***Witherspoon v. Illinois*** (1968). Justice Stewart...The jury found [Witherspoon] guilty [of murder] and fixed his penalty at death. At the time of his trial an Illinois statute provided:

> "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."

Through this provision the State of Illinois armed the prosecution with unlimited challenges for cause in order to exclude those jurors who, in the words of the State's highest court, "**might hesitate to return a verdict inflicting death**." At the petitioner's trial, the prosecution eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any venireman who expressed qualms about capital punishment. From those who remained were chosen the jurors who ultimately found the petitioner guilty and sentenced him to death. The Supreme Court of Illinois denied post-conviction relief, and we granted certiorari to decide whether the Constitution permits a State to execute a man pursuant to the verdict of a jury so composed.

The issue before us...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 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. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it...

In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return

a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty" or against its infliction "in a proper case" and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

Only one venireman who admitted to "a religious or conscientious scruple against the infliction of the death penalty in a proper case" was examined at any length. She was asked: "You don't believe in the death penalty?" She replied: "No. It's just I wouldn't want to be responsible." The judge admonished her not to forget her "duty as a citizen" and again asked her whether she had "a religious or conscientious scruple" against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not "like to be responsible for...deciding somebody should be put to death." Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to "step aside."

The petitioner contends that...such a jury, unlike one chosen at random from a cross-section of the community, must necessarily be **biased in favor of conviction**, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt. To support this view, the petitioner refers to what he describes as "competent scientific evidence that death-qualified jurors are partial to the prosecution on the issue of guilt or innocence."

...We simply cannot conclude...that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. In light of the presently available information, we are not prepared to announce a *per se* constitutional rule requiring the reversal of every conviction returned by a jury selected as this one was.

It does not follow, however, that the petitioner is entitled to no relief. For in this case the jury was entrusted with two distinct responsibilities: first, to determine whether the petitioner was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death. It has not been shown that this jury was biased with respect to the petitioner's guilt. But it is 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 under the Sixth and Fourteenth Amendments.

The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other States, the jury is given broad discretion to decide whether or not death *is* "the proper penalty" in a given case, and a juror's general views about capital punishment play an inevitable role in any such decision.

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. Guided 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. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community**. Culled of all who harbor doubts about the wisdom of capital punishment -- of all who would be reluctant to pronounce the extreme penalty -- such a jury can speak only for a distinct and dwindling minority...In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die...

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they **voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected**. Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law. *Reversed*.

**DISSENT/CONCURRENCE**: Justice Douglas...I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

The Court in *Logan v. United States*, held that prospective jurors who had conscientious scruples concerning infliction of the death penalty were rightly challenged by the prosecution for cause, 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..." That was a federal prosecution, the requirement being "an impartial jury" as provided in the Sixth Amendment, a requirement now applicable to the States by reason of the incorporation of the Jury Clause of the Sixth Amendment into the Due Process Clause of the Fourteenth. *Duncan v. Louisiana*.

...Where the jury has the discretion to impose the death penalty or not to impose it, the *Logan* rule is, in my opinion, an improper one. For it results in weeding out those members of the community most likely to recommend mercy and to leave in those most likely not to recommend mercy.

Challenges for cause and peremptory challenges do not conflict with the constitutional right of the accused to trial by an "impartial jury." No one is guaranteed a partial jury. Such challenges generally are highly individualized not resulting in depriving the trial of an entire class or of various shades of community opinion or of the "subtle interplay of influence" of one juror on another. *Ballard v.*

*United States.* In the present case, however, **where the jury is given discretion in fixing punishment, the wholesale exclusion of a class that makes up a substantial portion of the population produces an unrepresentative jury**...

**DISSENT:** Justice Black/Harlan/White...The obvious purpose of [the Illinois statute] is to insure, as well as laws can insure such a thing, that there be an impartial jury in cases in Illinois where the death sentence may be imposed. And this statute recognizes that the people as a whole, or as they are usually called, "society" or "the state," have as much right to an impartial jury as do criminal defendants...

A person who has conscientious or religious scruples against capital punishment will seldom if ever vote to impose the death penalty. This is just human nature, and no amount of semantic camouflage can cover it up. In the same manner, **I would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of "an eye for an eye").**

That just shows you how tough this question is. I wonder? Would the jury more likely be an impartial representation of the conscience of the community if lawyers were not permitted to ask them anything about the death penalty?

Yet the logical result of the majority's holding is that such persons must be allowed so that the "conscience of the community" will be fully represented when it decides "the ultimate question of life or death." While I have always advocated that the jury be as fully representative of the community as possible, I would never carry this so far as to require that those biased against one of the critical issues in a trial should be represented on a jury...

The majority opinion attempts to equate those who have conscientious or religious scruples against the death penalty with those who do not in such a way as to balance the allegedly conflicting viewpoints in order that a truly representative jury can be established to exercise the community's discretion in deciding on punishment. But for this purpose I do not believe that those who have conscientious or religious scruples against the death penalty and those who have no feelings either way are in any sense comparable. Scruples against the death penalty are commonly the result of a deep religious conviction or a profound philosophical commitment developed after much soul-searching. The holders of such scruples must necessarily recoil from the prospect of making possible what they regard as immoral. On the other hand, I cannot accept the proposition that persons who do not have conscientious scruples against the death penalty are "prosecution prone."...For no matter how the Court might try to hide it, the implication is inevitably in its opinion that people who do not have conscientious scruples against the death penalty are somehow callous to suffering and are, as some of the commentators cited by the Court called them, "prosecution prone." This conclusion represents a psychological foray into the human mind that I have considerable doubt about my ability to make...

I believe that the Court's decision today goes a long way to destroying the concept of an impartial jury as we have known it. This concept has been described most eloquently by Justice Story:

> "To insist on a juror's sitting in a cause when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to produce the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes. This is the administration of justice which is required." *United States v. Cornell*.

It is just as necessary today that juries be impartial as it was in 1820 when Justice Story made this statement. I shall not contribute in any way to the destruction of our ancient judicial and constitutional concept of trial by an impartial jury by forcing the States through "constitutional doctrine" laid down by this Court to accept jurors who are bound to be biased...