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." [142] A jury, the Court wrote, must "express the conscience of the community on the ultimate question of life or death," and the automatic exclusion of all with generalized objections to the death penalty "stacked the deck" and made of the jury a tribunal "organized to return a verdict of death." [143] A court may not refuse a defendant's request to examine potential jurors to determine whether they would vote automatically to impose the death penalty; general questions about fairness and willingness to follow the law are inadequate.[144]

In *Wainwright v. Witt*, the Court held that the proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" [145] Thus, to be excluded, a juror need not indicate that he would "automatic[ally]" vote against the death penalty, nor need his "bias be proved with 'unmistakable clarity.'" [146] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[147] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this argument, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothetical mix of individual viewpoints." [148] Moreover, the state has "an entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate

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[142] 391 U.S. at 519.

[143] 391 U.S. at 519, 521, 523. The Court thought the problem went only to the issue of the sentence imposed and saw no evidence that a jury from which death-scrupled persons had been excluded was more prone to convict than were juries on which such person sat. *Cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968). *Witherspoon* was given added significance when, in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), the Court held mandatory death sentences unconstitutional and ruled that the jury as a representative of community mores must make the determination as guided by legislative standards. *See also* Adams v. Texas, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

[144] Morgan v. Illinois, 504 U.S. 719 (1992).

[145] 469 U.S. 412, 424 (1985), quoting Adams v. Texas, 448 U.S. 38, 45 (1980).

[146] 469 U.S. at 424. *Accord*, Darden v. Wainwright, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

[147] Lockhart v. McCree, 476 U.S. 162 (1986).

[148] 476 U.S. at 183.