life imprisonment" jurors at the voir dire. This justification, however, remains largely unexamined in states, such as Florida, in which the judge makes the sentencing decision. In such instances, the state's interest in imposing a death sentence in an appropriate case can fully be accomplished even if "automatic life imprisonment" jurors remain on the capital jury.

Florida courts have assumed without examination the propriety of the removal of these "automatic life imprisonment" jurors.¹⁸ This assumption is questionable—both as a matter of state law and of federal constitutional law. Unlike the "automatic acquittal" jurors, whose removal for cause is specifically authorized by statute,¹⁹ no specific statutory provision authorizes the removal for cause of "automatic life imprisonment" jurors in Florida. Thus, there is a substantial question as to whether the removal of these jurors is permissible under state law. In addition, there is serious concern about whether capital juries from which a substantial proportion of jurors with reservations about the death penalty are excluded can make an impartial determination of guilt. This concern, supported by an impressive body of social science research,²⁰ raises an important due process question as to whether the practice of removing "automatic life imprisonment" jurors, at least in states in which the judge makes the sentencing decision, can be justified. Moreover, the exclusion of these jurors may remove from capital

Eye, TIME, Jan. 24, 1983, at 28.

16. In Arizona, Idaho, Montana, Nebraska and Oregon, the judge serves as sole decision-maker; in Alabama, Florida and Indiana, however, the jury makes a non-binding recommendation on sentence to the judge. See Gillers, *supra* note 12, at 14; ALA. CODE §§ 13A-5-46, -47 (1982) (amendment postdating Gillers' survey).

17. *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 n.21 (1968). See *infra* notes 27-49 and accompanying text.

18. See *supra* note 8.

19. FLA. STAT. § 913.13 (1983). See *supra* note 2 and accompanying text.

20. See *infra* notes 98-100 and accompanying text.

juries a significant portion of those in the community who have reservations about the death penalty. This raises the additional question of whether the practice undermines the representative character of capital juries so as to violate the sixth and eighth amendments. This article will examine these questions, none of which, curiously, have been analyzed in the Florida cases.

Not only do these issues have intrinsic interest, but they raise substantial questions about the validity of death penalty procedures in a state that presently has approximately 217 defendants awaiting execution, more than any other state in the country.²¹ Capital jury selection practices, and the composition of capital juries they produce, have taken on added importance in recent years. Recent decisions of the United States Supreme Court have upheld against eighth amendment attack the substantive validity of capital punishment for murder²²—at least for the present²³—but have

21. It is difficult to know precisely how many individuals await execution at any particular time. Not only does the number change frequently—with defendants being added to the list, sometimes on a daily basis, as new death sentences are imposed, and others deleted as appellate and habeas courts reverse death sentences—but official lists frequently continue to include prisoners still housed on death row whose sentences have been reversed. A current Florida total around 217 seems reasonable, however. The Miami Herald, April 15, 1984, at 1G, 11G, col. 5. (217 Florida defendants await execution). A generally reliable source of information on the current death row census is *Death Row, U.S.A.*, a periodic list by state of death row inmates, published by the NAACP Legal Defense and Education Fund, Inc. and frequently cited by courts, the media and scholars [hereinafter cited as *Death Row U.S.A.*"]. See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 909 n.7 (1982). As of March 1, 1984, *Death Row U.S.A.* reported that Florida had 203 residents of death row out of a national total of 1311. *Death Row U.S.A.*, March 1, 1984, at 1, 7. Moreover, the death penalty has become a reality in Florida: four of the eighteen defendants executed in America since the Supreme Court upheld capital punishment statutes in 1976 were executed in Florida—John Spenkelink on May 25, 1979, Robert Sullivan on November 30, 1983, Anthony Antone on January 26, 1984, and Arthur Goode on April 5, 1984. The Miami Herald, April 15, 1984, at 1G, 11G, col. 5. No other state has executed more than three defendants.

The present national total is the largest ever, and is increasing rapidly. See Anderson, *supra* note 15, at 28. In the eight states in which the judge rather than the jury decides penalty, see *supra* note 16, a total of 387 defendants await execution. See *Death Row U.S.A.*, *supra*, at 4, 5, 7, 10, 12; The Miami Herald, *supra* at 11G. Thus, the constitutional issues discussed in this article potentially affect 30% of the defendants currently on death row in America. Of course, to have standing to raise these issues, a defendant would have to demonstrate that at least one "automatic life imprisonment" juror was removed for cause in his case. See *infra* note 165.

22. Jurek v. Texas, 428 U.S. 262, 268 (1976); Proffitt v. Florida, 428 U.S. 242, 247 (1976); Gregg v. Georgia, 428 U.S. at 187. The Court has rejected the constitutionality of capital punishment for rape, Coker v. Georgia, 433 U.S. 584, 599-600 (1977) (plurality opinion) (death penalty grossly disproportionate to crime of rape of adult women); see Buford v. State, 403 So. 2d 943 (Fla. 1981), *cert. denied*, 102 S. Ct. 1039 (1982) (death penalty cruel and unusual for crime of rape of child under 12), and for felony murder where the defendant did not commit the murder himself, attempt to do so, nor intend to take life. Enmund v.

left the penalty's future constitutionality dependent upon continued acceptance within "the evolving standards of decency that mark the progress of a maturing society."²⁴ The composition of the capital jury is thus of critical importance, even in states like Florida, where the jury makes only a non-binding recommendation to the sentencing judge. For even in such states, the recommendations of capital juries are a reflection of community standards concerning the death penalty,²⁵ standards that must continue to find the death penalty acceptable if it is to continue to meet constitutional requirements.²⁶

II. *Witherspoon v. Illinois*

In *Witherspoon v. Illinois*,²⁷ the United States Supreme Court for the first time imposed constitutional limits on the ability of the states to remove potential jurors from capital juries on the basis of their opposition to the death penalty. Under Illinois law, the jury had wide discretion in choosing between life imprisonment and the death penalty at a unitary trial in which guilt and punishment were determined in the same deliberation by unanimous vote.²⁸ A state statute permitted the prosecutor to remove for cause any juror who stated "that he has conscientious scruples against capital punishment, or that he is opposed to the same."²⁹ Under this statute, the trial court eliminated forty-seven venirepersons because of their general opposition to the death penalty, only five of whom had stated that they could not vote for the death penalty under

Florida, 458 U.S. 782 (1982).

23. The constitutional question is open for reconsideration under the Supreme Court's eighth amendment jurisprudence if society should reject capital punishment in the future. See *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). See generally Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978).

24. *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)) (Supreme Court's traditional standard for applying the eighth amendment's ban on cruel and unusual punishments).

25. See *Gregg*, 428 U.S. at 181 (jury determinations on sentence serve as a "significant and reliable objective index of contemporary values"). The Court has frequently noted the importance of jury determinations in assessing the constitutionality of capital punishment. See *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *id.* at 814 (O'Connor, J., dissenting); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 299-300 (1972) (Brennan, J., concurring).

26. See *supra* note 24 and accompanying text; Winick, *supra* note 1, at 3-4.

27. 391 U.S. 510 (1968).

28. *Id.* at 512, 518 & n.12.

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

any circumstances.³⁰

The Supreme Court held that by permitting the removal for cause of jurors based merely on their general scruples against capital punishment, Illinois had denied the defendant his due process right to an impartial jury on the issue of sentence.³¹ When the state "swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle,"³² it produced a "hanging jury,"³³ one "uncommonly willing to condemn a man to die."³⁴ These jury selection practices "stacked the deck"³⁵ against the defendant, producing a "tribunal organized to return a verdict of death."³⁶ This violated one of the "basic requirements of procedural fairness . . . that the decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death."³⁷

Although restricting the use of challenges for cause to remove capital jurors based merely on general opposition to the death penalty, the *Witherspoon* Court did not condemn all challenges for cause based on opposition to capital punishment. The Court specifically declined to disapprove of the removal of venirepersons who made it

unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the

30. 391 U.S. at 514.

31. *Id.* at 523. *Witherspoon* was a fourteenth amendment due process rather than a sixth amendment case, as the trial in *Witherspoon* occurred before the sixth amendment was held applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and the Court, two weeks after *Witherspoon* was decided, declined to give *Duncan* retroactive effect. *DeStefano v. Woods*, 392 U.S. 631 (1968).

32. 391 U.S. at 520.

33. *Id.* at 523.

34. *Id.* at 521.

35. *Id.* at 523.

36. *Id.* at 521.

37. *Id.* at 521-22 n.20. Although the Court found it "self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled," *id.* at 518, the Court left open the question of whether such a jury could fairly consider the question of a defendant's guilt or innocence. *Id.* at 517-18. The Court was presented with the preliminary and unpublished results of several studies indicating that such a jury was biased in favor of the prosecution on the issue of guilt. *Id.* at 517 n.10. Although the Court rejected this evidence as "too tentative and fragmentary," *id.* at 517, it recognized that a defendant "in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*." *Id.* at 520 n.18. For further analysis of this issue, see *infra* notes 96-133 and accompanying text.

defendant's *guilt*.³⁸

The first category mentioned by the Court is the group referred to in this article as "automatic life imprisonment" jurors; the second, as "automatic acquittal" jurors. The Court has consistently adhered to this formulation, applying *Witherspoon* to invalidate death sentences imposed by juries from which even one prospective juror was excluded for cause because of views on capital punishment on "any broader basis" than these two categories.³⁹

Witherspoon thus places constitutional limits on the exclusion of jurors in capital cases; it does not itself authorize the removal of any jurors. There has been much confusion on this point, however, as state courts frequently misread *Witherspoon* as a ground for disqualifying jurors in capital cases.⁴⁰ As the Court recently made clear in *Adams v. Texas*,⁴¹ "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude: if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than these two categories, any ensuing death sentence cannot be carried out."⁴²

The *Witherspoon* Court expressly reserved decision on the constitutionality of the removal of "automatic acquittal" and "automatic life imprisonment" jurors, neither forbidding nor permitting their exclusion.⁴³ In more recent cases the Court squarely ap-

38. 391 U.S. at 522-23 n.21.

39. *Adams v. Texas*, 448 U.S. 38 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976) (per curiam); *Mathis v. New Jersey*, 403 U.S. 946 (1971) (reversing death sentences in consolidated cases); see also *Maxwell v. Bishop*, 398 U.S. 262 (1970) (per curiam) (remanding to determine whether death sentence can constitutionally stand under *Witherspoon*); *Boulden v. Holman*, 394 U.S. 478 (1969) (remanding to determine whether death sentence can stand under *Witherspoon*).

40. See *Adams v. Texas*, 448 U.S. 38, 48 & n.6 (1980) (citing Texas cases erroneously referring to *Witherspoon* as a ground for "disqualifying" prospective jurors). Florida courts have fallen into this error as well. See, e.g., *Gafford v. State*, 387 So. 2d 333, 334 (Fla. 1980) (*Witherspoon* "allows the exclusion of" certain jurors); *Jackson v. State*, 366 So. 2d 754, 755 (Fla. 1978) (trial judge properly "followed the dictates of *Witherspoon*"); *Witt v. State*, 342 So. 2d 497, 499 (Fla. 1977) (citing *Witherspoon* for the assertion that it is "proper" to exclude certain jurors).

41. *Id.* at 48.

42. 448 U.S. 38 (1980).

43. See 391 U.S. at 522-23 n.21 ("[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which" these two categories of jurors were excluded). *Id.*

The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a

proved the removal of "automatic acquittal" jurors⁴⁴ and, in dicta, seemed to suggest that propriety of the exclusion of "automatic life imprisonment" jurors as well.⁴⁵ Although the exclusion of these two groups of death penalty opponents would undoubtedly tip the scales toward death, the Court was unwilling to condemn their removal in view of the state's interest in having a jury capable of returning a verdict of guilt and a sentence of death. Thus, the *Witherspoon* principle reflects a careful balance between conflicting interests—the state's interest in enforcing its criminal laws as well as its capital punishment scheme and the defendant's interest in an impartial jury on sentence.⁴⁶ These state interests would be satisfied if the prosecution could exclude for cause "automatic ac-

right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.

Id. at 513-14. In a limited sense, the Court did permit the removal of these two groups of scrupled jurors, indeed of all scrupled jurors. Although vacating his death sentence, the Court affirmed *Witherspoon's* conviction, rejecting his contention that a jury from which all opponents of the death penalty are removed would not be neutral on guilt. Although willing to assume that such a jury was biased in favor of death, the Court was not prepared to assume that it was also biased in favor of guilt, and the incomplete and unpublished reports cited by *Witherspoon* in support of his contention were found "too tentative and fragmentary" to justify such a conclusion. *Id.* at 517-18. The Court's affirmance of *Witherspoon's* conviction thus stands as upholding the neutrality of death-qualified juries *on guilt*. But *Witherspoon's* limited holding in this regard was further qualified by the Court's recognition that the conviction-proneness issue turned on an open empirical question, one that future studies would address, and that the Court might be willing to reconsider the constitutional issue in light of such studies. *Id.* at 520 n.18. A substantial number of social science studies have now been performed on the conviction-proneness issue, *see infra* notes 99-100 and accompanying text, making the issue ripe for reconsideration. *See infra* notes 96-133 and accompanying text.

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

45. In *Adams v. Texas*, 448 U.S. 38, 48 (1980), the Court stated that it would be permissible for a state to bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths. The Court's language seems to apply not only to "automatic acquittal" jurors, but to "automatic life imprisonment" jurors as well. The Court referred to the Illinois law in effect at the time of *Witherspoon*, which "required the jury to consider the death penalty," and stated that "[a] juror wholly unable even to consider imposing the death penalty, no matter what the facts of a given case, would clearly be unable to follow the law of Illinois in assessing punishment." *Id.* at 44. There is uncertainty concerning the reach of the *Adams* dicta because, under the Illinois procedure referred to, the capital jury in a unitary trial decided both life and death in the same deliberation. 391 U.S. at 512. As a result, an "automatic life imprisonment" juror, unable to assert his opposition to capital punishment in any way other than to vote for acquittal, would have behaved as an "automatic acquittal" juror. The *Adams* dicta may therefore not apply in the context of a bifurcated trial.

46. Winick, *supra* note 1, at 44; *see Adams v. Texas*, 448 U.S. 38, 44 (1980) (The *Witherspoon* Court's statement, quoted in text at note 38, *supra*, "seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths.").

quittal" and "automatic life imprisonment" jurors.⁴⁷ Accordingly, *Witherspoon* does not forbid exclusion of these two groups.⁴⁸ But once the state's asserted interest in avoiding nullification of its criminal law or capital punishment scheme is accomplished, the state's power to exclude comes to an end. At that point, the defendant's right to an impartial jury prohibits exclusion of scrupled jurors on "any broader basis" than is necessary to satisfy the state interest in avoiding nullification.⁴⁹

III. THE STATUTORY BASIS IN FLORIDA FOR CHALLENGES FOR CAUSE IN CAPITAL CASES

A. Section 913.13

Chapter 913 of the Florida Statutes contains a special provision, section 913.13, entitled "Jurors in Capital Cases."⁵⁰ This section provides that "[a] person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case."⁵¹ By its terms, this section covers only "automatic acquittal" jurors; it does not disqualify "automatic life imprisonment" jurors. This is the only Florida statutory provision dealing expressly with the removal of jurors in capital cases based on attitudes toward the death penalty. As a result, the natural implication is that a juror with beliefs that do not "preclude him from finding a defendant guilty of an offense punishable by death," that only preclude him from recommending the death penalty—the "automatic life imprisonment" juror—should be deemed qualified as a juror in a capital case.⁵² Yet,

47. Professor White has argued, however, that the state's interests do not require removal of "automatic life imprisonment" jurors on the basis that so long as the state has left the death penalty decision to jury discretion, "it is not apparent why a juror's conscientious scruples against capital punishment or even her total unwillingness to vote for it in any case would incapacitate her from participating in the discretionary judgment." White, *supra* note 11, at 355. See also *Witherspoon*, 391 U.S. at 528-29 (Douglas, J., concurring).

48. *Id.* at 522 n.21; *Lockett v. Ohio*, 438 U.S. 586, 596 (1978).

49. Winick, *supra* note 1, at 44.

50. FLA. STAT. § 913.13 (1983).

51. *Id.*; see also *id.* § 913.03(3) (1983) (authorizing challenge for cause of a juror who "has conscientious beliefs that would preclude him from finding the defendant guilty").

52. See *Williams v. State*, 228 So. 2d 377, 380 (Fla. 1969), *vacated*, 408 U.S. 941 (1972):

The statute does not disqualify a person 'to serve as a juror on the trial of any capital case' merely because he may have 'conscientious scruples against the infliction of capital punishment for murder.' To be disqualified under the statute to serve as a juror in the trial of a capital case, the 'opinions' of the person must be 'such as to preclude him from finding any defendant guilty of an offense punishable with death.'

recent Florida cases permit the exclusion of "automatic life imprisonment" jurors without discussing the statutory basis for such exclusion.⁵³

Perhaps such discussion is omitted because of the mistaken belief that *Witherspoon* itself constitutes a ground for disqualifying "automatic life imprisonment" jurors for cause. Indeed, language in some of the cases suggests that the Supreme Court of Florida believes that the "dictates of *Witherspoon*" command exclusion of these jurors.⁵⁴ As mentioned earlier, however, "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude"⁵⁵ The basis for disqualifying these jurors must therefore be found in state law, and because Florida law authorizes challenges for cause only on the enumerated statutory grounds, there must be a statutory basis for exclusion.⁵⁶

Another reason that discussion of the statutory basis for exclusion of these jurors may be omitted is because Florida law has traditionally recognized that "automatic life imprisonment" jurors may be removed under the predecessor statutory provisions to section 913.13, which contained virtually identical language.⁵⁷ Indeed, in a series of 1969 cases in which defendants attempted to use *Witherspoon* to attack the challenge for cause of "automatic life imprisonment" jurors under this predecessor provision, the Supreme Court of Florida held that the statute authorized challenge for cause of such jurors.⁵⁸ These cases, however, are distinguishable because they involve the prior Florida death penalty statute under

(quoting *Boyington v. State*, 74 Fla. 258, 76 So. 2d 774 (1917) (construing predecessor to § 913.13)).

53. See *supra* note 8. Such a statutory basis for exclusion for cause is necessary in view of the requirement of section 913.03 of the Florida Statutes that challenges for cause may be made only on the specified statutory grounds.

54. See *Gafford v. State*, 387 So. 2d 333, 334 (Fla. 1980) (*Witherspoon* "allows the exclusion of" "automatic life imprisonment" jurors); *Jackson v. State*, 366 So. 2d 752, 755 (Fla. 1978) ("We find that the trial judge followed the dictates of *Witherspoon*, *supra*, and properly excused the jurors."); *Witt v. State*, 342 So. 2d 497, 499 (Fla. 1977) (citing *Witherspoon* for assertion that it is "proper" to exclude "automatic life imprisonment" jurors).

55. *Adams v. Texas*, 448 U.S. at 47-48; see *supra* notes 40-41 and accompanying text.

56. FLA. STAT. § 913.03 (1983).

57. *Id.* § 932.20 (1969), the precursor of which was initially enacted in 1868. See *Williams v. State*, 228 So. 2d 377, 379-80 (Fla. 1969), *vacated*, 408 U.S. 941 (1972). *E.g.*, *Piccott v. State*, 116 So. 2d 626 (Fla. 1959).

58. *Paramore v. State*, 229 So. 2d 855 (Fla. 1969), *vacated on other grounds*, 408 U.S. 935 (1972); *Perkins v. State*, 228 So. 2d 382 (Fla. 1969); *Williams v. State*, 228 So. 2d 377 (Fla. 1969), *vacated*, 408 U.S. 941 (1972); *Campbell v. State*, 227 So. 2d 873 (Fla. 1969); see also *Portee v. State*, 253 So. 2d 866 (Fla. 1971).

which both guilt and sentence were decided by the jury in a unitary procedure.⁵⁹ Florida's present death penalty statute provides for a bifurcated trial; a separate proceeding on the issue of penalty follows the trial on guilt.⁶⁰

Under the pre-1972 unitary death penalty procedure, a juror unable to impose death could frustrate a possible death sentence by voting to acquit the defendant. As a result, such a juror's opinions would preclude him from finding the defendant guilty of an offense punishable with death, and he was deemed to meet the provisions of the predecessor to section 913.13.⁶¹ For example, in *Perkins v. State*,⁶² the court discussed a prospective juror who stated on voir dire that he was against capital punishment. The juror was excused for cause after stating that there were no cases in which he could "give the verdict of the electric chair" and that he was "just unalterably opposed to the idea."⁶³ The Supreme Court of Florida upheld the juror's exclusion as consistent with *Witherspoon* and the Florida statute "since it eventually became clear this prospective juror's scruples against capital punishment were such as to preclude him from returning a verdict of guilty if it might mean the imposition of the death penalty."⁶⁴

Now that the current Florida death penalty statute bifurcates the determination of guilt and penalty, this pre-1972 analysis seems inappropriate. Under the bifurcated procedure a juror able to find guilt but unable to impose death would not be precluded by his beliefs from returning a guilty verdict where the offense is punishable by death. The pre-1972 cases construing the statutory pro-

59. FLA. STAT. §§ 782.04(1), 919.23 (1969).

60. *Id.* § 921.141 (1983). The bifurcated procedure in capital cases was initially introduced in 1972. 1972 Fla. Laws ch. 72-72 (amending FLA. STAT. § 921.141 (1971)). See Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973).

61. Under the then existing Florida death penalty statute, the death penalty would be imposed following conviction of a capital crime unless a majority of the jury recommended mercy. FLA. STAT. § 919.23(2) (1957). Thus, the Supreme Court of Florida concluded that it was "not unlikely" that a juror "who is opposed to infliction of capital punishment to the extent that he will not join in a verdict which results therein . . . would vote 'not guilty' merely to avoid the death penalty, if six other jurors refused to join in a recommendation to mercy." *Piccott v. State*, 116 So. 2d 626, 628 (Fla. 1959). As a result, the court held that if the juror says that he is opposed to capital punishment to the extent that "he will join in a verdict of guilty only if accompanied by a recommendation of mercy, he is not qualified" under the predecessor to section 913.13. *Id.*; accord *Campbell v. State*, 227 So. 2d 873, 876 (Fla. 1969).

62. 228 So. 2d 382 (Fla. 1969).

63. *Id.* at 392-93.

64. *Id.* at 393.

vision governing challenges for cause in a context in which there was a unitary determination of guilt and penalty are therefore inapplicable to construing the statutory provision after bifurcation. It can be argued that if the Florida Legislature that provided for a bifurcated proceeding in capital cases had desired to exclude potential jurors whose beliefs did not preclude a finding of guilt but did prevent a recommendation of death, it presumably would have amended section 913.13 to authorize the removal of these jurors. The absence of such an amendment at the time the death penalty statute was overhauled arguably supports an inference that the legislature did not contemplate the exclusion for cause of "automatic life imprisonment" jurors under the new procedure.

This construction is also fully consistent with the logic and structure of the new death penalty statute. Under the new statute, the jury renders merely "an advisory sentence" to the court, by majority (rather than unanimous) vote. The advisory sentence is based on whether there are "sufficient" aggravating circumstances as enumerated in the statute; whether "sufficient" mitigating circumstances exist to outweigh the aggravating circumstances; and, based on these considerations, whether the defendant should be sentenced to life imprisonment or death.⁶⁵ However, the court is free to impose a sentence of death notwithstanding the recommendation of a majority of the jury.⁶⁶ The Supreme Court of Florida has made it clear that the judge is not bound by the advisory vote of the jury,⁶⁷ and Florida judges have imposed death in a substantial number of cases despite jury recommendations of life.⁶⁸ In-

65. FLA. STAT. § 921.141(2) (1983).

66. *Id.* § 921.141(3) (1983); e.g., *Dobbert v. State*, 375 So. 2d 1069, 1071 (Fla. 1979) (sentence of death upheld following jury recommendation of life where "the facts suggesting a sentence of death are so clear and convincing that virtually no reasonable person could differ" (quoting *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975))). Indeed, the judge may impose a death sentence even where the jury unanimously recommends life imprisonment. See *Dobbert v. State*, 409 So. 2d 1053, 1058-59 (Fla. 1982).

67. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974). The United States Supreme Court, in construing and upholding the Florida statute, has recognized that "[t]he sentencing authority in Florida [is] the trial judge . . ." *Proffitt v. Florida*, 428 U.S. 242, 251 (1976), and that the jury's verdict "is only advisory; the actual sentence is determined by the trial judge." *Id.* at 249.

68. See *Walsh v. State*, 418 So. 2d 1000, 1003-04 (Fla. 1982) (listing 31 such cases reviewed by the Supreme Court of Florida); Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 125 (table II) (1979) (in 18 (27%) of the 66 death penalty cases to reach the Supreme Court of Florida in the period discussed, judges had imposed death despite jury recommendations of life); Foley, *Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty* (unpublished, cited in *Gillers*, *supra* note 12, at 68 n.318)(judges imposed death in 22 (13.9%) of 158 cases in sample studied in which juries

deed, it is more accurate to say that the Florida statute provides a "trifurcated" rather than a bifurcated procedure.⁶⁹

In view of this "trifurcated" structure, section 913.13, dealing with challenges for cause of jurors in capital cases, fully protects the state interest in having juries that are able to convict. And, since under this structure the penalty jury merely makes a recommendation to the judge which he is not bound to follow, permitting "automatic life imprisonment" jurors to participate in the second stage will not frustrate the state's interest in imposing the death penalty in an appropriate case. Reading section 913.13 literally to limit its application to "automatic acquittal" jurors is thus consistent not only with the plain meaning of the provision but also with the logic and structure of the death penalty statute.

B. Section 913.03(10)

The only other conceivable provision that could justify removal for cause of the "automatic life imprisonment" juror is section 913.03(10) of the Florida Statutes. This general provision governing challenges for cause permits removal of a juror who "has a state of mind regarding the defendant, the case, the person alleged to have been injured by the offense charged, or the person on whose complaint the prosecution was instituted that will prevent him from acting with impartiality"⁷⁰ It could be contended that an "automatic life imprisonment" juror has a state of mind regarding the "case" that will prevent him from acting with impartiality by construing "case" to include the sentence-recommendation stage of a capital trial. As these jurors will base their life or death recommendation on their preexisting beliefs, rather than exclusively on the legally relevant evidence, they can be deemed not to meet traditional requirements for impartiality.⁷¹ Indeed, the Su-

had recommended life); Isaly, *Life Recommendations Overridden by Judges* (unpublished list) (between adoption of new capital punishment statute in 1972 and April 29, 1983, 78 defendants sentenced to death despite jury recommendations of life). This Florida experience conforms with the findings of the classic study of jury behavior conducted by Professors Kalven and Zeisel. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 436 (1966) (judges would have given death penalty in 33% of cases in sample in which jury voted for life). The Supreme Court has recently granted certiorari in a Florida case questioning the constitutionality of a trial judge's override of a jury's recommendation against the death penalty. *Spaziano v. Florida*, 104 S. Ct. 697 (1984).

69. *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975); see also *Barclay v. Florida*, 103 S. Ct. 3418, 3429 (1983) (Stevens, J., concurring).

70. FLA. STAT. § 913.03(10) (1983).

71. See *Dobbett v. Florida*, 432 U.S. 282, 302 (1977) (quoting *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975)) (impartial juror is one who will "render a verdict based on the

preme Court of Florida has taken essentially this approach, although without referring to section 913.03(10), in a case requiring the exclusion for cause in capital cases of what might be called "automatic death penalty" jurors—those who can be fair and impartial in assessing guilt but who will automatically vote for the death penalty if the defendant is convicted.⁷²

Although the argument for construing section 913.03(10) to justify removal of "automatic life imprisonment" jurors in capital cases is persuasive, none of the Florida cases considering removal for cause of these jurors rely on this provision; rather, they rely on the predecessor to section 913.13 (the special provision dealing with jurors in capital cases) or, more recently, simply on the mistaken notion that *Witherspoon* itself authorizes exclusion. Moreover, a plausible argument can be made that the "automatic life imprisonment" juror is able to act with impartiality in fulfilling his essential role at the second stage of the "trifurcated" capital trial, and therefore should not be removed under section 913.13(10).

The essential role contemplated for the jury at this second stage is simply to express the conscience of the community on the critical life or death question. The jury is asked to make a general recommendation on penalty by majority vote.⁷³ Although under the statute this recommendation is to be informed by the jury's determinations as to the enumerated aggravating and mitigating circumstances, much of the statutory language setting forth these circumstances is so vague that the jury, instead of making a factual determination, is actually making subjective value judgments concerning the moral significance of the crime and the blameworthiness of the defendant.⁷⁴ Moreover, the jury is not asked to make

evidence presented in court"); *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (defining an "indifferent" juror as one whose "verdict must be based upon the evidence developed at the trial"). Indeed, in an early case the United States Supreme Court applied these traditional notions to uphold challenge for cause of prospective jurors with scruples against capital punishment, stating that such jurors would be prevented "from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence" *Logan v. United States*, 144 U.S. 263, 298 (1892).

72. *Thomas v. State*, 403 So. 2d 371 (Fla. 1981).

Juror Roberts should have been excused because of a fundamental violation—the presence of bias against the defendant in the sentencing aspect of a capital case. This bias violated the express requirements in the sixth amendment to the United States Constitution and in article I, section 16, of the Florida Constitution, that an accused be tried by "an impartial jury."

Id. at 375.

73. FLA. STAT. § 921.141(3) (1983); see *Dobbert v. State*, 409 So. 2d 1053, 1057-58 (Fla. 1982).

74. See *Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980) (recognizing the "imprecision of

specific findings concerning these factors.⁷⁵ Indeed, the determination of what constitutes "sufficient" aggravating circumstances, "sufficient" mitigating circumstances, and which set of "sufficient" circumstances outweighs the other, is left to the sole discretion of the jury.⁷⁶ Thus, the jury has the total discretion to determine

the criteria set forth in our capital punishment statute"); *see, e.g.*, FLA. STAT. § 921.141(5)(h) (1983) (whether "[t]he capital felony was especially heinous, atrocious, or cruel"); *id.* § 921.141(6)(a) (It is a mitigating circumstance if "[t]he defendant has no significant history of prior criminal activity." (emphasis added)); *id.* § 921.141(6)(b) (whether "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (emphasis added)). The attempt by the Supreme Court of Florida to define these factors has not eliminated their vagueness. *See, e.g.*, *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974):

It is our interpretation [of § 921.141(5)(h)] that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

Extreme mental or emotional disturbance [§921.141(7)(b)] . . . is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

Id. at 9-10. Confounding the vagueness of these terms is the constitutional requirement that the jury be free to consider nonstatutory mitigating factors, *Eddings v. Oklahoma*, 455 U.S. 104, 112-17 (1982); *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see Songer v. State*, 365 So. 2d 696, 700 (Fla. 1978) (construing statute to permit such consideration). *See generally* Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981). Their vagueness is further confounded by the possibility that a death sentence may be based on nonstatutory aggravating circumstances. Notwithstanding the Supreme Court of Florida's determination that "[t]he aggravating circumstances specified in the statute are exclusive and no others may be used for the purpose," *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982); *Spaziano v. State*, 393 So. 2d 1119, 1122-23 (Fla. 1980); *Miller v. State*, 373 So. 2d 882, 885 (Fla. 1979); *Purdy v. State*, 343 So. 2d 4 (Fla. 1977), the Florida court has applied a harmless error approach, declining to vacate death sentences in cases in which the trial judge improperly considered a nonstatutory aggravating factor where the trial judge found no mitigating circumstances, *see, e.g.*, *Ferguson v. State*, 417 So. 2d 639, 646 (Fla. 1982); *White v. State*, 403 So. 2d 331 (Fla. 1981); *Sireci v. State*, 399 So. 2d 964, 971 (Fla. 1981), or where a mitigating circumstance had only "minor significance." *Brown v. State*, 381 So. 2d 690, 696 (Fla. 1980). *See Elledge v. State*, 346 So. 2d 998, 1002-03 (Fla. 1977). This harmless error approach was recently upheld in *Barclay v. Florida*, 103 S. Ct. 3418 (1983).

75. *See Dobbert v. State*, 409 So. 2d 1053 (Fla. 1982) ("In fact, in most cases, the trial judge and this Court know only that a majority of the jury has recommended life or death." *Id.* at 1058. The numerical breakdown is not known.); *Florida Standard Jury Instructions in Criminal Cases* 83 (1982) (polling of capital jury limited to asking whether advisory recommendation was agreed to by majority of the jury).

76. *State v. Dixon*, 283 So. 2d 1, 17 (Fla. 1973) (Ervin, J., dissenting), *cert. denied*, 416 U.S. 943 (1974).

what weight is to be given to each aggravating and mitigating circumstance. "The presence or absence of any such circumstance or combination thereof does not compel any particular result. Whether a particular aggravating circumstance or circumstances will outweigh a particular mitigating circumstance or circumstances lies solely within the discretion" of the jury.⁷⁷ The essential role of the Florida capital jury, therefore, is, and perhaps must be,⁷⁸ to determine whether it is the "community's belief that [the crime is] so grievous an affront to humanity that the only adequate response may be the penalty of death,"⁷⁹ and if so, whether there are nevertheless "aspects of the defendant's character and record . . . which may call for a less severe penalty"⁸⁰ In playing this role, the jury's main function can be seen as expressing the "conscience of the community."⁸¹ Indeed, the Supreme Court of Florida has described the sentencing recommendation of the Florida capital jury as "reflecting . . . the conscience of the community" and as "represent[ing] the judgment of the community as to whether the death sentence is appropriate"⁸²

If this is viewed as the essential role of the capital jury in the second stage of Florida's "trifurcated" death penalty process, then the preexisting beliefs held by "automatic life imprisonment" ju-

77. *Id.*

78. See Gillers, *supra* note 12, at 56.

79. *Gregg v. Georgia*, 428 U.S. 153, 184 (1976) (plurality opinion); see also *Furman v. Georgia*, 408 U.S. 238 (1972) (Burger, C.J., dissenting) ("acting as 'the conscience of the community' juries are entrusted to determine in individual cases that the ultimate punishment is warranted," *id.* at 388; capital jury's responsibility is "choosing between life and death in individual cases according to the dictates of community values," *id.* at 389).

80. *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (plurality opinion).

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

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guarded by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.

Although the *Witherspoon* Court was construing a death penalty statute that provided unfettered discretion to the jury, whereas the Florida death penalty statute seeks to guide jury discretion by specifying aggravating and mitigating factors, the jury's role under the Florida provision is nonetheless essentially to make the discretionary choice between life imprisonment and capital punishment, a role that calls upon it to "express the conscience of the community on the ultimate question of life or death."

82. *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983); *McCampbell v. State*, 421 So. 2d 1072, 1075 (Fla. 1982); *Odom v. State*, 403 So. 2d 936, 942 (Fla. 1981), *cert. denied*, 456 U.S. 925 (1982).

rors (as well as those held by "automatic death penalty" jurors) should not be deemed disqualifying. In automatically voting against (or for) a recommendation of death, as by definition these jurors will do, they are performing their essential role of expressing the "conscience of the community on the ultimate question of life or death,"⁸³ a role that the United States Supreme Court has identified as "one of the most important functions any jury can perform in making such a selection"⁸⁴ The capital jury "does not try to determine what the community would say, but in giving its conclusion, speaks for the community."⁸⁵ A capital jury culled of all death penalty opponents cannot speak for the community; it expresses a distorted view of community values.⁸⁶ "Automatic life imprisonment" jurors, just as jurors with differing views on capital punishment, including "automatic death penalty" jurors, speak for the community in voting for or against the death penalty. For the jury's recommendation accurately to reflect the values of the community, all their voices must be heard.

It would thus effectuate the purpose of the statutory scheme to permit service on capital juries of all jurors, regardless of their views on the death penalty, so long as they can be fair and impartial in assessing guilt. Acceptance of this argument would mean not only that "automatic life imprisonment" jurors would be allowed to serve, but that, contrary to existing law, "automatic death penalty" jurors—those who favor capital punishment to the extent that they will automatically vote for it, although they can fairly assess guilt and innocence—would also serve.⁸⁷ These "automatic death penalty" jurors also express the conscience of the community, and they too can play this essential role with impartiality. The symmetry reflected in existing law, based perhaps on the perception that if "automatic life imprisonment" jurors are subject to removal for cause, "automatic death penalty" jurors should be removed as well,⁸⁸ would thereby not be disturbed: if both groups are

83. *Id.*

84. *Witherspoon*, 391 U.S. at 519 n.15 (capital jury plays the important function of maintaining "a link between contemporary community values and the penal system").

85. Gillers, *supra* note 12, at 64.

86. See *Witherspoon*, 391 U.S. at 520.

87. If this argument is accepted, *Thomas v. State*, 403 So. 2d 371 (Fla. 1981), requiring removal for cause of "automatic death penalty" jurors, should be overruled, at least to the extent that such jurors can be fair and impartial in assessing guilt.

88. It may be that the *Thomas* court thought that the removal of "automatic death penalty" jurors was required in view of the practice of removing "automatic life imprisonment" jurors because of the inherent unfairness of a system wherein "a venireman who thought it was his 'duty' to impose capital punishment in the event of a conviction was

permitted to serve, neither the state nor the accused would be disadvantaged.

The existing practice systematically eliminates from capital juries some jurors who can be fair and impartial in assessing guilt because their views on capital punishment are so strong that they would automatically vote either for life or for death. This practice limits the jury's ability to reflect community values, providing Florida sentencing judges with a misleading picture of whether the conscience of the community demands the death penalty in particular cases. Moreover, under the existing system, sentencing judges are misled in the direction of death rather than life imprisonment. Although both "automatic life imprisonment" and "automatic death penalty" jurors are excluded for cause,⁸⁹ the empirical evidence suggests that the former group makes up ten percent or more of the community, while the latter constitute only two percent or less.⁹⁰ The existing practice thus produces advisory juries in Florida that express a distorted exaggeration of the community's willingness to impose the death penalty. Not only does this undermine the Florida capital sentencing scheme, but it is inconsistent with *Witherspoon's* condemnation of jury selection practices in capital cases that "stack the deck" against the defendant and that produce decisionmaking on "scales that are . . . deliberately tipped toward death."⁹¹

Given the limited and basically subjective and discretionary role of the capital jury in Florida, both "automatic life imprisonment" and "automatic death penalty" jurors should be deemed able to participate with impartiality. Indeed, their preexisting beliefs concerning capital punishment in general, rather than being disqualifying, would seem indispensable to the ability of capital jurors to express community sentiments. Although these strongly held beliefs might be deemed disqualifying if the jury in Florida were asked to make specific findings with regard to the existence of aggravating and mitigating circumstances, the statutory scheme does not ask the jury to play this role.⁹² In fact, the statutory

permitted to serve, while those whose dictates of conscience would presumably feel a converse duty were summarily excluded from service," *Crawford v. Bounds*, 395 F.2d 297, 303 (4th Cir.), *vacated and remanded for further consideration in light of Witherspoon*, 393 U.S. 76 (1968), *reinstated* (unreported), *cert. denied*, 397 U.S. 936 (1970). See *Thomas v. State*, 403 So. 2d at 375 (quoting argument of counsel below); *id.* at 376 (citing *Crawford*).

89. See *supra* note 8; *Thomas v. State*, 403 So. 2d 371 (Fla. 1981).

90. See *infra* notes 117-19 and accompanying text.

91. See *supra* notes 35-37 and accompanying text.

92. See *supra* note 75 and accompanying text.

scheme assigns to the trial judge the task of making specific findings concerning aggravating and mitigating circumstances,⁹³ findings that he must make independently and without any benefit of jury findings in this regard. The jury's role is basically to act as a conduit for community values on the life or death question, and all jurors who are able to assess guilt fairly can contribute to this process regardless of their views on capital punishment.

Section 913.03(10) of the Florida Statutes, the general challenge for cause provision dealing with states of mind that will preclude a juror from "acting with impartiality," may thus be construed either to authorize the exclusion of "automatic life imprisonment" jurors, or not to authorize their exclusion. This appears to be an open question in Florida law, as the modern cases upholding the removal for cause of these jurors do not discuss the statutory basis for their exclusion.⁹⁴ The following section discusses the constitutional considerations that are relevant to the inquiry, considerations that should, under general principles,⁹⁵ inform the construction of this somewhat ambiguous statutory provision.

93. FLA. STAT. § 921.141(3) (1983). Although the statute requires such findings to be made in writing only where the judge imposes a sentence of death, the Supreme Court of Florida, under its constitutional power to regulate practice and procedure in the courts, has imposed a parallel requirement of written findings by the trial judge where he rejects the death penalty and imposes life imprisonment. *State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

94. See cases cited *supra* note 8.

95. It is a "cardinal principle" of statutory construction in Florida that "when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be valid, it is the duty of the Court to adopt that construction which will save the statute from constitutional infirmity." *Boynton v. State*, 64 So. 2d 536, 546 (Fla. 1953); *accord* *State v. Lick*, 390 So. 2d 52, 53 (Fla. 1980); *Florida State Board of Architecture v. Wasserman*, 377 So. 2d 653, 656 (Fla. 1979); *Leeman v. State*, 357 So. 2d 703, 705 (Fla. 1978); *State v. Beasley*, 317 So. 2d 750, 752 (Fla. 1975); *State v. Dinsmore*, 308 So. 2d 32, 38 (Fla. 1975). This, of course, is also the approach taken by other courts. See *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 569 (1947) (Supreme Court will avoid passing upon the constitutionality of a statute "if a construction of the statute is fairly possible by which the question may be avoided."); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same."); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (when constitutionality of a statute is drawn in question, Supreme Court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *United States v. Boerner*, 508 F.2d 1064, 1067-68 (5th Cir.), *cert. denied*, 421 U.S. 1013 (1975).

IV. CONSTITUTIONAL CONSIDERATIONS

A. *The Sixth Amendment/Due Process Right to Jury Impartiality on Guilt*

In *Witherspoon*, the Supreme Court was unwilling to assume that a jury from which all venirepersons with reservations about the death penalty were excluded, although biased in favor of death, was also biased in favor of conviction. The incomplete and unpublished versions of three studies cited on appeal in support of this contention were considered by the Court to be "too tentative and fragmentary" to warrant such a conclusion.⁹⁶ Nevertheless, the Court regarded the question as an open one and suggested that future studies might result in a different ruling.⁹⁷

An impressive body of social science research has emerged in response to the *Witherspoon* invitation in the fifteen years since the Court's decision. This research calls for reexamination of the question whether a jury from which substantially all opponents of the death penalty have been removed is "less than neutral with respect to *guilt*."⁹⁸ Two of the three incomplete and unpublished studies that were before the Court in *Witherspoon* have since been completed and published,⁹⁹ and various new empirical studies have been performed.¹⁰⁰ Several cases in which defendants have at-

96. *Witherspoon*, 391 U.S. at 517.

97. *Id.* at 520 n.18.

98. *Id.* Such lack of neutrality would violate the due process right to "a fair trial by a panel of impartial, 'indifferent' jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961); *see also* *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Turner v. Louisiana*, 379 U.S. 466, 471 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963). More recently, the Supreme Court has noted that the right to an impartial jury arises from both the sixth amendment and principles of due process. *Ristaino v. Ross*, 424 U.S. 589, 595 n.6 (1976). Moreover, the right is also protected by article I, section 16 of the Florida Constitution. *Thomas v. State*, 403 So. 2d 371, 375 (Fla. 1981).

99. H. Zeisel, *Some Data on Juror Attitudes Towards Capital Punishment* (1968) (University of Chicago Center for Studies in Criminal Justice); Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970). The third study was never published. W. Wilson, *Belief in Capital Punishment and Jury Performance* (1957).

100. *See* unpublished studies by Ellsworth *et al.* cited in *Hovey v. Superior Court*, 28 Cal. 3d 1, 27-60, 616 P.2d 1301, 1315-41, 168 Cal. Rptr. 128, 142-68 (1980); Berry, *Death-Qualification and the "Fireside Induction"*, 5 U. ARK. LITTLE ROCK L.J. 1 (1982); Boehm, *Mr. Prejudice, Miss Sympathy and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 WIS. L. REV. 734; Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some California Evidence*, 3 WOODROW WILSON J.L. 11 (1980); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Buckhout, Baker, Perlman & Speigel, *Jury Attitudes and the Death Penalty*, 3 SOC. ACTION & L. 80 (1977); Cros-

tempted to demonstrate that juries are conviction-prone when formed by eliminating "automatic life imprisonment" jurors have produced extensive expert testimony concerning these studies and related social science issues.¹⁰¹ This substantial body of social science research on the conviction-proneness issue makes it no longer possible to regard the evidence as "too tentative and fragmentary."¹⁰²

son, An Investigation into Certain Personality Variables among Capital Trial Jurors (unpublished doctoral dissertation), reported in PROC. 76TH ANN. MEETING AM. PSYCHOLOGICAL ASS'N (1968); Girsh, *The Witherspoon Question: the social sciences and the evidence*, 35 NLADA BRIEFCASE 99 (1978); Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 512 (1980); Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Kadane, *Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure*, 78 J. AM. STATISTICAL A. 544 (1983); Mitchell & Byrne, *The Defendant's Dilemma: Effects of Juror's Attitudes and Authoritarianism on Judicial Decisions*, 25 J. PERSONALITY & SOC. PSYCHOLOGY 123 (1973); Moran & Comfort, *Is the "Death Qualified" Juror Conviction Prone: A Definite Maybe* (1983) (unpublished draft); Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQ. U. L. REV. 125 (1969-1970); Thayer, *Attitudes and Personality Differences between Conventional Jurors Who Could Return a Death Verdict and Those Who Could Not*, PROC. 78TH ANN. MEETING AM. PSYCHOLOGICAL ASS'N 445 (1970); White, *supra* note 11; White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176, 1178 n.12, 1185-86 (1973) (summarizing study by Louis Harris & Assoc.). The studies by Professor Ellsworth and her colleagues summarized in *Hovey* have been published in 8 L. & HUM. BEHAV. 1-195 (1984), a special issue dedicated to the question of death qualification and the *Hovey* case, under the following titles: Cowan, Thompson & Ellsworth, *The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, *id.* at 53; Ellsworth, Bukaty, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity*, *id.* at 81; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, *id.* at 31; Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, *id.* at 95.

101. *E.g.*, Keeten v. Garrison, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984); Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark.), *aff'd in part, modified in part, and remanded*, 637 F.2d 525 (8th Cir. 1980), *on remand*, 569 F. Supp. 1273 (E.D. Ark. 1983), *appeal pending*, No. 83-2113-EA (8th Cir.); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); *see* Gross, *Constitutional Challenges to the Death-Qualifying Voir Dire: Witherspoon to Hovey*, in JURYWORK: SYSTEMATIC TECHNIQUES §§ 3.03-.04 (B. Bonora & E. Krauss eds. 2d ed. 1983).

102. *See* Keeten v. Garrison, No. C-C-77-193-M, slip op. at 3 (W.D.N.C. Jan. 12, 1984); Grigsby v. Mabry, 483 F. Supp. at 1388; Hovey v. Superior Court, 28 Cal. 3d, 27-60, 616 P.2d 1301, 1304-41, 168 Cal. Rptr. 128, 142-68 (1980); White *supra* note 100, 41 U. PITT. L. REV. at 370; Winick, *supra* note 1, at 50-51. Several courts, on records that contained none or few of the recent studies, have continued, however, to find insufficient evidence to establish that death-qualified juries are conviction-prone. *See, e.g.*, Spinkellink v. Wainwright, 578 F.2d 582, 593-95 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); United States *ex rel.* Townsend v. Twomey, 452 F.2d 350, 362-63 (7th Cir.), *cert. denied*, 409 U.S. 854 (1972); Craig v. Wyse, 373 F. Supp. 1008, 1011 (D. Colo. 1974).

In its 1980 decision in *Hovey v. Superior Court*,¹⁰³ the Supreme Court of California gave extensive consideration to these studies. It quoted expert testimony that the studies designed to test for conviction-proneness had "convincingly established a strong correlation between the tendencies of jurors to vote for conviction and juror attitudes toward capital punishment."¹⁰⁴ Several studies that had been introduced into evidence relating to attitudes concerning various aspects of the criminal justice system that might be associated with conviction-proneness were found to establish a significant relationship between death penalty opposition and pro-prosecution attitudes.¹⁰⁵ Studies of demographic characteristics of death penalty opponents concluded that exclusion of capital punishment objectors results in the disproportionate exclusion of blacks and women.¹⁰⁶ Studies concerning juror evaluation of evidence revealed a significant difference between death penalty opponents and the groups remaining on capital juries in their thresholds of reasonable doubt and in their perceptions of the credibility of defense and prosecution witnesses.¹⁰⁷ The consistent differences revealed by these studies between "automatic life imprisonment" jurors, who were excludable for cause in California, and the groups remaining on capital juries in the state (which the court referred to as the "*Witherspoon*-qualified" groups) led the California court to find that the defendant "has shown . . . that if a state used all four '*Witherspoon*-qualified' groups in a capital trial, the jury would not be neutral."¹⁰⁸

The "four '*Witherspoon*-qualified' groups" to which the California court referred were labeled the "automatic death penalty" group, those who will vote automatically for the death penalty; the "favor death penalty" group, those who, although favoring the death penalty, will not vote to impose it in every case; the "indifferent" group, those who neither favor nor oppose the death pen-

103. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

104. *Id.* at 40, 616 P.2d at 1325, 168 Cal. Rptr. at 152.

105. *Id.* at 43-54, 616 P.2d at 1326-37, 163 Cal. Rptr. at 153-64.

106. *Id.* at 54-57, 616 P.2d at 1337-39, 168 Cal. Rptr. at 164-66.

107. *Id.* at 57-60, 616 P.2d at 1337-40, 168 Cal. Rptr. at 166-68.

108. *Id.* at 68, 616 P.2d at 1346, 168 Cal. Rptr. at 173; see also *Grigsby v. Mabry*, 483 F. Supp. 1372, 1387-88 (E.D. Ark.) (finding the studies provided "sufficient evidence . . . that a death qualified jury is more likely to find guilt than is a jury chosen without regard to *Witherspoon* scruples against the death penalty. . . . [T]here appears to be a positive and consistent relationship between the degree to which one favors capital punishment and one's readiness to assess guilt."), *aff'd in part, modified in part, and remanded*, 637 F.2d 5254 (8th Cir. 1980), *on remand*, 569 F. Supp. 1273 (1983), *appeal pending*, No. 83-2113-EA (8th Cir.).

alty; and the "oppose death penalty" group, those who, although opposing the death penalty, will not automatically vote against it in every case.¹⁰⁹ The defendant in *Hovey* had contended that a jury composed of these four groups, but excluding the "automatic life imprisonment" group, violated his due process right to an impartial jury on guilt.¹¹⁰ Although conceding that a jury composed of the first four groups, but excluding the fifth, "would not be neutral," the California court rejected the defendant's challenge on the basis that California is not a state that uses all four "Witherspoon-qualified" groups.¹¹¹ Rather, the court found that under California law, the first group—the "automatic death penalty" group—is excluded for cause.¹¹² As a result, the California court found that the studies on which the defendant relied, although sufficient to establish that juries from which "automatic life imprisonment" jurors are removed are in general not neutral on the question of guilt, failed to make such a showing as to California juries.¹¹³ In order to make such a showing for California juries, the studies would have to be reanalyzed to compare the relative conviction-proneness of the California "Witherspoon-qualified" groups—the "favor death penalty," "indifferent," and "oppose death penalty" groups—and the two groups excluded because they would vote automatically either for life or for death—the "automatic life imprisonment" and "automatic death penalty" groups.

Because "automatic death penalty" jurors also are excludable in Florida,¹¹⁴ the existing studies, if used to attack the exclusion of "automatic life imprisonment" jurors in Florida, would suffer from the same defect identified in *Hovey*. The *Hovey* analysis, however, although correct, may not affect the general conclusion reached by the studies. What is now known concerning the size of the "automatic death penalty" group suggests that it may represent such a small number of potential jurors that correcting for the failure of the studies to take it into account will not affect the conclusions

109. 28 Cal. 3d at 20, 616 P.2d at 1311, 168 Cal. Rptr. at 138.

110. A sixth group, the "automatic acquittal" group, was conceded by the defendant in *Hovey* to be properly excludable. *Id.* at 18, 616 P.2d at 1308, 168 Cal. Rptr. at 135.

111. *Id.* at 67, 616 P.2d at 1346, 168 Cal. Rptr. at 173.

112. *Id.* at 63-64 & n.110, 616 P.2d at 1343 & n.110, 168 Cal. Rptr. at 170 & n.110.

113. *Id.* at 68-69, 616 P.2d at 1346, 163 Cal. Rptr. at 173-74.

114. *Fitzpatrick v. State*, 437 So. 2d 1072 (Fla. 1983); *Thomas v. State*, 403 So. 2d 371 (Fla. 1981); see Carroll, *Removing the Killers—The Touching Story of How Defense Counsel Came to Love Witherspoon*, 7 THE CHAMPION 1 (No. 3, April, 1983); Gross, *supra* note 101, at § 3.08. As I contended earlier, if "automatic life imprisonment" jurors are permitted to serve on capital juries, so should "automatic death penalty" jurors who can be fair and impartial in assessing guilt and innocence. See *supra* note 87.

they reach.¹¹⁵ The California court's analysis in *Hovey* prompted a number of studies designed to ascertain the size of this group. These studies were recently reviewed in *Grigsby v. Mabry*, in which the federal district court for the Eastern District of Arkansas conducted an extensive hearing on the conviction-proneness issue.¹¹⁶ The court concluded, based on studies showing that from less than one percent to no more than two percent of jurors are in the "automatic death penalty" group,¹¹⁷ that the number of such

115. See Gross, *supra* note 101, at §§ 3.03[5][d][ii], 3.05[2]; Kadane, *After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 L. & HUM. BEHAV. 115 (1984). Indeed, the Supreme Court has recognized that there are likely to be few such jurors. See *Adams v. Texas*, 448 U.S. 38, 49 (1980) ("it is undeniable . . . that ["automatic death penalty"] jurors will be few indeed as compared with those excluded because of scruples against capital punishment").

116. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *appeal pending*, No. 83-2113-EA (8th Cir.). In a 1980 opinion, the court, on petition for habeas corpus, found that the state trial judge had improperly refused a continuance to a defendant convicted of capital murder who had sought an opportunity to show that a "death qualified" jury was biased on guilt. 483 F. Supp. 1372 (E.D. Ark. 1980). On appeal, the circuit court agreed that the defendant was entitled to a hearing, but found that the hearing should be held in federal rather than state court. 637 F.2d 525 (8th Cir. 1980). An extensive hearing was thereafter held on the conviction-proneness issue, followed by the court's recent decision accepting the defendant's contentions.

117. 569 F. Supp. at 1307, reviewing Arkansas Archival Study (1981) (less than 1% in Arkansas sample were "automatic death penalty" jurors); Jurow, *supra* note 100 (2% in New York sample were "automatic death penalty" jurors); The 1981 Harris Study, L. Harris & Assoc., Inc., Study No. 814002 (Jan. 1981) (less than 1% in national sample were "automatic death penalty" jurors). These studies are also analyzed in Berry, *supra* note 100, at 25-30, as are three additional studies reaching similar conclusions concerning the size of the "automatic death penalty" group. See Berry & Butler, *Distributions of Death-Penalty Attitudes: An Arkansas Sample* (unpublished), *discussed in* Berry, *supra* note 100, at 27-28 (1% in Arkansas sample were "automatic death penalty" jurors); Cowan & Thompson, *Death Penalty Attitudes and Conviction Proneness: The Automatic Death Penalty Juror* (unpublished, 1981), *discussed in* Berry, *supra* note 100, at 28 (none in California sample were "automatic death penalty" jurors); Hamilton, *Individual Differences in Ascriptions of Responsibility, Guilt and Appropriate Punishment*, in *PSYCHOLOGY AND THE LAW* (G. Bermont, C. Nemeth & N. Vidmar eds. 1976), *discussed in* Berry, *supra* note 100, at 27 (1% in New York sample were "automatic death penalty" jurors). The *Grigsby* court dismissed as flawed a telephone survey conducted by one of the state's expert witnesses that purported to show that 33.3% in a California sample were "automatic death penalty" jurors. *Grigsby v. Mabry*, 569 F. Supp. at 1307-08 (study by Dr. Shure). Rather than inquiring whether the participants in the survey would always vote for the death penalty following conviction, regardless of the evidence, this study described a specific, heinous case and asked participants if they would vote for death in the described case. Moreover, the court questioned the representativeness of the area surveyed—a wealthy, almost all white, conservative area in Los Angeles in which several highly publicized crimes had occurred a short time before the survey. In addition, the court noted that Dr. Shure had "acknowledged potential errors and omissions in his study," did not "view it as definitive," and conceded that the number of "automatic death penalty" jurors shown was "inflated." *Id.* at 1308; *see also* Berry, *supra* note 100, at 26-27 ("Shure's procedures . . . may have been seriously flawed" and "the results of other studies suggest that Shure's results are not at all representative").

jurors is "negligible" when compared to that of "automatic life imprisonment" jurors,¹¹⁸ which the court found represented between eleven percent and seventeen percent of those eligible for jury service.¹¹⁹ The exclusion of "automatic life imprisonment" jurors, therefore, will not be offset by the exclusion of "automatic death penalty" jurors. As a result, the general conclusion recognized by the *Hovey* court—that juries formed by excluding "automatic life imprisonment" jurors are conviction-prone when compared to the typical jury utilized in non-capital cases remains intact notwithstanding the defect in the studies identified by the California court. Following its extensive review of the studies, the *Grigsby* court thus became the first to accept the contention that removal for cause of "automatic life imprisonment" jurors results in a capital jury "uncommonly predisposed to favor the prosecution, a jury 'organized to convict.'"¹²⁰

The extensive social science evidence now available on the conviction-proneness issue cannot be ignored. At a minimum, these studies raise a substantial doubt concerning the neutrality of capital juries in Florida with regard to guilt, and thus make the exclusion of "automatic life imprisonment" jurors constitutionally sus-

118. *Grigsby v. Mabry*, 569 F. Supp. at 1308; accord *Keeten v. Garrison*, No. C-C-77-193-M, slip op. at 26 (W.D.N.C. Jan. 12, 1984) (relying on Dr. Kadane's testimony in a related case for the conclusion that "exclusion of potential jurors who will vote to impose the death penalty in every capital case does not correct the biasing effects of excluding the much larger group of potential jurors who will never vote to impose the death penalty in any case").

119. *Grigsby v. Mabry*, 569 F. Supp. at 1285; see also Arkansas Archival Study, *supra* note 117, described in Berry, *supra* note 100, at 28-29 (13.25% in Arkansas study of transcribed voir dire in capital cases were removed for cause as "automatic life imprisonment" jurors); Berry & Butler, *supra* note 117, described in Berry, *supra* note 100, at 27-28 (10% in Arkansas sample were "automatic life imprisonment" jurors); Ellsworth & Fitzgerald, *Due Process vs. Crime Control: The Impact of Death Qualification on Jury Attitudes* (1979) (prepublication draft), summarized in *Hovey v. Superior Court*, 28 Cal. 3d 1, 50-54, 616 P.2d 1301, 1333-37, 168 Cal. Rptr. 128, 161-64 (1980) (15.2% in 1979 survey conducted in Alameda County, California were "automatic life imprisonment" jurors); Field Poll of Californians, cited in Kadane, *supra* note 115, at 116 (11.6% in 1981 statewide poll conducted in California were "automatic life imprisonment" jurors); Hamilton, *supra* note 117, described in Berry, *supra* note 100, at 27 (35% in New York sample were "automatic life imprisonment" jurors); Jurow, *supra* note 100, described in Berry, *supra* note 100, at 18 (10% in New York study were "automatic life imprisonment" jurors).

120. *Grigsby v. Mabry*, 569 F. Supp. at 1304. *Grigsby* was recently followed in *Keeten v. Garrison*, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984). The expert testimony in *Grigsby*, endorsed in *Keeten*, concluded that the exclusion of "automatic life imprisonment" jurors "results in a ten per cent higher conviction rate than would normally be expected to occur in close cases, i.e., ones in which the evidence is not strong enough to produce a clear majority vote for conviction on the first ballot." *Keeten v. Garrison*, slip op. at 49.

pect.¹²¹ These doubts concerning jury impartiality on guilt upset the careful balance struck in *Witherspoon* between the defendant's interest in jury impartiality and the state's interests in convicting the guilty and effectuating its capital punishment scheme. Under the Florida "trifurcated" procedure, neither state interest would be frustrated by the inclusion of these jurors. Because the trial judge decides sentence without being bound by a jury recommendation, he may impose capital punishment in an appropriate case even if "automatic life imprisonment" jurors remain on the capital jury and vote, as inevitably they will, for life imprisonment.¹²² Indeed, whatever guidance the judge is provided by the jury's recommendation on the life or death question is still provided by a jury whose members include "automatic life imprisonment" jurors.¹²³ Since voir dire questioning will identify these jurors as being "automatic life imprisonment" jurors, the judge will be aware of the number of such jurors sitting on the capital jury and will be able to give appropriate weight to the jury's advisory vote on sentence.

Moreover, inclusion on capital juries of "automatic life imprisonment" jurors will not frustrate the state's interest in convicting the guilty, as by definition "automatic life imprisonment" jurors can fairly assess guilt or innocence notwithstanding their opposition to the death penalty. However, two decisions by the Fifth Circuit Court of Appeals, and one by the First District Court of Appeal of Florida, expressing an inclination to follow the Fifth

121. See *Hovey v. Superior Court*, 28 Cal. 3d at 17 n.37, 616 P.2d at 1308 n.37, 168 Cal. Rptr. at 135 n.37 (1980) (defendant raising conviction-proneness argument would only have to establish a "substantial doubt" about whether resulting juries are neutral with respect to guilt); *White*, *supra* note 11, at 381-82; cf. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (applying standard in sixth amendment context). These studies provide a strong inference of conviction-proneness. See *id.* (studies considering effects of reducing jury size from 12 or 10 to a smaller number relied on for determining consequences of reducing jury size from six to five).

122. Even in cases in which, under the existing practice, "automatic life imprisonment" jurors were removed from such juries, Florida judges have imposed death in a substantial number of cases despite jury recommendations of life. See *supra* note 68.

123. The Florida advisory jury provides the judge with little in the way of guidance other than informing him of whether the conscience of the community demands the death penalty. See *supra* notes 73-81 and accompanying text. The jury does not make specific factual findings, but merely reports its recommendation by majority vote, a vote the numerical breakdown of which is frequently not even revealed to the trial judge. See *Dobbert v. State*, 409 So. 2d 1053, 1058 (Fla. 1982):

[I]n most cases, the trial judge and this court know only that a majority of the jury has recommended life or death. Nothing more is required because it is not material what number of the majority of the jury recommends a sentence of death or recommends a sentence of life.

Circuit's reasoning, reject this analysis.¹²⁴ The Fifth Circuit's view is that a jury that includes "automatic life imprisonment" jurors, rather than being neutral, might be biased in favor of the defendant, thereby denying the state its right to an impartial jury. Underlying these concerns appears to be the suspicion that "automatic life imprisonment" jurors may actually be "automatic acquittal" jurors, although they swear at voir dire that they are not. This suspicion alone could not justify the exclusion of these jurors and still be consistent with the explicit holding of *Witherspoon* and its progeny that the factual basis for a venireperson's exclusion on account of death penalty attitudes must be "unmistakably clear."¹²⁵ Indeed, if the Fifth Circuit's view is correct prosecutors presumably should be able to interrogate venirepersons in non-capital cases (assuming that their asserted defense-proneness would apply there as well) concerning their views on the death penalty, and remove for cause those who could never impose it on the ground that they are acquittal-prone. Nowhere, however, is this allowed.¹²⁶ Moreover, the concern expressed by the Fifth Circuit appears inconsistent with *Witherspoon's* central holding that exclusion of "oppose death penalty" jurors—those who oppose the death penalty but who will not automatically vote against it in every case—results in an unconstitutionally death-prone jury. As applied to *Witherspoon's* facts, the Fifth Circuit approach would

124. *Smith v. Balkcom*, 660 F.2d 573, 578-79 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir.), *cert. denied*, 103 S. Ct. 181 (1982); *Spinkellink v. Wainwright*, 578 F.2d 582, 594, 594-96 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *Nettles v. State*, 409 So. 2d 85 (Fla. 1st DCA 1982).

125. *Witherspoon*, 391 U.S. at 515-16 n.9, 522-23 n.21; *accord Adams v. Texas*, 448 U.S. 38, 44 (1980); *Maxwell v. Bishop*, 398 U.S. 262 (1970) ("Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that is his position." *Id.* at 265 (quoting *Witherspoon*, 391 U.S. at 516 n.9)); *Boulden v. Holman*, 394 U.S. 478, 482 (1969); *Hance v. Zant*, 696 F.2d 940, 955 (11th Cir. 1983) (venireperson's responses must be "unequivocal"); *Burns v. Estelle*, 626 F.2d 396 (5th Cir. 1980) (en banc) (venirepersons' statements must constitute "unequivocal avowals disqualifying her under either aspect of *Witherspoon's* two-pronged test," *id.* at 397-98); *Marion v. Beto*, 434 F.2d 29, 31 (5th Cir. 1970) (doubts concerning venireperson's ability should be resolved against exclusion).

126. *Grigsby v. Mabry*, 569 F. Supp. at 1310-11 (E.D. Ark. 1983) ("no one has yet argued that either those strongly in favor of the death penalty or those strongly opposed to it should be excluded in cases where the death penalty would never be an issue, e.g., in a simple robbery case. Indeed, it is assumed that no inquiry into such attitudes would even be permitted in such non-capital cases, and this is as it should be . . ."); *Haney, supra* note 100, at 514 (1980) ("[T]he process . . . [of] 'death qualification' . . . is unique to capital cases. In no other instance are prospective jurors systematically queried about their attitudes toward a particular legal punishment and then excluded, as a matter of law, depending on how they answer.").

presumably call for affirmance of Witherspoon's death sentence on the basis that juries including "oppose death penalty" jurors are more life imprisonment-prone than juries excluding all death-scrupled jurors, and therefore biased in favor of the defendant. But *Witherspoon* explicitly rejected this contention in favor of a jury that the Court deemed more impartial than the one which excludes all death penalty objectors. *Witherspoon* thus suggests that if a capital jury resembling the jury that sits in the typical non-capital case—universally regarded as fair and impartial—is found to be significantly less conviction-prone than a death-qualified jury, then the latter would be constitutionally suspect as a trier of the defendant's guilt. The Fifth Circuit's doubts, therefore, seem ill-considered.¹²⁷

The Florida cases that reject the contention that exclusion of "automatic life imprisonment" jurors is unconstitutional do so without analysis, citing the Supreme Court's disclaimer that nothing in its *Witherspoon* opinion precludes exclusion of this group.¹²⁸ But *Witherspoon* was decided in the context of a unitary capital trial process, and its reservation of the issue there certainly should not be read to bar consideration of the constitutionality of excluding these jurors in a context in which not only is there a bifurcated trial process, but a "trifurcated" one in which the trial judge makes the sentencing decision without being bound by any jury recommendation on sentence. In this context, the *Witherspoon* disclaimer concerning "automatic life imprisonment" jurors, as well as the Court's more recent dicta in *Adams v. Texas*, which can be read as approving their removal,¹²⁹ should be rethought. Particularly in view of the serious concerns presented by the social science research dealing with the conviction-proneness of capital juries formed by excluding this group, the defendant's interest in an

127. For further criticism of the Fifth Circuit's reasoning, see *Grigsby v. Mabry*, 483 F. Supp. 1372, 1387 n.19 (E.D. Ark.), *aff'd in part, modified in part, and remanded*, 637 F.2d 525 (8th Cir. 1980), *on remand*, 569 F. Supp. at 1311-13 (E.D. Ark. 1983), *appeal pending*, No. 83-2113-EA (8th Cir.). *Hovey*, 28 Cal. 3d at 19 n.41, 616 P.2d 1301, 1309 n.41, 168 Cal. Rptr. 128, 136 n.41 (1980); Gross, *supra* note 101, at § 3.04; White, *supra* note 11, at 374-75.

128. See cases cited *supra* note 8.

129. 448 U.S. 38, 44 (1980); see *supra* note 45. Even if the Court's language in *Adams* can be read as approving the removal of these jurors in a bifurcated capital case, this dicta would seem inapplicable to a "trifurcated" case. The Texas statute in *Adams* provided for a bifurcated trial in which the judge is required to impose sentence based on the jury's answers to statutory questions. TEX. CRIM. PROC. CODE ANN. § 37.071(b), (c), (e) (Supp. 1980). Although the judge in Texas actually imposes the penalty, he is bound by the jury's recommendation, and it is therefore appropriate to classify Texas as a state in which the jury makes the penalty determination. See Gillers, *supra* note 12, at 14 & n.14.

impartial jury on guilt argues strongly in favor of the inclusion of "automatic life imprisonment" jurors on capital juries. And in a system like Florida's, involving a "trifurcated" proceeding in which the trial judge makes the determination of sentence without being bound by a jury recommendation, inclusion of these jurors would not frustrate the state's concededly significant interests in the conviction of the guilty and in the imposition of the death penalty in an appropriate case. When properly analyzed, the defendant's interest in having such jurors is significant, and the state's interest in excluding them is scant to non-existent.

The exclusion of "automatic life imprisonment" jurors in Florida should be held unconstitutional. The serious doubts concerning the neutrality of remaining juries and the lack of justification for the practice compel this conclusion.¹³⁰ Capital defendants no less than defendants in noncapital cases deserve juries that are neutral on guilt.¹³¹ Indeed, concern for the reliability of the guilt determination process is greater in capital cases.¹³² Absent justification,

130. See *Ballew v. Georgia*, 435 U.S. 223, 239-44 (1978) (empirical studies concerning behavior of six-person juries and psychological studies of small groups generally held to "raise substantial doubt about the reliability and appropriate representativeness of panels smaller than six," *id.* at 239; reduction of jury size below six held to impair the purpose and functioning of the criminal jury in violation of the sixth amendment and due process where asserted state justifications (financial savings and reduced court time) were found insignificant); *White*, *supra* note 11, at 376-405 (empirical evidence demonstrating death-qualified jury's conviction-proneness compared to neutral jury stronger than studies relied on in *Ballew*; state interests in death-qualification less than those in *Ballew*).

131. "It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.'" *Witherspoon*, 391 U.S. 510, 521 (1968) (quoting *Fay v. New York*, 332 U.S. 261, 294 (1947)). See *Tumey v. Ohio*, 273 U.S. 510 (1927).

132. See *Beck v. Alabama*, 447 U.S. 625, 643 (1980) (statutory prohibition on instructing juries in capital cases on lesser included offenses "introduce[d] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." Because of the significant constitutional difference between the death penalty and lesser punishments, "we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination." *Id.* at 638.) The Supreme Court has frequently insisted on more in the way of due process in capital cases. Compare *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) ("when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic") with *Gilbert v. California*, 388 U.S. 263, 274 (1967) (although post-indictment lineup is a critical stage for sixth amendment right-to-counsel purposes, resulting in a per se exclusionary rule for testimony concerning lineup identifications made without presence of counsel, such testimony, at least in non-capital cases, is subject to the harmless error rule); compare *Powell v. Alabama*, 287 U.S. 45 (1932) (capital defendant unable to employ counsel or make his own defense had due process right to assigned counsel) with *Betts v. Brady*, 316 U.S. 455 (1942) (refusal to appoint counsel for robbery suspect held not to violate due process); see *Winick*, *supra* note

there is no constitutional basis for juries that are more conviction-prone in capital cases than the juries in noncapital cases.¹³³ At a minimum, these substantial constitutional concerns about the neutrality of death-qualified capital juries argue strongly for resolving the ambiguity in the Florida statutory scheme concerning challenges for cause against the removal of "automatic life imprisonment" jurors.

B. *The Sixth Amendment Right to a Representative Jury on Guilt*

The concern for jury representativeness reflected in the sixth amendment right to a jury selected from "a fair cross-section of the community"¹³⁴ provides further support for the inclusion on capital juries of "automatic life imprisonment" jurors. Sixth amendment cross-section cases, as well as prior cases dealing with jury representativeness that were decided under the equal protection clause or through the Supreme Court's supervisory powers over the lower federal courts, involved jury selection methods used to form the jury pool—the venire from which jurors are selected by a process of elimination occurring through exercise of jury challenges.¹³⁵ These cases consider the cross-section requirement violated if the jury pool is made up solely from "special segments of the populace or if large, distinctive groups are excluded from the pool."¹³⁶ Although the cases involve the validity of jury selection practices that affect the composition of the jury pool, in a related context I have previously argued that the cross-section requirement applies not only to venires but also to actual juries and that jury challenge practices should accordingly be subject to scrutiny under the sixth amendment cross-section requirement.¹³⁷ As a re-

1, at 19-20.

133. Not only would this violate the sixth amendment/due process right to an impartial jury, but in view of the heightened concern for reliability in the factfinding process in capital cases, *see supra* note 132, it would seem to violate equal protection as well. *See Stanley v. Illinois*, 405 U.S. 645, 658 n.10 (1972) (equal protection violated where "a State has accorded bedrock procedural rights to some, but not to all similarly situated"); *see, e.g., Jackson v. Indiana*, 406 U.S. 715 (1972) (violation of equal protection to commit permanently incompetent criminal defendants pursuant to different standards and procedures than civil committees).

134. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). *See generally* J. Van Dyke, *supra* note 1, at 45-83 (1977); Winick, *supra* note 1, at 62-77.

135. *E.g., Taylor v. Louisiana*, 419 U.S. 522 (1975); *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946); *Smith v. Texas*, 311 U.S. 128 (1940); *see* Winick, *supra* note 1, at 62-63.

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

137. *See* Winick, *supra* note 1, at 63-66; *see also* Gross, *supra* note 101, at § 3.05[2].

sult, if the removal of "automatic life imprisonment" jurors for cause in Florida results in capital juries that exclude "large, distinctive groups" in the community,¹³⁸ then absent justification, such exclusion would violate the cross-section requirement.

The United States Supreme Court has defined the elements of proof necessary to establish a *prima facie* violation of the cross-

Two courts have expressly so held in the very context under consideration—the exclusion for cause in capital cases of "automatic life imprisonment" jurors. See *Keeten v. Garrison*, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984) (exclusion for cause in capital case of "automatic life imprisonment" group scrutinized under cross-section requirement); *Grigsby v. Mabry*, 483 F. Supp. 1372, 1376-85 (E.D. Ark.), *aff'd in part, modified in part, and remanded*, 637 F.2d 525 (8th Cir. 1980), *on remand*, 569 F. Supp. 1273, at 1285-86 (E.D. Ark. 1983) (same); see also *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (Ill. App. Ct. 1982) (peremptory challenge of six of seven blacks on venire scrutinized under sixth amendment cross-section requirement), *overruled on other grounds by*, *People v. Williams*, 97 Ill. 2d 252, 454 N.E.2d 220 (1983) (use of peremptory challenges in single case not subject to challenge); *People v. Wheeler*, 22 Cal. 3d 258, 276-78, 583 P.2d 748, 761-62, 148 Cal. Rptr. 890, 903 (1978) (peremptory challenge of all blacks on venire to produce all-white jury scrutinized under state constitution cross-section requirement); *Commonwealth v. Soares*, 377 Mass. 461, 477-92, 387 N.E.2d 499, 510-12 (peremptory challenge of 12 of 13 blacks on venire scrutinized under state constitution; "judgment of his peers" interpreted to mandate a jury "that represents a cross-section of community concepts") (quoting *Commonwealth v. Ricard*, 355 Mass. 509, 512, 246 N.E.2d 433, 435 (1969)), *cert. denied*, 444 U.S. 881 (1979); cf. *Ballew v. Georgia*, 435 U.S. 223 (1978) (scrutinizing under the cross-section requirement a statutory reduction in jury size). The Fifth Circuit Court of Appeals has suggested, in dicta, that the sixth amendment cross-section requirement may apply only to venires, and not to actual juries. *Smith v. Balkcom*, 660 F.2d 573, 583 n.26 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 181 (1982). But see *Grigsby v. Mabry*, 569 F. Supp. at 1285 ("such a contention flies in the face of the policies underlying the cross-section requirement and, if accepted, would provide a device for avoiding the effects thereof."); Winick, *supra* note 1, at 63-66 (criticizing this approach as inconsistent with the policies underlying the cross-section requirement).

The United States Supreme Court recently declined an opportunity to resolve the issue, although in an unusual series of opinions, five of the justices noted the importance of the question. *McCray v. New York*, 103 S. Ct. 2438 (1983). In a dissent to the denial of certiorari, Justices Marshall and Brennan contended that the cross-section right

is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury. . . . The desired interaction of a cross-section of the community does not take place within the venire; it is only effectuated by the jury that is selected and sworn to try the issues. The systematic exclusion of prospective jurors because of their race is therefore unconstitutional at any stage of the jury selection process.

Id. at 2442. In a highly unusual "opinion . . . respecting the denial of" certiorari, three additional justices noted that their vote to deny review did not reflect disagreement with the dissent's "appraisal of the importance of the underlying issue," but merely their belief "that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." *Id.* at 2438 (opinion of Stevens, J., joined by Blackmun, J., and Powell, J.); see also *Gilliard v. Mississippi*, 104 S. Ct. 40 (1983) (Marshall, J., dissenting to denial of certiorari, joined by Brennan, J.).

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

section requirement as follows:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group . . . is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.¹³⁹

An identifiable group which must not be excluded is defined as one with a distinct attitude or "decisional outlook."¹⁴⁰ I have previously argued that the class of jurors with reservations about capital punishment should be deemed a "distinctive" group or "cognizable class" within the meaning of the cross-section requirement.¹⁴¹ If death-scrupled jurors are considered a cognizable class, a defendant attacking exclusion for cause of "automatic life imprisonment" jurors would have to demonstrate that juries resulting from this exclusionary practice contain so few death-scrupled jurors that the representation of this group "is not fair and reasonable in relation to the number of such persons in the community"¹⁴²

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

140. *United States v. Olson*, 473 F.2d 686, 688 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973) (quoting *King v. United States*, 346 F.2d 123, 124 (1st Cir. 1965); *see also* *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 230 (1946) (Frankfurter, J., dissenting) ("a different outlook psychologically and economically," "a different sense of justice, and a different conception of a juror's responsibility"; *United States v. Guzman*, 337 F. Supp. 140, 143 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 973 (1973) ("a common thread which runs through the groups, a basic similarity in attitudes or ideas or experience"; *Rubio v. Superior Court*, 24 Cal. 3d 93, 98, 593 P.2d 595, 598, 154 Cal. Rptr. 737, 737 (1979) (a "unifying viewpoint," "a common perspective," "a common social or psychological outlook on human events"); *Winick, supra* note 1, at 66-69.

141. *See* *Winick, supra* note 1, at 69-73. Those with conscientious scruples against capital punishment form a coherent and sizable group within the community. Public opinion polls indicate that approximately 25% of the American public opposes the death penalty. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1981, 209-12 (T. Flanagan, D. van Alstyne & M. Gottfredson eds. 1982). Not only are death-scrupled jurors sufficiently numerous to meet the cognizability requirement, but the group is cohesive, possessing a common perspective on the death penalty, an attitude that social science studies have shown is related to other social and legal attitudes and to personality variables. *See* Fitzgerald & Ellsworth, *supra* note 100 (discussing studies and presenting new data); Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1258-62 (1974) (discussing studies); *Winick, supra* note 1, at 71-72 (same). These studies support the conclusion that death penalty objectors are attitudinally distinct from nonobjectors and therefore should be considered a cognizable class for sixth amendment purposes. *Winick, supra* note 1, at 72-73.

142. *Duren v. Missouri*, 439 U.S. 357, 364 (1979). This demonstration of underrepresentation is performed by using statistical probability theory that compares "the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time." *Id.* at 357. *Casteneda v. Partida*, 430 U.S. 482, 494 (1977); *see id.* at 496-97 n.17 (illustrating application of standard deviation analysis; *prima facie*

Whether resulting capital juries contain a sufficient representation of death-scrupled jurors is thus an empirical question requiring statistical proof, which may vary from district to district and from time to time.¹⁴³

case established "if the difference between the expected value and the observed number is greater than two or three standard deviations"); see D.W. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE 75-142 (1983); Winick, *supra* note 1, at 23 & nn.86-89. Applying this methodology to the data reported in my prior study of capital jury selection practices in a Florida district reveals a substantial underrepresentation of death-scrupled jurors on the juries selected during the five-year period studied. Although 147 (13.2%) of the venirepersons examined expressed opposition to the death penalty, see Winick, *supra* note 1, at 30 (table 1), only 12 (2.8%) of the jurors and alternates selected in the 30 cases considered were death-scrupled. See Winick, *supra* note 1, at 28-31. Of the 135 jurors that were removed, 4 were removed by defense challenge (3 by peremptories and 1 for cause), 67 were removed for cause by prosecutors, 24 were excused for cause by the court without motion, and 40 were removed by prosecutorial peremptory challenge. Winick, *supra* note 1, at 30-31 (tables 1-2). The chances of 12 or fewer scrupled venirepersons being selected at random is calculated at approximately 29 in one hundred billion (.000,000,000,29), a result that is statistically significant to an astronomical degree (6.25 standard deviations). See Winick, *supra* note 1, at 73-74. The accuracy of the 13.2% figure as representing the portion of the community opposed to capital punishment during this period is confirmed by an independent survey of substantially the same area conducted in 1979 which revealed that 15% of those interviewed opposed the death penalty. Research Department, Florida Publishing Company, What Residents of Metro Jacksonville Think About Capital Punishment (unpublished, 1979). See Winick, *supra* note 1, at 70 n.262.

143. If a defendant in a particular district can demonstrate substantial underrepresentation of death-scrupled jurors, then, assuming they constitute a cognizable class, a *prima facie* case of violation of the cross-section requirement will have been established. In sixth amendment cross-section cases, "systematic disproportion itself demonstrates an infringement of the defendant's interest in a jury chosen from a fair community cross-section. There is no need to show particularized bias against the defendant. The only remaining question is whether there is adequate justification for this infringement." *Duren v. Missouri*, 439 U.S. 357, 368 n.26 (1979). The state bears the burden of justifying the underrepresentative result "by showing attainment of a fair cross-section to be incompatible with a significant state interest." *Id.* at 368-69; see *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975) (the sixth amendment right to a representative jury "cannot be overcome on merely rational grounds"). Moreover, the significant state interests asserted must be "manifestly and primarily advanced by those aspects of the jury selection process . . . that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri*, 439 U.S. at 367-68.

The state certainly has a significant interest in excluding one group of death-scrupled jurors—the "automatic acquittal" jurors—as inclusion of this group would frustrate the state's interest in convicting the guilty. See *Lockett v. Ohio*, 438 U.S. 586, 596 (1978). The justifications for excluding "automatic life imprisonment" jurors are less clear, however. In states in which the jury makes the sentencing decision in capital cases, the state's interest in effectuating its capital punishment scheme would be frustrated if these jurors were required to participate in the determination of sentence. In such states, however, a "less restrictive alternative" to wholesale exclusion of this group exists that makes it possible to accommodate this state interest with the defendant's interests in an impartial and representative jury. Indeed, the United States Supreme Court has suggested such a possibility—a bifurcated trial, using one jury to decide guilt, on which "automatic life imprisonment" jurors would serve, and another to fix punishment, from which such jurors would be removed. *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.18 (1968); see Winick, *supra* note 1, at 56-61. Although

It is also possible to conceptualize a subset of death-scrupled jurors—the “automatic life imprisonment” jurors—as themselves constituting a cognizable class.¹⁴⁴ Indeed, two recent federal district court decisions so hold.¹⁴⁵ In the early stages of the *Grigsby* litigation, the court had rejected a cross-section challenge to the exclusion for cause of “automatic life imprisonment” jurors in capital cases on the basis that death-scrupled jurors who will not automatically vote against death in every case—“oppose death penalty” jurors—were not so excludable, and would represent the perspectives of the excluded group.¹⁴⁶ After remand and a lengthy hearing, however, the court reversed itself, finding that the social science evidence demonstrated that “automatic life imprisonment” jurors “are different and distinctive” from “oppose death penalty” jurors, and that this evidence “undercuts the idea that the mildly scrupled jurors who are not excluded under *Witherspoon* would adequately represent the attitudes of those who are excluded under *Witherspoon*.”¹⁴⁷ Not only did the court find that “automatic life imprisonment” jurors have a highly distinctive attitude

this alternative approach would involve added costs and possible delays, the state interests in avoiding these may not be sufficiently “significant” to justify the impact on representativeness and impartiality caused by the exclusion from the jury that assesses guilt of “automatic life imprisonment” jurors. See White, *supra* note 11, at 399-401; Winick, *supra* note 1, at 55-61. The court in *Grigsby v. Mabry* recently accepted this contention, ruling that the bifurcated trial alternative suggested in *Witherspoon* was constitutionally required. *Accord Keeten v. Garrison*, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984) (bifurcated trial alternative required; additional costs found “trivial compared with the human rights and constitutional issues at stake,” *id.*, slip op. at 4).

In Florida, the state interests in removing “automatic life imprisonment” jurors is even less than in states with more typical capital sentencing statutes under which the jury determines sentence. Indeed, in Florida the costs and delays of impanelling a second jury to determine sentence are unnecessary. Under Florida’s “trifurcated” process the judge decides sentence and the jury can play its essential role of expressing the “conscience of the community” on the life or death question even if it contains jurors who can never recommend death. See notes 65-69, 76-93, *supra*, and accompanying text. The exclusion of these jurors in Florida, therefore, cannot be justified as “incompatible with a significant state interest.” 439 U.S. at 368-69. Assuming that the number of such “automatic life imprisonment” jurors removed for cause in the district in question is not *de minimis*, see note 119, *supra* (studies finding 10% or more of community were “automatic life imprisonment” jurors), the practice should be held to violate the sixth amendment.

144. For example, although Christians would certainly constitute a cognizable class, see *State v. Madison*, 240 Md. 265, 213 A.2d 880 (1965), so would Catholics. See *Juarez v. State*, 102 Tex. Crim. 297, 277 S.W. 1091 (1925).

145. *Keeten v. Garrison*, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984); *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983); *contra* *People v. Fields*, 673 P.2d 680, 197 Cal. Rptr. 803 (Cal. 1983) (plurality opinion).

146. 483 F. Supp. 1372, 1375 (E.D. Ark. 1980).

147. 569 F. Supp. at 1283-93.

or decisional outlook, but it also found that the group was of substantial size both nationally and within Arkansas, "ranging between 11% and 17% of those eligible for jury service."¹⁴⁸ The court thus concluded that "automatic life imprisonment" jurors were a cognizable class for sixth amendment purposes. As no representative of this class would remain on the capital jury after voir dire, given their systematic exclusion for cause, the court held that a prima facie violation of the cross-section requirement was established.¹⁴⁹ And as the court found the state's interest in excluding this group from the guilt determination process to be insufficient to justify "the destruction of the representativeness of the juries which result from death qualification," a sixth amendment violation was found.¹⁵⁰ *Grigsby* was recently followed by the federal district court for the Western District of North Carolina, which in *Keeten v. Garrison* relied on the same social science evidence to find that exclusion of "automatic life imprisonment" jurors violated the cross-section requirement of the sixth amendment.¹⁵¹

Whether or not the exclusion for cause of "automatic life imprisonment" jurors in Florida capital cases results in substantial underrepresentation of death-scrupled jurors sufficient to violate the sixth amendment, or whether or not "automatic life imprison-

148. *Id.* at 1285; see also *supra* note 119.

149. *Grigsby v. Mabry*, 569 F. Supp. at 1286.

150. *Id.* at 1321.

151. No. C-C-77-193-M (Jan. 12, 1984), slip op. at 34-45. The court found that "automatic life imprisonment" jurors constitute a "distinctive group" in the community, estimated to constitute 8% to 23% of the population of the United States. *Id.* at 37. These persons, the court found, "share a unique set of attitudes toward the criminal justice system which separate them as a group not only from persons who favor the death penalty, but also from persons who are generally opposed to the death penalty, but are willing to consider it in some cases." *Id.* at 38-39.

The Supreme Court of California recently rejected this conclusion in a plurality opinion joined by only three of the six justices participating. *People v. Fields*, 673 P.2d 680, 197 Cal. Rptr. 803 (1983) (Broussard, J., concurring, joined by Mosk and Richardson, J.J.). Without discussing the social science evidence, the plurality opinion concluded that "automatic life imprisonment" jurors—a "class of persons united only by their determination to vote automatically against the death penalty—a class divided in all else, including even their reason for refusing to consider the death penalty"—do not comprise "a distinctive, self-conscious group" and hence are not cognizable for sixth amendment purposes. 673 P.2d at 692, 197 Cal. Rptr. at 815. A dissent by the Chief Justice, joined by another of the justices, criticized the plurality's assumptions concerning the distinctiveness of this class as "flatly contradicted by the *Hovey* decision and by the consistent results of each of the two dozen studies discussed therein." *Id.* at 711, 197 Cal. Rptr. at 834 (Bird, C.J., dissenting, joined by Reynoso, J.); see also *id.* at 711-14, 197 Cal. Rptr. at 834-37. The sixth justice participating concurred in the decision on alternate grounds, without reaching the cognizability issue. *Id.* at 709, 197 Cal. Rptr. at 832 (Kaus, J., concurring).

ment" jurors themselves constitute a cognizable class,¹⁵² the practice is certainly inconsistent with the value of jury representativeness reflected in the cross-section requirement. As a result, a second constitutional consideration must weigh strongly against permitting the exclusion for cause of "automatic life imprisonment" jurors.

C. *The Eighth Amendment Interest in Jury Representativeness on Sentence*

The sixth amendment concern for jury representativeness is heightened in the capital trial context by the eighth amendment values that infuse the Supreme Court's decision in *Witherspoon*. In *Witherspoon* the Court noted that a jury from which all death penalty opponents are excluded cannot perform the task demanded of it by states that leave the life or death decision to jury discretion. For where state law leaves capital punishment to the discretion of the jury, "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."¹⁵³ A full measure of community participation in this vital decision is thus crucial.

In assessing the constitutionality of capital punishment, the Supreme Court has frequently emphasized the importance of the role of the jury in capital sentencing as an indication of community values.¹⁵⁴ Indeed, the Court has relied on the conduct of capital

152. The Supreme Court of Florida has summarily rejected the related contention that the cross-section requirement mandates inclusion of "automatic life imprisonment" jurors on the guilt phase of a capital trial and their replacement by alternates at the sentence-recommendation phase. *Maggard v. State*, 399 So. 2d 973, 976 (Fla. 1981); *Gafford v. State*, 387 So. 2d 333, 335-36 (Fla. 1980); *Riley v. State*, 366 So. 2d 19, 21 (Fla. 1978). The court's summary discussion of this contention, however, did not consider whether death-scrupled jurors or a subset thereof constituted a cognizable class within the meaning of the sixth amendment.

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

154. See *supra* note 25; *Gillers*, *supra* note 12, at 69-72. The Supreme Court has never determined whether the eighth amendment requires jury participation in the decision to impose the death penalty. The Court's statement in *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion), that it "has never suggested that jury sentencing is constitutionally required," *id.* at 252, is dictum. See *Gillers*, *supra* note 12, at 6 n.22. Because the death sentence in *Lockett v. Ohio*, 438 U.S. 586 (1968), was reversed on other grounds, the Court found it unnecessary to address the defendant's assertion of a constitutional right to a jury determination of penalty in capital cases. 438 U.S. at 609 n.16. Various members of the Court, however, have expressed the view that the Constitution does not require a jury in capital cases. See *Westbrook v. Balkcom*, 449 U.S. 999 (1980) (White, J., dissenting from denial of certiorari); *Lockett v. Ohio*, 438 U.S. at 633 (Rehnquist, J., dissenting). For an

juries acting as reflectors of community sentiments on the death penalty question in its assessment of various capital punishment statutes. For example, in invalidated mandatory capital punishment statutes under the eighth amendment, the Court stressed the reluctance of American juries to convict a significant portion of those charged under such mandatory statutes as indicating a repudiation of automatic death sentences.¹⁵⁵ The Court similarly relied on the sentencing decisions of capital juries for its conclusion that capital punishment for rape¹⁵⁶ and for felony murder¹⁵⁷ has been rejected by the conscience of the community and is therefore unconstitutional.

The eighth amendment's ban on cruel and unusual punishments is an evolving constitutional norm that reflects society's changing moral judgments concerning the limits of appropriate punishment.¹⁵⁸ Jury selection practices which permit the systematic removal of a substantial proportion of death-scrupled jurors have the effect of freezing the procedure for imposing death sentences in a structure that would prevent the progressive evolution of constitutional norms over time, posing a threat to basic eighth amendment values.¹⁵⁹ Jury representativeness in the capital context is thus mandated not only by the sixth amendment, but by eighth amendment concerns as well. The Supreme Court in *Witherspoon* recognized the critical importance of representative juries in capital cases by stating that "one of the most important functions any jury can perform" in deciding between life and death "is to maintain a link between contemporary community values and the penal system—a link without which a determination of punishment could hardly reflect 'the evolving standards of decency

extensive argument in support of such a constitutional right, see *Gillers*, *supra* note 12, at 39-74.

155. *Woodson v. North Carolina*, 428 U.S. 280, 293 (1976).

156. *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977).

157. *Enmund v. Florida*, 458 U.S. 782, 795-96 (1982) (invalidating statute authorizing capital punishment for felony murder where defendant did not commit the homicide, attempt to kill, or intend that the killing take place).

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

159. See Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 294-96 (1975) (analyzing *Witherspoon* as mandating a "structure through which eighth amendment principles would be linked to community sentiments"); Winick, *supra* note 1, at 80.

that mark the progress of a maturing society.'"¹⁶⁰ A jury can perform this function only if it fairly represents community attitudes on capital punishment.

Thus, eighth amendment values strongly counsel against the removal for cause of "automatic life imprisonment" jurors. The systematic elimination of this sub-group of death-scrupled jurors biases jury composition in capital cases, resulting in a distorted exaggeration of the community's willingness to impose the death penalty.¹⁶¹ Advisory opinions on sentence rendered by such juries may thus mislead sentencing judges as to whether the "conscience of the community" demands the extreme penalty in particular cases and "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."¹⁶² If juries are to effectively express the community conscience in their advisory role in the second stage of Florida's "trifurcated" capital trial process,¹⁶³ the opinions of "automatic life imprisonment" jurors must be heard.

V. CONCLUSION

This article has demonstrated that the typical practice in Florida of excusing for cause jurors whose beliefs about capital punishment render them unable to recommend death, but which do not interfere with their ability to make a fair assessment of guilt, may not be authorized by state law, and even if authorized, is unconstitutional.¹⁶⁴ The cases upholding this practice, reflexively citing *Witherspoon*, do not analyze the substantially open state law ques-

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

161. This is true in Florida even though "automatic death penalty" jurors are also removed for cause, see *supra* note 72 and accompanying text, in view of the empirical evidence suggesting the substantially larger size of the "automatic life imprisonment" group in the community. See *supra* note 90 and accompanying text; notes 117-19 and accompanying text.

162. *Lockett v. Ohio*, 438 U.S. 586, 605 (1976) (Burger, C.J.) (plurality opinion).

163. See *supra* notes 78-84 and accompanying text.

164. Even if the Florida courts should construe the statutory provisions dealing with challenge for cause to authorize removal of "automatic life imprisonment" jurors, the constitutional problems I have identified, which constitute "limitation[s] on the State's power to exclude," *Adams v. Texas*, 448 U.S. 38, 48 (1980), would independently demand an end to this practice.

tions, nor the troubling constitutional difficulties presented. Accordingly, Florida courts should reexamine this issue.

The removal of "automatic life imprisonment" jurors raises grave concerns about the prosecution-proneness of resulting juries, posing a serious threat to the sixth amendment/due process right of capital defendants to an impartial jury on guilt. In addition, the practice distorts the representative character of capital juries by eliminating a significant proportion of those members of the community who oppose capital punishment. This raises serious problems under the sixth amendment requirement that juries represent a fair cross-section of the community. Moreover, this underrepresentation of death penalty objectors on capital juries in Florida prevents such juries from serving as an accurate indicator of community values regarding the limits of appropriate punishment. This frustrates the ability of capital juries to play the essential role contemplated for them by Florida's death penalty statutory scheme and is inconsistent with basic eighth amendment values. Capital punishment is constitutional only if its continued imposition does not violate the enlightened conscience of the community. For the jury to serve as the conscience of the community, it must decide cases the way the community would, and to do this, it must be fairly representative of the community.

"Automatic life imprisonment" jurors thus should not be subject to challenge for cause in Florida. Their inclusion on capital juries would frustrate no legitimate state interest. By definition, these jurors are able fairly and impartially to assess guilt, and their inability to recommend a sentence of death does not prevent them from playing their essential role in the sentencing portion of the capital case. Therefore, including these jurors in capital juries will not frustrate the state's interest in convicting the guilty or its interest in imposing the death penalty in appropriate cases. Allowing these jurors to serve would result in capital juries able to assess guilt with increased impartiality, and with an increased ability to reflect the conscience of the community on the critical question of life or death.¹⁶⁵

165. If the removal for cause of "automatic life imprisonment" jurors is held improper, then these jurors either would serve on capital juries, or their removal would require the expenditure of some of the prosecution's limited number of peremptory challenges. In Florida each party is given ten peremptory challenges in a capital case, FLA. STAT. § 913.08(1)(a)(2)(1983); FLA. R. CRIM. P. 3.350(a), plus an additional peremptory challenge for each alternate juror (usually two) selected, FLA. R. CRIM. P. 3.350(f). Any systematic use of these peremptory challenges to exclude "automatic life imprisonment" jurors, should they be held not subject to removal for cause, would, as I have previously argued, be unconstitu-

tional. *See generally* Winick, *supra* note 1. Moreover, if held improper, the removal of "automatic life imprisonment" jurors—under the Supreme Court's general practice in death penalty cases involving the improper removal of scrupled jurors—would require that any death sentence returned in a case in which this had occurred be vacated. *Davis v. Georgia*, 429 U.S. 122 (1976) (*per curiam*) (improper removal of even one juror requires vacation of death sentence); *Hance v. Zant*, 696 F.2d 940, 956 (11th Cir. 1983) (existence of available peremptory challenge does not render error harmless); *Burns v. Estelle*, 592 F.2d 1297, 1300 (5th Cir. 1979) (existence of available peremptory challenge does not render error harmless), *aff'd en banc*, 626 F.2d 396 (5th Cir. 1980); *Chandler v. State*, 8 FLA. L. WEEKLY 291, 291-92 (Fla. July 28, 1983) (rejecting harmless error approach). In addition, if held unconstitutional under either the sixth amendment/due process right to an impartial jury or the sixth amendment cross-section requirement, any resulting conviction must be set aside. *Keeten v. Garrison*, No. C-C-77-193-M (W.D.N.C. Jan. 12, 1984); *Grigsby v. Mabry*, 569 F. Supp. at 1273 (E.D. Ark. 1983).