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## Guilty Pleas, Jury Trial, and Capital Punishment

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*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.

and to attempt to assess the implications the decision has for state statutes imposing capital punishment, particularly those of Louisiana.

*The Constitutional Question*

Mr. Justice Stewart, speaking for the six-man majority,<sup>5</sup> posed the constitutional question<sup>6</sup> in terms whether a statute permitting imposition of the death penalty only on those defendants who exercised their right to a jury trial is constitutionally permissible. The answer was negative. Significantly, the answer is not drawn in narrow and delimiting language. The Court, with apparently no equivocation, stated: "The inevitable effect of *any such provision* is, of course, to discourage the assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand jury trial."<sup>7</sup> (Emphasis added.) Further emphasizing the strength of its opinion, the Court, in response to the government's position that the trial judge could be relied upon to reject coerced guilty pleas and jury waivers, said that "any such provision" which discourages jury trial and encourages guilty pleas by imposing "the risk of death" is unconstitutional *on its face*: ". . . or the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently . . . coercive in order that it be held to impose an impermissible burden upon assertion of a constitutional right."<sup>8</sup>

Many unanswered questions are raised by this apparently straight-forward decision. Since the defendant may not be "encouraged" to waive jury trial or plead guilty by "the risk of death," does he any longer have a right<sup>9</sup> to do either so that he might avoid jury trial in a capital case? The court recognized that the total exclusion of trial waiver and guilty pleas is not desirable in that defendants should be allowed to "spare themselves and their families the expense and spectacle of protracted

5. Justice White, who was joined by Justice Black, dissented on the grounds that he did not feel that the statute was invalid on its face. Justice Marshall did not participate.

6. The question presented in *Jackson* was not novel. The lower federal courts, with the exception of the Connecticut District Court, had consistently upheld the statute. See *Waley v. United States*, 233 F.2d 804 (9th Cir. 1956); *Seadlund v. United States*, 97 F.2d 742 (7th Cir. 1938); *McDowell v. United States*, 274 F. Supp. 426 (D. Tenn. 1967); *LaBoy v. New Jersey*, 266 F. Supp. 581 (D. N.J. 1967); *Robinson v. United States*, 264 F. Supp. 146 (W.D. Ky. 1967).

7. *United States v. Jackson*, 390 U.S. 570, 581 (1968).

8. *Id.* at 583.

9. The Court had previously held that there is no absolute right to demand trial without a jury. *Singer v. United States*, 380 U.S. 24 (1965).

courtroom proceedings.”<sup>10</sup> How this goal is to be accomplished, however, is not elucidated. The court suggested that a jury might be empaneled in every case to impose punishment.<sup>11</sup> This would not completely do away with the “expense and spectacle” since presumably the sentencing jury should be made well aware of the facts and circumstances of the case in order to properly impose sentence. This somewhat novel procedure also presents administrative and procedural problems with which neither the federal government nor most states are presently equipped to cope.<sup>12</sup>

The other alternative<sup>13</sup> implied is to allow the court as well as the jury to impose capital punishment. While procedurally this might prove more satisfactory, it is generally conceded that judges do not desire this power nor do legislatures wish to grant it to them.<sup>14</sup>

For those states that allow jury waiver in capital cases,<sup>15</sup> *Jackson* seems to require that either the court be allowed to impose capital punishment or that a jury be empaneled in all capital cases to impose sentence, even if guilt is determined by the court.

The standard announced with respect to guilty pleas appears to have an even greater potential impact. The court clearly stated that the basis for its decision relative to guilty pleas is not that they are coerced, but simply that they are needlessly encouraged.<sup>16</sup> The statute in question “encouraged” guilty pleas by allowing one who has pleaded guilty to be subject only to life imprisonment. This raises the question of how one is to develop a system which constitutionally allows guilty pleas in capital cases. Again, the alternatives appear to be either a grant of power to the court to impose the death sentence or the empaneling of sentencing juries. Either of these routes limits signifi-

10. *United States v. Jackson*, 390 U.S. 570, 584 (1968).

11. *Id.* at 582.

12. The Court itself noted several articles dealing with this problem: Notes, 52 CALIF. L. REV. 386 (1964), 39 N.Y.U. L. REV. 50 (1964); Comment, 63 COLO. L. REV. 608 (1965).

13. The obvious third alternative is not considered here—the mandatory death sentence. That alternative is not considered meaningful in light of present-day trends and is not considered in this Note. See generally H. BEDAU, *THE DEATH PENALTY IN AMERICA* (1967).

14. There are, of course, exceptions to this generalization. At least two federal crimes are made punishable by death without a jury. See 18 U.S.C. §§ 34, 1992 (1958). Louisiana, to the contrary, prohibits the judge acting alone from imposing capital punishment. LA. CODE CRIM. P. art. 780.

15. As of 1966, twenty-two states and the federal government allowed waiver of jury trial in capital cases. See Note, 51 CORN. L.Q. 339, 342-43 (1966).

16. *United States v. Jackson*, 390 U.S. 570, 583 (1968).

cantly the flexibility of the criminal justice process. It is true that the defendant would not be "encouraged" into pleading guilty, but the result for him is that he is subject to the death penalty in all cases. Ironically, the Supreme Court is "protecting" the defendant against being "encouraged" by "the risk of death" into pleading guilty or waiving jury trial to avoid that risk, with the consequence that he is exposed to "the risk of death" in *every* instance.

The Court failed to examine an important facet in the administration of criminal justice—the plea bargain.<sup>17</sup> Plea bargaining in capital cases in light of the constitutional standards set down in *Jackson* raises serious and difficult questions. The argument that a plea bargain encourages the defendant to plead guilty and discourages the exercise of his right to jury trial and privilege against self-incrimination seems as tenable a position (if not more so) as the *Jackson* position with respect to jury waiver and non-bargained guilty pleas. If, as the Court found, the statute in question "needlessly encourages" guilty pleas by imposing "the risk of death," one is placed in the logically untenable position of arguing that the active and conscious plea bargaining process does not discourage the exercise of the same constitutional rights. The Court's language accepted, it seems necessary to conclude that plea bargaining also imposes an impermissible burden on the defendant when he is induced or allowed to plead guilty to a lesser (non-capital) offense. The plea bargaining process in capital cases *actively* discourages the exercise of the rights to jury trial and against self-incrimination. Again, ironically, the defendant is "protected" against plea-bargaining to the extent that he must be subject to capital punishment.

In sum, the Court is saying that the defendant cannot be "encouraged" to waive his right to jury trial and privilege against self-incrimination at "the risk of death." The necessary result is that the defendant who desires to waive these rights to avoid "the risk of death" is left no opportunity. Practically, of course, the ruling has the effect of striking down the death penalty provision itself. The Court is thus forcing the federal government and those states that wish to impose capital punishment *and* allow jury waiver and/or guilty pleas into either granting the court that power without a jury or requiring the empaneling

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17. See D. NEWMANN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Rossett, *The Negotiated Guilty Plea*, 374 ANNALS 70 (1967).

of a jury to impose sentence no matter how guilt has been determined. Congress and those states affected by the ruling are faced with the problem that if they desire to keep the death penalty, a more rigid procedure must be adhered to with the consequence of creating greater potential liability to all defendants. Under these circumstances, capital punishment would (or should) be subject to re-evaluation which would very likely result in fewer supporters. One can only speculate as to whether this was an intentional consequence, but the possibility should not be overlooked.<sup>18</sup>

### *Implications for Louisiana*

Louisiana has five capital crimes.<sup>19</sup> The remaining inquiry attempts to examine the impact of *Jackson* on the penalty provision of these crimes. *Spillers v. State*,<sup>20</sup> a Nevada case, provides further perspective for examining *Jackson's* implications for Louisiana. *Spillers* held that a rape statute which imposed capital punishment "if the jury by their verdict affix the death penalty"<sup>21</sup> was unconstitutional. Significantly, the United States Supreme Court in *Jackson* noted the case approvingly.<sup>22</sup> The Nevada Supreme Court pointed out that *Spillers* could not have been sentenced to death if he had either pleaded guilty to the crime or waived jury trial. They found the statute provided "[a] coercion . . . to forego that right [jury trial] and prefer court adjudication, since the court is powerless to order death."<sup>23</sup>

Louisiana's position is ostensibly different from that of Nevada and the Federal Kidnapping Act in that it does not allow a defendant in a capital case to waive jury trial.<sup>24</sup> A Louisiana defendant cannot through a jury trial waiver (as distinguished from a guilty plea) be "encouraged" to forego his right to jury trial. The *Code of Criminal Procedure* also does not allow the court to receive an unqualified plea of guilty in capital cases.<sup>25</sup> It does, however, specifically provide that "the defendant, with the consent of the district attorney may plead 'guilty without

18. In light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), noted in 29 LA. L. REV. 381 (1969), there is little doubt that the Court is developing stringent constitutional requirements for capital cases.

19. LA. R.S. 14:30 (murder), 14:42 (aggravated rape), 14:44 (aggravated kidnapping), 14:113 (treason), 40:981 (narcotics) (1950).

20. 436 P.2d 18 (Nev. 1968).

21. NEV. R.S. 200.360(1) (1963).

22. *United States v. Jackson*, 390 U.S. 570, 583 n.24 (1968).

23. *Spillers v. Nevada*, 436 P.2d 18, 22 (Nev. 1968).

24. LA. CODE CRIM. P. art. 780.

25. *Id.* art. 557.

capital punishment.'"<sup>26</sup> This provision is, in effect, a statutory authorization for plea bargaining in capital cases. The question becomes whether this procedure is constitutionally permissible under the *Jackson* standards.

The answer is suggested by paraphrasing the language in *Jackson*:<sup>27</sup> in a capital case in Louisiana, the defendant's assertion of the right to jury trial may cost him his life, for the state's provision allows the jury—and only the jury—to return a verdict of death. The inevitable effect of the provision is to encourage defendants to plead "guilty without capital punishment" if they can obtain the district attorney's consent.

Louisiana's procedure thus appears to be only technically different from that involved in *Jackson* and *Spillers*. In *Jackson*, the government argued that the court's authority to reject "coerced" guilty pleas was enough to save the statute. The court flatly rejected that contention. How can one argue that the district attorney's role of consent saves the Louisiana provision? Again, paraphrasing *Jackson*<sup>28</sup> it might be argued the evil in the statute is not that it necessarily coerces guilty pleas but simply that it needlessly encourages them. The defendant in Louisiana is certainly "encouraged" to "bargain" with the district attorney and plead guilty to avoid the risk of death. *Jackson* reasoning accepted, this discourages the exercise of his right not to plead guilty and his right of jury trial.

Applying the same constitutional reasoning that the Supreme Court used in *Jackson* and which it endorsed in *Spillers*, the Louisiana capital punishment provisions are unconstitutional on their face.

Very recently, the United States Court of Appeals for the Fourth Circuit issued an opinion which supports this position. In *Alford v. North Carolina*<sup>29</sup> the court held: "[T]hat in the present posture of the North Carolina statutes the various provisions for the imposition of the death penalty are unconstitutional and hence capital punishment may *not* under *Jackson* be imposed under any circumstances [footnote omitted]."

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26. *Id.*

27. 390 U.S. 570, 572 (1968).

28. *Id.* at 583.

29. Docket No. 11,598, U.S. Ct. App. 4th Cir., Nov. 26, 1968. The statutory scheme relevant for comparison to Louisiana's is found N.C. GEN. STAT. 5 15-162.1(a), (b) (1965).

This decision is of particular interest because the North Carolina statutory scheme relative to capital punishment is substantially the same as that of Louisiana. The defendant cannot receive the death penalty except by a jury's verdict and the only way to avoid a jury trial and "the risk of death" is to plead guilty.

### *Conclusion*

Accepting that the Louisiana capital punishment provisions are, at least, constitutionally suspect and more probably unconstitutional, what response should be taken? The first question that must be answered is basically normative; that is, whether Louisiana *should* maintain a death sentence. The standards set out in *Jackson* will certainly influence that decision, but it remains essentially normative and outside the scope of this inquiry.

Assuming the normative question is resolved in favor of maintaining capital punishment in at least some instances, the empirical question becomes, how to satisfy the requirements of *Jackson* with an economy of change in Louisiana criminal procedure. The legislature has apparently already decided that it is undesirable to impose this awesome responsibility on judges alone and also that mandatory death sentences reduce the flexibility of criminal procedure so greatly as not to be considered acceptable alternatives.

Since the defendant's right to waive jury trial and his right to plead guilty without qualification are already denied, the further prohibition against accepting *any* guilty pleas in capital cases appears to be the least drastic change from present criminal procedures (the significance of this change should not be overlooked however, especially in light of negotiated pleas). By so prohibiting guilty pleas, the problem of both "voluntary" and bargained guilty pleas being encouraged is completely eliminated. The result, of course, is that anyone charged and indicted with a capital crime is potentially subject to the death penalty regardless of his or the district attorney's actions. A greater responsibility is thus put upon the district attorney to decide at the outset whether the defendant, under all the circumstances, should be subject to this great liability. Once that decision has been made, it would be up to the jury to determine the merits

of it. In this connection, the *Witherspoon*<sup>30</sup> decision relative to standards for selecting jurors in capital cases makes the probability of getting a death penalty slight.

*P. Raymond Lamonica*

#### A CASE FOR THE ABOLITION OF CAPITAL PUNISHMENT

Two recent decisions of the United States Supreme Court noted in this issue<sup>1</sup> and the nationwide debate which preceded them seriously question the advisability and constitutionality of capital punishment. This note will examine the legislative and judicial considerations bearing on these questions.

#### *Legislative Considerations*

At the turn of the nineteenth century, Edward Livingston, in his proposed penal code, advocated "the total abolition of capital punishment."<sup>2</sup> The Louisiana legislature rejected his recommendations, but his work has been repeatedly cited in later years by those who seek the repeal of capital punishment. In its 1968 session, the Louisiana legislature again considered the advisability of a death penalty in a bill calling for its suspension for six years.<sup>3</sup> However, again it was defeated. The following factors normally form, expressly or impliedly, a part of the consideration of such a proposal.<sup>4</sup>

#### *Deterrence*

Every year about six in every 100,000 of the population commit capital crimes in spite of the possible capital punishment. The question here is whether a change in statutory penalty to long-term imprisonment would serve as an equal deterrent.<sup>5</sup>

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30. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968), noted in 29 LA. L. REV. 381 (1969).

1. *Witherspoon v. Illinois*, 391 U.S. 510 (1968), noted in 29 LA. L. REV. 381 (1969), and *United States v. Jackson*, 390 U.S. 570 (1968), noted in 29 LA. L. REV. 389 (1969).

2. 2 E. LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON* 244 (1873).

3. La. H. Bill 303 (1968).

4. From 1930-1966 Louisiana has electrocuted 133 men. There were 39 electrocutions from 1930-1934, 19 from 1935-1940, 24 from 1940-1944, 23 from 1945-1949, 14 from 1950-1954, 13 from 1955-1959, and 1 in 1961. Of the 133 electrocuted, 30 were white and 103 were Negroes. There have been 116 electrocutions for murder; 30 white, and 86 Negro; and 17 for rape, all Negroes. *U.S. Dep't of Justice, Bull. No. 41, National Prisoner Statistics, Executions, 1930-1966*, at 10, 12 (April, 1967).

5. H. BEDAU, *THE DEATH PENALTY IN AMERICA* 261 (1967) (hereinafter cited as *BEDAU*).