

# Louisiana Law Review

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Volume 29 | Number 2

*The Work of the Louisiana Appellate Courts for the*

*1967-1968 Term: A Symposium*

*February 1969*

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## Prospective Jurors and Capital Punishment

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### Repository Citation

H. Alston Johnson III, *Prospective Jurors and Capital Punishment*, 29 La. L. Rev. (1969)

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## NOTES

### PROSPECTIVE JURORS AND CAPITAL PUNISHMENT

In 1960, petitioner Witherspoon was sentenced to death by the jury that had convicted him of murder under statutory provisions giving the jury the option of imposing capital punishment or life imprisonment. Under applicable Illinois law, the state was allowed to challenge for cause and to excuse prospective jurors who had scruples against capital punishment. On certiorari, the United States Supreme Court *held* it is unconstitutional to exclude persons with conscientious scruples against capital punishment from juries which have the discretion to impose capital punishment or a lesser sentence if guilt is found. *Witherspoon v. Illinois*, 391 U. S. 510 (1968).<sup>1</sup>

Capital punishment was an established sentence for certain serious crimes in England as early as 1500.<sup>2</sup> At first the number of crimes for which the ultimate penalty was prescribed was relatively small, but the number grew much larger with the passage of time. In 1825, death was the usual punishment for felonies in England, which had 230 different capital crimes on its law books.<sup>3</sup> At this stage of criminal law development in England and in the great majority of American jurisdictions, the death penalty was mandatory if the accused were found guilty.<sup>4</sup> There was only a single question for the jury to determine—the guilt or innocence of the defendant. The death penalty, if applicable

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1. Fifteen separate trial errors urged by Witherspoon on appeal were rejected by the Illinois Supreme Court and the conviction was affirmed on March 25, 1963. *People v. Witherspoon*, 27 Ill.2d 483, 199 N.E.2d 281 (1963). No mention was made of any jury bias, although persons who acknowledged having "conscientious or religious scruples against the infliction of the death penalty" had been excluded from the jury by the state's challenge for cause, under the applicable Illinois statute. ILL. REV. STAT. ch. 38, § 743 (1959). *Witherspoon v. Illinois*, 391 U.S. 510, 533 (1968). Further attacks on the conviction by habeas corpus relief and statutory post-conviction remedy were likewise of no avail. *Witherspoon v. Ogilvie*, 337 F.2d 427 (7th Cir. 1964), *cert. denied*, 379 U.S. 950 (1964).

2. By the year 1500, there were eight capital crimes recognized in English law: treason, petty treason, murder, larceny, robbery, burglary, rape, and arson. See H. BEDAU, *THE DEATH PENALTY IN AMERICA* 1 (1964). See also generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 424-54 (5th ed. 1956).

3. H. Kalven & H. Ziesel, *THE AMERICAN JURY* 434 (1966).

4. *Id.* This represented a legislative recognition that imposition of the death penalty was too great a burden for a judge to bear alone. By making the sentence follow a verdict of "guilty" without any further proof of any kind, legislatures attempted to spread out the onus of capital punishment. But this effort eventually backfired when juries simply refused to return "guilty" verdicts that would necessarily result in capital punishment. See *Andres v. United States*, 333 U.S. 740, 753, 767 (1948), for a list of the responsive verdicts to the charge of murder in each state.

to the accused's crime, followed the verdict as a natural legal concomitant, without regard to the feelings of judge or jury.

It was only a matter of time before the harshness of this procedure caused modifications, since frequently a jury would refuse to convict an obviously guilty defendant simply because it did not wish to impose the death penalty.<sup>5</sup> In an attempt, therefore, to ensure more verdicts resulting in capital punishment many jurisdictions separated the issues of guilt and sentence.<sup>6</sup> Juries were given two issues to decide in capital cases: (1) is the accused guilty of the crime charged and (2) if he is guilty, should capital punishment be inflicted? On the second question, however, it should be noted that *no standards* were given by which the jury was to decide whether the accused deserved to live or should be condemned to die.<sup>7</sup>

Even with the separation of the two issues, most states continued to permit challenges for cause as to those jurors opposed to capital punishment or with scruples against its imposition.<sup>8</sup> This has also been the federal practice.<sup>9</sup>

In Louisiana until 1846 crimes designated as capital carried with them mandatory death sentences if guilt were found.<sup>10</sup> In that year, a legislative act provided that jurors could add "without capital punishment" to their "guilty" verdicts in capital cases; but no criteria for determination of the question of life or death were given.<sup>11</sup> By this legislation, the two issues of guilt

5. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 434-35 (1966). See also Grinnell, *The Jury and Death Sentences*, 31 MASS. L.Q. 60 (1946).

6. See H. BEDAU, *THE DEATH PENALTY IN AMERICA* 10 (1964).

7. See, for example, MASS. ANN. LAWS ch. 265, § 2 (1968).

8. The notable exceptions are Iowa, *State v. Lee*, 91 Iowa 499, 60 N.W. 119 (1894) and South Dakota, *State v. Garrington*, 11 S.W. 178, 76 N.W. 326 (1898).

9. See *United States v. Puff*, 211 F.2d 171 (2d Cir. 1954). The court of appeals in the *Puff* case ducked the issue of the justification of capital punishment as not yet ripe for decision. The *Witherspoon* decision also failed to reach that question directly, but the opinion shows that the degree of ripeness is clearly greater in 1968 than it was in 1954.

10. It is interesting to note that the eminent civilian Edward Livingston in a report to the General Assembly of the State of Louisiana spent some 40 pages explaining why he had concluded "that the punishment of death should find *no* place in the Code which you have directed me to present." (Emphasis added.) E. LIVINGSTON, *REPORT MADE TO THE GENERAL ASSEMBLY OF THE STATE OF LOUISIANA ON THE PLAN OF A PENAL CODE FOR THE SAID STATE* 49 (1822). The Code which he finally did present was so revolutionary, however, that the legislature rejected this and other elements before accepting it.

11. Act of May 29, 1846, La. Acts 118 (1846). This provision has been reenacted in subsequent codes of criminal procedure in this state and is presently listed as a responsive verdict in capital cases. LA. CODE CRIM. P. arts. 814, 817. In *State v. Kennedy*, 8 Rob. 590 (La. 1845), decided prior to the Act of May 29, 1846, the Supreme Court ruled that since the two issues of guilt and sentence

and punishment were, in effect, separated. However, both issues were settled by the jury in its verdict.

Soon after passage of the act, the Louisiana Supreme Court ruled that the state could continue to challenge for cause jurors who were opposed to or had scruples against capital punishment.<sup>12</sup> The court felt that the legislation now permitted a verdict "in two forms" and if the jurors had scruples against either, they could not "carry into effect the whole law" and they did not "stand indifferent between the State and the accused."<sup>13</sup> The opinion in that case has been followed without significant change for over 100 years.<sup>14</sup>

Witherspoon urged two main grounds for denial of due process in his petition to the United States Supreme Court. His first contention was that exclusion of jurors who leaned toward mercy in a capital case left his fate in the hands of cruel and heartless extremists who would necessarily be prejudiced on the issue of *guilt*. To support this position, he cited two unpublished surveys and some interviews which he claimed tended to show that jurors who felt no compunction about returning the death penalty are naturally prosecution-prone.<sup>15</sup> The Court rejected this argument as presented, but it did not close the door com-

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were merged, a juror partial on either element of the verdict could be challenged for cause even in the absence of statutory provisions to that effect.

12. State v. Melvin, 11 La. Ann. 535 (1856).

13. *Id.* at 536.

14. State v. Stewart, 45 La. Ann. 1164, 14 So. 143 (1893); State v. Alphonse, 34 La. Ann. 9 (1882); State v. Baker, 30 La. Ann. 1134 (1878); State v. Ward, 14 La. Ann. 673 (1859); State v. Mullen, 14 La. Ann. 570 (1859); State v. Reeves, 11 La. Ann. 686 (1856); State v. Costello, 11 La. Ann. 233 (1856). See also State v. Ricks, 242 La. 823, 138 So.2d 589 (1962); State v. Scott, 243 La. 1, 141 So.2d 389 (1962); State v. Ledet, 211 La. 769, 30 So.2d 830 (1947).

In State v. Henry, 197 La. 999, 3 So.2d 104 (1941), the corresponding principle that the defendant is entitled to challenge for cause jurors who refuse to return anything but the death penalty in a given case was recognized. That principle has been reaffirmed in the recent cases of State v. Newton, 241 La. 261, 128 So.2d 651 (1961) and State v. Jackson, 227 La. 642, 80 So.2d 105 (1955).

The principle and the case were also cited approvingly in Winston v. United States, 172 U.S. 303 (1898); People v. Sainz, 162 Cal. 242, 121 P. 924 (1912); Demato v. People, 49 Colo. 147, 111 P. 704 (1910); Hill v. State, 42 Neb. 503, 60 N.W. 918 (1894); State v. Peltier, 21 N.D. 188, 129 N.W. 453 (1910); Howell v. State, 102 Ohio 411, 131 N.E. 708 (1921); State v. Riley, 126 Wash. 256, 218 P. 241 (1923).

15. 391 U.S. 510, 517 n.10 (1968). The studies mentioned are F. GOLDBERG, ATTITUDE TOWARD CAPITAL PUNISHMENT AND BEHAVIOR AS A JUROR IN SIMULATED CAPITAL CASES (Unpublished Manuscript, Morehouse College, undated); W. WILSON, BELIEF IN CAPITAL PUNISHMENT AND JURY PERFORMANCE (Unpublished Manuscript, University of Texas 1964). See generally Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEXAS L. REV. 545, 556-57 (1961).

pletely to future claims of this nature which might be better documented.<sup>16</sup>

The Court, through Mr. Justice Stewart, found greater merit in Witherspoon's second contention that exclusion of persons with scruples against capital punishment left the jury prejudiced as to the *punishment* to be imposed. The Court held that the jury that determined Witherspoon's punishment fell "woefully short" of the requirement of an impartial jury,<sup>17</sup> stating

"If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality."<sup>18</sup>

Mr. Justice Stewart's opinion emphasized that jurors are given no rule or standard by which they are to judge between life imprisonment and death. In the absence of a standard, the jury is charged with expressing the feeling of the community on this vital question.<sup>19</sup> The Court concluded that under such circumstances, when the conscience of the community is to be brought to bear on the issue, it is a denial of due process to exclude any identifiable segment of that community.<sup>20</sup> In this particular case, the exclusion of the segment of the community leaning toward mercy left a jury which the Court felt could "speak only for a distinct and dwindling minority."<sup>21</sup>

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16. 391 U.S. 510, 517-18 (1968). The Court commented: "We simply cannot conclude, either on the basis of the record *now before us* or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction. *In light of the presently available information*, we are not prepared to announce a *per se* constitutional rule..." (Emphasis added.) See also *id.* at 520 n.18 (1968).

17. Implicit in the Court's decision is a recognition of the application of the "impartial jury" requirement of the sixth amendment to the states by the fourteenth amendment due process clause. This application was decided in the recent case of *Duncan v. Louisiana*, 391 U.S. 145 (1968).

18. 391 U.S. 510, 520 (1968). It could be argued that the Court has crossed the line of neutrality by refusing to permit challenges for cause as to those persons admittedly leaning away from the death penalty without any requirement that they declare that they could lay aside their bias and render a verdict on the evidence presented. Cf. LA. CODE CRIM. P. art. 797(2).

19. 391 U.S. 510, 519 (1968).

20. *Id.* at 520.

21. *Id.* The Court also points out in a footnote that while the number of persons under sentence of death has climbed in recent years, the number of persons executed has fallen. Witherspoon's brief suggests that this may be due

To exclude such persons, the Court felt, leaves the defendant to face "a tribunal organized to return a verdict of death."<sup>22</sup> Just as no accused can be tried on the issue of guilt before a tribunal organized to convict,<sup>23</sup> "no defendant can constitutionally be put to death at the hands of a tribunal so selected."<sup>24</sup>

In a footnote, the Court clarifies the two types of challenges for cause on this matter that remain for the state to exercise. The state may challenge (1) those whose testimony on *voir dire* makes it clear that they would *automatically* vote against the death penalty regardless of the evidence adduced and (2) those whose attitude toward the death penalty would prejudice them on the issue of guilt, *i.e.*, where the issue of guilt and punishment are one.<sup>25</sup> The decision does not affect the validity of any sentence other than a capital sentence; and the decision does not invalidate the *conviction*, as opposed to the *sentence*, in the *Witherspoon* case or any other case.<sup>26</sup> Finally, buried in a footnote, the Court announces that the decision is to be "fully retroactive."<sup>27</sup>

The actual holding in *Witherspoon* is quite narrow. Simply stated, the decision holds that it is a denial of due process of law to the defendant to exclude from the capital jury "the leaners," those with scruples against capital punishment.<sup>28</sup> This appar-

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to a divergence in the views of the juries selected and the views of society as a whole. See *id.* at 521 n.19.

22. *Id.* at 521. This statement by the Court makes it clear that it agreed with *Witherspoon* that persons with scruples against capital punishment may not be challenged as prejudiced on the *sentence* question, although it would not take the further step of declaring that jurors who would vote for the death penalty are prejudiced as to *guilt*.

23. *Fay v. New York*, 332 U.S. 261, 294 (1946). See also *Tumey v. Ohio*, 273 U.S. 510 (1927).

24. 391 U.S. 510, 522-23 (1968). See *Swain v. Alabama*, 380 U.S. 202 (1965); *Ballard v. United States*, 329 U.S. 187, 195 (1946); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946); *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966); *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965).

25. 391 U.S. 510, 522-23 n.21 (1968).

26. *Id.* But see *Louisiana v. Turner*, Docket no. 49,330 (Feb. 28, 1969).

27. *Id.* at 523 n.22 (1968). In *Bumper v. North Carolina*, 391 U.S. 543 (1968), decided on the same day, the Court rejected an argument on challenges for cause similar to *Witherspoon's* because the jury had in fact returned a verdict of life imprisonment.

28. There is a paucity of examples in the jurisprudence of what the law considers "scruples." The word itself is derived from the Latin word *scrupulus*, meaning a small stone. But the word is used to mean "qualms" as well as "strong moral or religious feelings inhibiting" a certain action. The Court apparently felt that the Illinois jurisprudence defined "scruples" as "hesitation" to return a capital verdict. The Court's citation, however, is to a case which states that those *who have scruples* might hesitate to return a capital verdict. *People v. Carpenter*, 13 Ill.2d 470, 150 N.E.2d 100 (1958). This is a truism which sheds no light at all on the question of what "scruples" actually are. In Louisiana, scruples have been termed a "mental obstacle" preventing an impartial discharge of duty.

ently includes those who have "voiced general objection" to the death penalty.<sup>29</sup>

The import of this decision may be much greater. One can hardly deny that capital verdicts will now be difficult for the state to achieve, if not impossible. Article 798(2) of the Louisiana Code of Criminal Procedure has been severely limited by *Witherspoon*.<sup>30</sup> The state may challenge for cause only those jurors who will not render a capital verdict in any case, regardless of the evidence presented.<sup>31</sup>

The broad impact of the decision poses some interesting questions for the state and for those sentenced to death and awaiting execution. In the case of the latter, since the Court announces that a sentence of death cannot be carried out if jurors with scruples against capital punishment were excluded from the sentencing body,<sup>32</sup> it would seem that each defendant who can demonstrate such a procedure in his own case may effectively reduce his sentence to life imprisonment under federal habeas corpus relief. Since our commutation and parole statutes envision *jury-imposed* sentences, a question may arise whether prisoners who have their sentences reduced under the *Witherspoon* rationale are then eligible for commutation or parole.<sup>33</sup>

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State v. Mullen, 14 La. Ann. 570, 571 (1859). There are very few other definitions. But definitions are largely of academic interest only, for now only the extremists in either direction are excluded from the jury; the "leaners," however one defines that term, may stay.

29. The Court does not discuss the implied corollary to the decision: that the defendant may no longer challenge for cause those who lean *away from* a qualified verdict. In Louisiana, the defendant's right to such challenges was upheld in *State v. Henry*, 196 La. 218, 233, 198 So. 910, 915 (1940). It is not clear whether the defendant's challenges on this issue are swept away along with the state's. In any case, the defendant and the state retain the general power to challenge for cause. LA. CODE CRIM. P. art. 797(2): "The state or the defendant may challenge a juror for cause on the ground that: . . . (2) The juror is not impartial, whatever the cause of his partiality." Here the defendant must demonstrate more than an opinion or impression of the juror; it must be shown to the court's satisfaction that the juror cannot render an impartial verdict according to the law and the evidence before he may be excused.

30. LA. CODE CRIM. P. art. 798(2): "It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

". . . .  
 "(2) the juror tendered in a capital case has conscientious scruples against the infliction of capital punishment . . ." In response to *Witherspoon*, the Louisiana legislature has now amended *id.* art. 798(2), permitting challenges only as those persons mentioned as able to be challenged by the court. See La. Acts 1968 (E.S.) No. 31, § 1.

31. The state may continue to challenge by peremptory challenges jurors which it finds unacceptable, but in capital cases only twelve such challenges are permitted for each defendant. LA. CODE CRIM. P. art. 799. The Supreme Court of the United States has recently reiterated that it will not inquire into the reasons for a peremptory challenge. *Swain v. Alabama*, 380 U.S. 202 (1965).

32. 391 U.S. 510, 522 (1968).

33. LA. R.S. 15:571.7 (1950) provides: "Whenever a prisoner who has

The state is not completely without recourse after *Witherspoon*. The lack of adequate standards by which the jurors are to judge whether a man should live or die appears to be a major reason for the decision.<sup>34</sup> The state could attempt to define through legislation the factors to be taken into account by the jurors in deciding the question of punishment.<sup>35</sup> In practically every other instance, the law prescribes a fairly definite penalty to be imposed if guilt is found. Establishment of standards for punishment would eliminate the broad, free discretion of jurors in sentencing which was a principal factor in *Witherspoon*.<sup>36</sup>

The state might also return to its former procedure and provide mandatory capital punishment if guilt is found, thus taking the sentencing burden from the jury entirely. By once again merging the issues of guilt and capital punishment, the state should be able to challenge those jurors whose scruples on the punishment issue would prevent them from rendering an impartial decision as to the defendant's *guilt* or *innocence*. As noted

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been convicted of a crime and sentenced to imprisonment for life, so conducts himself as to merit the approval of the superintendent of the state penitentiary he may apply for a commutation of his sentence and the application, upon approval of the superintendent, shall be forwarded to the governor. The governor may commute the sentence upon the recommendation in writing of the lieutenant governor, attorney general, and presiding judge of the court before which the conviction was had or any two of them. No commutation under the provisions of this Section shall reduce the period of incarceration to less than ten years and six months." *Id.* 15:574.3 further provides: "No parole shall be granted to any prisoner serving a life sentence until after his life sentence has been commuted to a fixed term of years by action of the state board of pardons and the Governor, and until the prisoner has served at least one-third of the time fixed by the commutation of sentence." This question may be largely academic, however, because it is unlikely that the governor would commute the sentences of men formerly awaiting execution.

34. 391 U.S. 510, 519 n.15 (1968). This is aptly demonstrated in the Court's comment that "one of the most important functions any jury can perform... is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' Trop v. Dulles, 356 U.S. 86, 101 (1958)."

35. The jury might be instructed that death would be a proper verdict after taking into account some of the following circumstances: (1) Is the defendant a multiple offender? (2) Was the crime committed "with treachery, taking advantage of superior strength, with aid or armed men"? (3) Was the crime committed for a price or reward? (4) Was the crime committed in such a way (explosion) that the lives of many others might have been endangered as well? (5) Was the crime committed with evident premeditation? (6) Was the crime committed with cruelty, "by deliberately and inhumanly augmenting the suffering of the victim, or outraging or scoffing at his person or corpse? (7) Is the defendant a person whose life could be improved by proper treatment during confinement?" Some of these standards are actually in use for judges in the Philippine Islands. See PHILIPPINE REV. PENAL CODE art. 248.

36. Other statutes with broad discretion and no standards may also come under attack after *Witherspoon*, even though it is the judge rather than the jury who has the sentencing power. For example, LA. R.S. 14:31 (1950) prescribes a penalty of not more than twenty-one years for manslaughter without giving any standards by which the decision is to be made.



earlier, *Witherspoon* is said not to affect this type of challenge for cause. The possibility of lesser included offenses as responsive verdicts lessens the probability of a jury's returning a verdict of "innocent" to avoid imposing death sentences in capital cases.<sup>37</sup> But as an added safeguard against compromise acquittals, the state could limit the number of capital crimes, confining them to those in which the majority of the population would feel that the death penalty is necessary or desirable. To this end, the felony-murder provision might be deleted;<sup>38</sup> jurors would almost certainly balk at the idea of mandatory capital punishment in all felony-murder cases as a result of "guilty" verdicts. The state might also re-examine the mandatory capital punishment provisions in aggravated rape cases.<sup>39</sup> Consideration could also be given to eliminating the death penalty which may be imposed if a person over twenty-one is convicted of selling or giving a marijuana cigarette to a minor.<sup>40</sup> In short, if the state still desires the death penalty as punishment for certain aggravated crimes, it should be careful to limit those crimes to ones which, in the community opinion, clearly deserve the supreme punishment.<sup>41</sup>

The decision in *Witherspoon* is obviously a momentous one for defendants, but it is also very important for the state. The effect of the decision should be to force states to re-assess their own position toward the death penalty. The Court has put the burden on the states to re-examine carefully their procedures if they wish to retain capital punishment.<sup>42</sup> The tone of *Wither-*

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37. LA. CODE CRIM. P. art. 814.

38. LA. R.S. 14:30 (1950). For an extreme example of the application of the doctrine, see *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204 (1955), where the court held that the killing of a co-felon by the robbery victim was attributable to the surviving felon.

39. LA. R.S. 14:42 (1950). The present penalty for rape may actually encourage murder of the victim. Since the offender will get death for his act if convicted of aggravated rape, he has nothing to lose by killing the victim; and he could eliminate the key witness in the process.

40. *Id.* 40:981, 40:961.

41. The state might leave murder of a policeman as the only capital crime, as some states have done. Still others have included murder by a person already serving life imprisonment for another crime. See, for example, N.Y. PENAL LAW § 125.30 (McKinney 1967), which permits the imposition of the death penalty only in these two instances and if the defendant is over the age of eighteen at the time of the crime.

42. It appears that the Court may be reacting to current social opinion on the matter of capital punishment. In a footnote, the Court cites a public opinion poll showing 47% of persons interviewed opposed to capital punishment while 42% favored capital punishment in proper cases and 11% were undecided. 391 U.S. 510, 520 n.16 (1968). See also H. BEDAU, *THE DEATH PENALTY IN AMERICA* 194-213, 231-58 (1964).

*spoon* indicates, however, that the time may not be too far distant when the Court will strike down capital punishment as a penalty for crime altogether.<sup>43</sup>

H. Alston Johnson III

#### GUILTY PLEAS, JURY TRIAL, AND CAPITAL PUNISHMENT—

##### The Effects of *United States v. Jackson*

An indictment charging defendants with violation of the Federal Kidnapping Act<sup>1</sup> was dismissed by the United States District Court<sup>2</sup> which held the *entire* statute unconstitutional because it authorized only the jury to impose capital punishment.<sup>3</sup> The principal grounds for the ruling was that the defendant was required to expose himself to "the risk of death" in order to gain jury trial. The United States Supreme Court on direct appeal, agreeing with the district court on the basic constitutional question, reversed on the issue of severability<sup>4</sup> and *held* the death penalty provision of the Federal Kidnapping Act is invalid because it places an impermissible burden—"the risk of death"—upon the exercise of the fifth amendment right not to plead guilty and the sixth amendment right to jury trial. *United States v. Jackson*, 390 U.S. 570 (1968).

*Jackson* is examined here, not because of the specific and rather narrow holding relative to the Federal Kidnapping Act, but rather to present and evaluate the reasoning of the court

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43. Recent decisions show that the Court tends to regard capital punishment as suspect, and shows increasing concern about procedure when a man's life hangs in the balance. In *United States v. Jackson*, 390 U.S. 570 (1968), the Court held the death penalty could not be imposed on a defendant who had to subject himself to the risk of capital punishment in order to get a jury trial. Had he waived the jury trial, the maximum penalty permitted under the applicable statute was life imprisonment. In a related case, the Nevada Supreme Court ruled that a statute permitting the death penalty to be imposed only by the jury constituted a lop-sided constitutional scheme which could not be justified. *Spillers v. State*, 436 P.2d 18 (Nev. 1968).

1. 18 U.S.C. § 1201(a) (1958). The charge was that defendants had transported across state lines a person who had been kidnapped, held for ransom, and harmed when liberated.

2. *United States v. Jackson*, 262 F. Supp. 716 (D. Conn. 1967).

3. The Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1958), provides: "Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed." (Emphasis added.)

4. The Supreme Court found the death penalty provision a "functionally independent" part of the statute and held the unconstitutionality of the death penalty provision did not defeat the validity of the remaining provision.