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Criminal Law -- United States v. Jackson and Its Impact Upon State Capital Punishment Legislation

James G. Billings

fill every seat.[42] There was little doubt that the Alabama law was on the books to keep Negroes from "single shot" voting one of their race onto the city council. The court's application of *Avery* probably denied a significant racial minority a chance to gain at least one voice on Birmingham's city council. However, *Avery* dealt with a completely different circumstance than "single shot" voting, and it need not have been applied in such an inflexible manner to the set of facts found in *Gordon*. The court in *Gordon* actually took a portion of the language in *Avery* out of context to support its decision.[43]

Even in a situation where it is applied too rigidly, such as in *Gordon*, the one man, one vote rule has a saving feature. In American life there is really no such thing as a monolithic majority with one or a few overriding interests. "[T]he majority is but a coalition of minorities which must act in a moderate, broadly representative fashion to preserve itself."[44] In other words, the political majority cannot long ignore various minority interests in governing without offending all or some of the many minorities of which it itself is composed. Thus, there is a strong argument that the one man, one vote concept—while not perfect—nevertheless is the best rule in a representative democracy, even on the local level of government with its many complex governing bodies. But it should not be applied in inappropriate situations, as was done in *Gordon*, and the courts should apply it flexibly, using the rationale of *Dusch* where apposite.

THOMAS F. LOFLIN III

Criminal Law—*United States v. Jackson* and Its Impact Upon State Capital Punishment Legislation

INTRODUCTION

The provisions of the Federal Kidnapping Act[1] subject a defendant to the risk of death if he is tried by a jury, but to no more than life imprison-

[42] *Id.* at 4.

[43] Compare the paragraph in which the court in *Gordon* quotes *Avery*, 394 F.2d at 4, with the actual context of that language in *Avery* itself, 390 U.S. at 480-81.

[44] Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 SUP. CT. REV. 1, 52.

[1] 18 U.S.C. § 1201(a) (1964) provides that:
Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnapped, ab-

ment if he waives a jury trial or pleads guilty. In *United States v. Jackson*,[2] the district court held that the threat of death "made costly" the assertion of the sixth amendment right to a jury trial, and was thus an impermissible burden upon the free exercise of that right. On appeal,[3] the Supreme Court of the United States not only agreed that the statutory scheme violated the sixth amendment right to a jury trial,[4] but indicated that the statute was also violative of the fifth amendment right "not to plead guilty."[5]

The significance of the district court opinion was apparent from the ensuing litigation[6] and commentary,[7] and, as predicted, the Supreme Court

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ducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, 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.

The Federal Kidnapping Act had withstood no less than eight challenges, on various grounds, to its constitutionality. Livers v. United States, 185 F.2d 807 (6th Cir. 1950) (failure to specify a minimum penalty does not render § 1201(a) unconstitutional); Robinson v. United States, 324 U.S. 282 (1945) (the phrase "liberated unharmed" is not so indefinite as to render § 1201(a) unconstitutional); United States v. Dressler, 112 F.2d 972 (7th Cir. 1940); Waley v. Johnston, 112 F.2d 749 (9th Cir.), *cert. denied*, 311 U.S. 649 (1940) (failure to specify a maximum term of imprisonment does not render § 1201(a) unconstitutional); Bates v. Johnston, 111 F.2d 966 (9th Cir.), *cert. denied*, 311 U.S. 646 (1940) (§ 1201(a) is not unconstitutional for failure to specify a maximum term for which an offender may be punished); Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938) (§ 1201(a) is a valid exercise of the commerce power); Kelly v. United States, 76 F.2d 847 (10th Cir. 1935) (§ 1201(a) is a valid exercise of the commerce power); Bailey v. United States, 74 F.2d 451 (10th Cir. 1934) (§ 1201(a) is a valid exercise of the commerce power).

[2] 262 F. Supp. 716 (D. Conn. 1967).

[3] United States v. Jackson, 390 U.S. 570 (1968). The *Jackson* rationale has also been applied to invalidate the death penalty provisions of the Federal Bank Robbery Act. Pope v. United States, 392 U.S. 651 (1968).

[4] By Constitutional mandate, one accused of a crime has the right to a jury trial except in cases of impeachment. *E.g.*, Singer v. United States, 380 U.S. 24 (1965); Reid v. Covert, 354 U.S. 1 (1957); Patton v. United States, 281 U.S. 276 (1930); U.S. CONST. art. III, § 2; U.S. CONST. amend. VI. The essential elements of a trial by jury are derived from the common law: (1) a jury consisting of twelve men; (2) trial in the presence and under the supervision of a judge having power to instruct the jury as to the law and advise them in respect to the facts; (3) a unanimous verdict. *E.g.*, United States v. Wood, 299 U.S. 123 (1936); Patton v. United States, 281 U.S. 276 (1930); Thompson v. Utah, 170 U.S. 343 (1898).

[5] 390 U.S. at 581. It is well settled that due process forbids a conviction on the basis of a coerced guilty plea. *E.g.*, Herman v. Claudy, 350 U.S. 116 (1956).

[6] See Nieves v. United States, 280 F. Supp. 994 (S.D.N.Y. 1968); McDowell v. United States, 274 F. Supp. 426 (E.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); Spillers v. State, — Nev. —, 436 P.2d 18 (1968).

[7] See Note, *The Federal Kidnapping Act is Unconstitutional in That It Impairs the Free Exercise of the Sixth Amendment Right to Trial by Jury*, 5 HOUSTON L. REV. 166 (1967); Note, *Constitutional Law—Criminal Procedure—Right to a Jury*

decision has provided a basis for challenges to state capital punishment legislation. While *Jackson* has been readily applied by some courts,[8] it has engendered considerable hostility in other forums.[9] The purpose of this note will be to comment on the *Jackson* decision and upon its implications for state statutory schemes that impose the death penalty through procedures that are arguably within the scope of its rationale.

The Jackson *Decision*

In *Jackson* the defendants were indicted in the district court under the provisions of the Federal Kidnapping Act.[10] Section 1201(a) of the Act authorized punishment "(1) by death if the kidnapped person has not been liberated unharmed,[11] and *if the verdict of the jury shall so recommend,*[12] or (2) by imprisonment for any term of years or for life, if the

Trial, 53 IOWA L. REV. 206 (1967); Comment, *Criminal Law—Jury Discretion Over Death Penalty—Unconstitutionality of Section (a) of the Federal Kidnapping Act,* 12 N.Y.L.F. 668 (1966) [hereinafter cited as Comment, 12 N.Y.L.F. 688 (1966)]; Comment, *United States v. Jackson: The Possible Consequences of Impairing the Right to Trial by Jury,* 22 RUTGERS L. REV. 167 (1967) [hereinafter cited as Comment, 22 RUTGERS L. REV. 167 (1967)]; Note, 1 SUFF. L. REV. 130 (1967).

[8] Alford v. North Carolina, — F.2d — (4th Cir. 1968); Spillers v. State, — Nev. —, 436 P.2d 18 (1968); State v. Harper, — S.C. —, 162 S.E.2d 712 (1968).

[9] State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968); State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968).

[10] See note 1 *supra.*

[11] The provision invoking the death penalty only when the victim is not liberated unharmed was included in the statute as an inducement to the kidnapper to release his victim unharmed. *E.g.,* Robinson v. United States, 324 U.S. 282 (1945); United States v. Parker, 19 F. Supp. 450 (D.N.J.), *aff'd,* 103 F.2d 857 (3rd Cir. 1937), *cert. denied,* 307 U.S. 642 (1939); Finley, *The Lindberg Law,* 28 GEO. L.J. 908 (1939); Bomar, *The Lindberg Law,* 1 LAW & CONTEMP. PROB. 436 (1934).

[12] Various policy considerations have been advanced for allowing only a jury to impose the death penalty. In Laboy v. New Jersey, 266 F. Supp. 581 (D.N.J. 1967), it was suggested that the policy was not only to provide fairness for the defendant, but also to relieve the trial judge of the onerous burden of imposing the death penalty himself. It has also been stated:

> The practice of jury sentencing is most often explained as a desire to prevent jury nullification and a rejection of the mandatory death penalty concept. First, juries will often acquit or return verdicts for lesser crimes to avoid the death penalty notwithstanding the evidence of guilt. This practice, at the very least, frustrates the legislative intent and points dramatically to inadequacies in the law. By giving the jury control over the punishment, it can render its verdict on the merits of the case, without fear of the consequences.
>
> Second, the rejection of the policy that death sentences are mandatory for crimes which provide for the death penalty was concomitant with the acceptance, by legislatures, of the fact that some acts, which constitute capital offenses, do not merit the death penalty. This is reflective of the overall movement away from capital punishment.
>
> Where the death penalty has remained, it is almost always a discretionary matter for the jury.

Comment, 12 N.Y.L.F. 688, 691-92 (1966).

death penalty is not imposed."[13] Since only the jury could impose the death penalty, a defendant could either completely preclude or substantially reduce the risk of death by successfully waiving his rights to a jury trial or by pleading guilty.[14] Relying on the rationale of *Griffin v. California*,[15] in which it was held that a prosecutor's comment on a defendant's failure to testify "made costly" his fifth amendment right to silence, the district court reasoned that the "assertion of the equally fundamental right to trial by jury is made no less costly"[16] by the threat of death. The court then stayed the effectiveness of its judgment in order to allow an appeal directly to the United States Supreme Court pursuant to the provisions of 18 U.S.C. § 3731.[17]

On appeal the Government questioned the defendant's reliance on the

[13] 18 U.S.C. § 1201(a) (1964) (emphasis and footnotes added).

[14] In Waley v. United States, 233 F.2d 804 (9th Cir.), *cert. denied*, 352 U.S. 896 (1956), it had been suggested that a plea of guilty would preclude imposition of the death penalty, and presumably the same would be true in the event of a waiver of jury trial. However, in the earlier case of Seadlund v. United States, 97 F.2d 742 (7th Cir. 1938), it had been held that in the event of a guilty plea it was within the discretion of the trial judge to impanel a jury for the purpose of determining punishment. The same reasoning would seem to apply in cases where a defendant had waived jury trial. However, the district court in *Jackson* reasoned: "[E]ven if the trial court has the power to submit the issue of punishment to a jury, that power is discretionary, its exercise uncertain." United States v. Jackson, 262 F. Supp. 716, 717-18 (D. Conn. 1967). Thus the defendant who pleads guilty or waives jury trial is at least insulated by the discretion of the trial judge from jury-imposed capital punishment, while the defendant who submits the issue of guilt to the jury has no such protection. The district court thus found the possible conflict between *Waley* and *Seadlund* to be immaterial in that under either: "If defendants claim their fundamental Sixth Amendment right to a jury trial . . . they must risk their lives. That risk is at least substantially reduced if defendants waive their constitutional right to jury trial by claiming trial to the court or by pleading guilty." *Id.* at 717. For a penetrating analysis of the relative risks under both the *Waley* and *Seadlund* interpretations see Comment, 22 RUTGERS L. REV. 167 (1967). The Supreme Court finally resolved the conflict in statutory interpretation in favor of the *Waley* case.

Waiver of a jury trial must be affirmatively and intelligently made and requires the consent of the court and the prosecution. FED. R. CRIM. P. 23(a); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Patton v. United States, 281 U.S. 276 (1930). A defendant in the federal system also has no absolute right to plead guilty. Lynch v. Overholser, 369 U.S. 705, 719 (1962).

[15] 380 U.S. 609 (1965). The *Griffin* rationale has been reaffirmed by the Supreme Court in Spevack v. Klein, 385 U.S. 511 (1967) (an attorney who asserted his right against self-incrimination at a judicial inquiry into his professional conduct may not be disbarred), and applied in a number of state and federal decisions. *E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967); Moraro v. United States, 374 F.2d 583 (1st Cir. 1967); People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); State v. Turner, 429 P.2d 565 (Ore. 1967).

[16] United States v. Jackson, 262 F. Supp. 716, 718 (D. Conn. 1967).

[17] 18 U.S.C. § 3731 (1964) allows the Government to make a direct appeal to the United States Supreme Court when a decision setting aside an indictment in a criminal proceeding is based on the invalidity of a federal statute.

Griffin rationale. Its contention was that intentional comment on a defendant's silence inures to the benefit of the prosecution, while requiring jury authorization for the death penalty operates as an alternative to mandatory capital punishment, thus having an ameliorative effect and inuring to the benefit of the defendant. The Government took the position that a statutory scheme implemented to mitigate the severity of punishment should not be invalidated because of an incidental and unintentional inducement to forego constitutional rights.[18] The Court rejected this argument, emphasizing that the desirable policy underlying jury-imposed capital punishment[19] could be implemented by alternative statutory schemes that do not penalize those who assert their right to a jury trial or to refrain from pleading guilty. As the Court observed, there are statutes which leave the decision on capital punishment to a jury in every case, regardless of how guilt is determined. For example, in cases where a defendant is convicted after trial by a judge or upon a plea of guilty, statutes could authorize the impaneling of a jury convened especially for the purpose of passing on the propriety of capital punishment. Thus all defendants would be subjected to an equal risk of death, regardless of whether their guilt had been determined by jury, judge or upon their own admission. With this and other available alternatives,[20] which implement capital punishment in such a way that there is no inducement to forfeit valuable constitutional rights, the question became not whether the inducement was "incidental rather than intentional,"[21] but whether it was "unnecessary and therefore excessive."[22]

Even if the threat of death did act as an inducement to waive jury trial or to plead guilty, the Government argued that the trial judge's power to reject coerced waivers or guilty pleas would act as an effective safeguard.[23] However, the Court saw the problem as not necessarily one of *coerced* guilty pleas and waivers, but rather that the statute *"needlessly encourages* them."[24] Thus, while the power of rejection may "alleviate

[18] Reply Brief for Appellant at 2, n.1; Brief for Appellant at 6-9, United States v. Jackson, 390 U.S. 570 (1968).

[19] The policy considerations which underly the practice of allowing only a jury to impose capital punishment are enumerated in note 12 *supra.*

[20] For other suggested schemes see Comment, 22 RUTGERS L. REV. 167, 195-96 (1967).

[21] 390 U.S. at 582.

[22] *Id.*

[23] As previously pointed out, a defendant has no absolute right to waive jury trial or to plead guilty. See note 14 *supra.*

[24] 390 U.S. at 583 (emphasis added).

. . . it cannot totally eliminate"[25] the improper inducement which is inherent in § 1201(a) of the Federal Kidnapping Act.

In a last attempt to uphold the constitutionality of the Act, the Government submitted the alternative proposal that all federal judges should be instructed to refuse to accept any waiver of jury trial or guilty plea in a kidnapping case.[26] Admittedly this alternative would subject all defendants to an equal risk of death, and thus eliminate any unconstitutional incentive to forego trial by jury or to plead guilty. But it would also have the undesirable effect of forcing all defendants to submit to a full trial on the merits. The Court was not receptive to this proposal. It emphasized that it would be "cruel" to require a trial of those defendants who prefer not to contest their guilt, and that the automatic rejection of all guilty pleas would "rob the criminal process of much of its flexibility."[27]

However, the Court held that the unconstitutionality of a part of the statute did not necessarily render the remaining portion invalid. The offensive portion could be severed from the remainder unless analysis of the legislative intent indicated otherwise.[28] The Court held that the death penalty provision was a "functionally independent" part of the Act, and that it could be severed, leaving the remainder in full force.

The Aftermath of the Jackson *Decision*

Following the Supreme Court decision in *Jackson,* defendants were quick to attack other statutory schemes in which the operative effect was similar to that of the Kidnapping Act. *State v. Harper,*[29] *State v. Peele,*[30] and *State v. Forcella*[31] are three post-*Jackson* cases in which state courts have been faced with challenges to their states' capital punishment statutes, and in *Alford v. North Carolina*[32] the Court of Appeals for the Fourth Circuit had the opportunity to pass upon the issue. While there are minor variations in each state's statutory scheme,[33] two characteristics

[25] *Id.*

[26] Reply Brief for Appellant at 5, United States v. Jackson, 290 U.S. 570 (1968).

[27] 390 U.S. at 584.

[28] If the unconstitutional provisions of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, then the entire statute will not be held unconstitutional. See 16 AM. JUR. 2D *Constitutional Law* § 186, at 414-15 (1962).

[29] — S.C. —, 162 S.E.2d 712 (1968).

[30] 274 N.C. 106, 161 S.E.2d 568 (1968). The *Peele* decision was followed in Parker v. State, 1 N.C. App. 27 (1968), and State v. Spence, — N.C. —, — S.E.2d —, (1968). *But see* Alford v. North Carolina, — F.2d — (4th Cir. 1968), in which the court of appeals disagreed with the *Peele* decision.

[31] 52 N.J. 263, 245 A.2d 181 (1968).

[32] — F.2d — (4th Cir. 1968).

[33] The South Carolina statutory scheme is as follows:

are common to all: (1) upon conviction the death penalty is mandatory, unless the jury recommends life imprisonment; (2) a defendant may enter a plea of guilty (or *non vult* under the New Jersey statute), which, if accepted, will preclude imposition of the death penalty. Thus, unlike

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Punishment for murder—Whoever is guilty of murder shall suffer the punishment of death; *provided however,* that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.

S.C. CODE ANN. § 16-52 (1962).

Sentencing in cases of guilty pleas—In all cases where by law the punishment is affected by the jury recommending the accused to the mercy of the court, and a *plea of guilty is accepted with the approval of the court, the accused shall be sentenced in like manner as if the jury in a trial had recommended him to the mercy of the court.*

S.C. CODE ANN. § 17-553.4 (Supp. 1967) (emphasis added). The North Carolina statutory scheme for the crime of rape is as follows:

Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.

N.C. GEN. STAT. § 14-21 (1953).

(a) Any person, when charged in a bill of indictment with the felony of murder in the first degree, or burglary in the first degree, or arson, or rape, when represented by counsel whether employed by the defendant or appointed by the court under G.S. 15-4 and 15-5, may, after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance.

(b) In the event such plea is accepted, the tender and acceptance thereof *shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life . . . .*

N.C. GEN. STAT. § 15-162.1 (1965) (emphasis added). The New Jersey statutory scheme is as follows:

Every person convicted of murder in the first degree . . . shall suffer death *unless the jury shall by its verdict . . . recommend life imprisonment,* in which case this and no greater punishment shall be imposed.

N.J. STAT. ANN. § 2A:113-4 (1951) (emphasis added).

In no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea is offered, it shall be disregarded, and the plea of not guilty entered, and a jury, duly impaneled, shall try the case.

Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; *the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree.*

N.J. STAT. ANN. § 2A:113-3 (1951) (emphasis added). (N.J STAT. ANN. § 2A: 113-4 (1951) provides for a maximum sentence of thirty years imprisonment for a conviction of murder in the second degree).

the Kidnapping Act, under these statutes the possibility of death does not turn on whether trial is by a jury or by the court. Indeed it cannot, for apparently none of these states allow a defendant to waive jury trial in a capital case.[34] Thus, while the Kidnapping Act offered two avenues of escape from the death penalty—by either a waiver of jury trial or by a guilty plea—the latter is the only means of escape for the state defendant.

Since the accused *must* be tried, if at all, by a jury, the *Forcella* court saw the sixth amendment as irrelevant, the issue being not the right to a jury trial, but rather the "right to defend."[35] Thus the sole basis for challenging the New Jersey statute was deemed to be whether the inducement to plead guilty violated the fifth amendment.

The language of *Harper* indicates that the South Carolina court was also cognizant of the distinction recognized in *Forcella*, for the court stated that:

> The death penalty provisions of the Federal Kidnapping Act were . . . declared unconstitutional because the death penalty under the Act was "applicable only to those defendants who assert the right *to contest their guilt before a jury.*"
>
> The question before us then is whether the provisions of our statutes render the death penalty for murder . . . applicable only to those defendants who assert the right *to plead not guilty.*[36]

And, although in *Peele* the distinction is less clearly articulated, it seems that the court there was also dealing in terms of only the fifth amendment.[37]

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[34] In North Carolina "no person shall be convicted of any crime but by the unanimous verdict of a jury . . . in open court." N.C. CONST. art. I, § 13. This right cannot be waived. *E.g.*, State v. Muse, 219 N.C. 226, 13 S.E.2d 229 (1941); State v. Hill, 209 N.C. 53, 182 S.E. 716 (1935). The New Jersey court expressly stated: "Indeed the right to trial by jury cannot be waived." State v. Forcella, 52 N.J. 263, —, 245 A.2d 181, 184 (1968). Apparently jury trial could not have been waived in the *Harper* case either, for the South Carolina court stated: "[H]ereafter . . . the choice between life imprisonment and the death penalty must be left . . . to the jury in *every* case . . . regardless of how the defendant's guilt has been determined, whether by the *verdict of the jury* or by a *plea of guilty.*" State v. Harper, — S.C. —, —, 162 S.E.2d 712, 715 (1968) (emphasis added).

[35] 52 N.J. at —, 245 A.2d at 185.

[36] — S.C. at —, 162 S.E.2d at 713 (emphasis added).

[37] The North Carolina Supreme Court stated that:

> We think there are certain material differences in the Federal Kidnapping Act and in North Carolina Statutes 14-21 and 15-162.1, and that *Jackson* is not authority for holding the death penalty in North Carolina may not be imposed under any circumstances for the crime of rape. In the kidnapping act the law fixes imprisonment in the penitentiary, but provides that the jury may impose the death penalty. The North Carolina rape statute provides

Both the South Carolina and the North Carolina courts read *Jackson* as holding that § 1201(a) of the Kidnapping Act was repugnant not only to the sixth amendment right to jury trial, but that it was *independently* violative of the fifth amendment right "not to plead guilty." Recognition of the two independent bases for invalidation of § 1201(a) was expressly stated in the *Peele decision.*[38] It is implicit in the result reached in *Harper*, for the court summarily observed that if the South Carolina statutes rendered the death penalty applicable only to those defendants who plead not guilty, "then the *Jackson* decision renders . . . the statutes in question unconstitutional . . . ."[39] However, the *Forcella* court took a different approach. It recognized that there were two possible grounds on which § 1201(a) could have been held unconstitutional, and the court conceded the fact that the statute was a clear violation of the sixth amendment right to a jury trial.[40] But it was unwilling to interpret *Jackson* as holding that there was a *separate and independent* violation of the fifth amendment right "not to plead guilty." Since the fifth amendment was considered the only basis on which the New Jersey scheme could be challenged, it was held that *Jackson* did not implicate the state statute.

In *Alford*, the Court of Appeals for the Fourth Circuit, in the course of rejecting the *Peele* decision and applying *Jackson* to invalidate the North Carolina statutory scheme,[41] also disagreed with the *Forcella* interpretation. Not only did the circuit court read *Jackson* as

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that the death penalty shall be ordered unless the jury, at the time it renders its verdict of guilty, as a part thereof fixes the punishment at life imprisonment. True, G.S. § 15-162.1 provides that a defendant charged with rape, if represented by counsel, may tender a plea of guilty which, if accepted by the State with the approval of the Court, shall have the effect of a verdict of guilty by the jury with a recommendation the [sic] punishment be life imprisonment. The State, acting through its solicitor, may refuse to accept the plea, or the judge may decline to approve it. In either event, there must be a jury trial, although the facts are not in serious dispute.

State v. Peele, 274 N.C. 106, 111, 161 S.E.2d 568, 572 (1968).

[38] "The *Jackson* case holds the death penalty provision of the kidnapping act . . . violates fundamental rights guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States." *Id.* at 110, 161 S.E.2d at 571.

[39] — S.C. at —, 162 S.E.2d at 713.

[40] 52 N.J. at —, 245 A.2d at 184.

[41] In addition to holding that the North Carolina statutory scheme was invalid, the circuit court went two steps further. In *Jackson* the Supreme Court indicated that the mere fact that a defendant may plead guilty to a charge under the Kidnapping Act does not necessarily render his plea involuntary and require reversal of the conviction. *Alford* involved a habeas corpus proceeding in which the defendant contended that his plea of guilty to *second degree murder* had been coerced by the threat of death, which would have existed had he asserted his right to trial on the issue of first degree murder. From a review of the record the circuit court was satisfied that petitioner's guilty plea had been motivated by the desire to avoid the risk of death and that such a plea was involuntary.

rendering the death penalty provisions of the Federal Kidnapping Act unconstitutional on two separate grounds, but, contrary to the position taken in *Forcella, Peele,* and *Harper,* the court held that the state statutes in question could be challenged on both grounds. As to the first point the circuit court seems correct. The *Forcella* court's interpretation that the Kidnapping Act was not a separate and independent violation of both the fifth and sixth amendments seems a bit tenuous, particularly in light of some of the express language of the *Jackson* opinion. For example, the Supreme Court, in speaking of the death penalty provision of the Kidnapping Act, stated: "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty *and* to deter exercise of the Sixth Amendment right to demand a jury trial."[42] And later in its opinion the Court stated that "the evil in the federal statute is not that it necessarily *coerces* guilty pleas *and* jury waivers but simply that it needlessly *encourages* them."[43] In each instance the Court spoke in terms of both the fifth and sixth amendments, and in view of this language it is difficult to accept the *Forcella* court's interpretation.

In respect to the circuit court's second point—that the state statutes may involve sixth as well as fifth amendment infirmities—the question is not so easily resolved. As previously noted,[44] under none of the state statutes involved can a defendant waive his right to be tried by a jury and thereby secure trial by the court. If a defendant decides to contest his guilt, trial *must* be by a jury. For this reason the *Forcella* opinion expressly, and *Harper* and *Peele* by implication, treat the sixth amendment right as irrelevant, the only issue being whether the inducement to plead guilty violates the fifth amendment. It is arguable that the right to defend necessarily encompasses the right to defend via jury trial. But as a practical matter the jury trial-judge trial alternative can arise only after the initial decision to contest guilt. Furthermore, if the right to a jury trial is automatically violated by impeding the right to defend, then it may be argued with equal validity that other rights, such as the right of confrontation, are also impaired.

The Necessity of Balancing Conflicting Interests

Even if the *Alford* court was correct in its interpretation that the state statutes could be challenged on both fifth and sixth amendment

[42] 390 U.S. at 581 (emphasis added).
[43] *Id.* at 583 (emphasis added).
[44] See note 34 *supra,* and accompanying text.

grounds, there still may be a basis for questioning the applicability of the *Jackson* decision. The Court in *Jackson* emphasized that the inducement inherent in the Kidnapping Act was *needless* and *unnecessary*. This was so because the statutory alternative of allowing a jury to decide upon capital punishment in every case, regardless of how guilt is determined, could retain the policy of jury-imposed capital punishment and at the same time make the risk of death equal for all defendants. However, it may be that the alternative scheme will have the effect of destroying *other* policy considerations. If this is true, then the inducement was not needless or unnecessary, and these policies must be weighed against the degree of inducement.[45]

There are, of course, valid policy reasons for maintaining the practice of allowing only a jury to impose the death sentence. The *Jackson* Court observed that limiting the death penalty to cases in which the jury recommends death avoids the more drastic alternative of mandatory capital punishment.[46] Further, having only the jury as the sentence-imposing body relieves the trial judge of the onerous burden of imposing the death sentence himself. It has also been suggested that when juries have no control over sentencing they will often acquit or return verdicts for lesser included offenses, notwithstanding evidence of guilt, in order to avoid the possibility that the defendant will receive the death sentence. By having control over punishment the jury can render its decision on the merits without fear of the consequences.[47]

Recognizing the validity of allowing only the jury to impose death, the *Jackson* Court noted that there are statutes that authorize a jury to decide on the issue of punishment in every case, regardless of how guilt is determined.[48] Under such a scheme the risk of death would be equal for all defendants and no premium would be placed upon waiving a jury trial or on pleading guilty.

At this point it would be tempting to conclude summarily that there was actually no need to balance conflicting interests in the *Jackson* case—

[45] The evil inherent in the Federal Kidnapping Act was that its operative effect conditioned jury trial upon acceptance of the risk of death, thus discouraging the assertion of fifth and sixth amendment rights. Courts have shown increasing concern that constitutional rights may be chilled by the infliction of judicially or legislatively imposed penalties upon defendants who elect to exercise them. See Comment, 22 RUTGERS L. REV. 167, 172 (1967). Implicit in these decisions is the proposition that if the particular procedure that imposed the penalty served legitimate functions, then the utility of those functions must be weighed against the procedure's inhibiting effects.

[46] 390 U.S. at 581-82.

[47] See note 12 *supra*.

[48] 390 U.S. at 582.

that the burden on the assertion of constitutional rights *was* needless—because the statutory scheme recommended in lieu of § 1201(a) would eliminate the conflict. But such a conclusion would be premature without inquiry into the possible collateral effects of the proposed alternative scheme. It must be remembered that the procedural device of waiving trial by jury in order to obtain trial by the court, while not expressly embodied in the terms of § 1201(a), is, nevertheless, part and parcel of the total statutory scheme. Thus inquiry must be made into whether adoption of the alternative scheme would in any way destroy the reasons for allowing waiver of jury trial.[49] More simply stated, would the practice of allowing a jury to impose death following trial by the court be destructive of the reasons for allowing a waiver in the first place? In addition, it must be determined if there are valid policy considerations which will be thwarted if death is allowed to be imposed following a guilty plea.

It is generally recognized that there are situations in which an accused may feel that he will be better protected by choosing trial by the court rather than submitting his case to a jury. For example, a defendant may feel that a judge is more capable of understanding a complex case and of rendering an intelligent verdict.[50] Trial by the court may give the accused the opportunity to make a fuller presentation of his case because the judge will be more likely to relax the normal rules of evidence.[51] In addition there is the very real possibility that certain factors that might prejudice a jury will not sway the conditioned objectivity of a trial judge.[52] It would seem that none of these policy considerations would in any way be subverted by submitting the issue of capital punishment to a jury subsequent to a guilty verdict rendered by the court.

However, there are valid policy considerations that may be destroyed if the death penalty is allowed following a guilty plea. One policy favoring a death-free guilty plea can be illustrated by a review of the historical development of capital punishment legislation in New Jersey. Prior to 1893 death was mandatory upon a conviction of murder in the first degree,[53] and in ac-

[49] Waiver of jury trial is provided for by FED. R. CRIM. P. 23(a).

[50] Note, *Waiver of Trial Jury in Felony Cases in Kentucky*, 48 KY. L.J. 457, 461 (1960).

[51] *Id.* at 461-62.

[52] *Id.* at 462-63.

[53] The 1893 act was intended to ameliorate the course of capital punishment. Prior thereto, the penalty for murder in the first degree was mandatorily death, and if a defendant was convicted on confession in open court, the court had to "proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly."
52 N.J. at —, 245 A.2d at 188.

cordance with the common law rule the death penalty could be imposed upon a plea of guilty.[54] However, judges were reluctant to impose death upon a defendant's own admission and often advised them to retract the plea and submit to trial.[55] In 1893 the legislature abolished the plea of guilty and authorized a plea of *non vult*, the sentence being the same as that imposed upon a conviction of second degree murder. In 1917 legislation was passed that eliminated mandatory capital punishment, giving the jury the authority to recommend life imprisonment. At the same time the penalty upon a plea of *non vult* was increased to life imprisonment.[56]

It can be seen, then, that the catalyst for adoption of the *non vult* statute was simply a reluctance to impose the death sentence upon a defendant's own admission. Thus the statute "served to 'substitute for the advice of the judge the mandate of the law, that the citizen shall not be adjudged to death upon his own confession, but that . . . the state shall prove in all respects to the satisfaction of a jury the crime laid in the indictment.' "[57] Apparently the *Forcella* court lost sight of the underlying policy that prompted the enactment of the *non vult* statute when it argued that the statute "was intended to benefit murder defendants, permitting the court . . . to accept a plea which would bar the death penalty."[58] The point is that the statute was not intended to provide a ready means of escape from the risk of death. Had the legislature thought the death penalty inappropriate it could have simply eliminated it. The *non vult* statute was merely a manifestation of legislative intent that the defendant who pleaded guilty should not suffer death. Of course, like § 1201(a) of the Kidnapping Act, the statute has the collateral effect of allowing defendants to escape the death penalty. In this respect it can be argued, as indeed it was in both *Forcella* and *Peele*, that statutes of this type are "beneficial."[59]

[54] At common law a defendant could enter a plea of guilty to any offense with which he was charged and apparently the court was bound to accept the plea if entered into voluntarily and with full knowledge of the consequences. See MODEL CODE OF CRIMINAL PROCEDURE § 225 (Official Draft, 1930), comment and cases cited therein.

[55] "[J]udges from the earliest times, abhorring to enter a death judgment on a defendant's admission, generally advised prisoners to retract the plea and to plead to the indictment." 52 N.J. at —, 245 A.2d at 188.

[56] *Id.* at —, 245 A.2d at 188-89.

[57] *Id.* at —, 245 A.2d at 188.

[58] *Id.* at —, 245 A.2d at 189.

[59] The North Carolina Supreme Court stated that:

> G.S. 15-162.1 is primarily for the benefit of a defendant. Its provisions may be invoked only on his written application. It provides that the State and the defendant, under rigid court supervision, may, without the ordeal of a trial, agree on a result which will vindicate the law and save the defendant's life.

274 N.C. at 111, 161 S.E.2d at 572. Both the *Peele* and *Forcella* courts also argued

This line of reasoning presupposes that leniency to those who otherwise would have been put to death outweighs the inducement of guilty pleas from defendants who otherwise would have been successful[60] in contesting their guilt. While analysis of this intriguing question is beyond the scope of this note, suffice it to say that there are few executions in this country, and for this reason the *Forcella* court's conclusion that a "justified leniency for the many"[61] should weigh more heavily is far from clear. While the *Jackson* Court did not engage in an express analysis of the relative benefit and burden, it is arguably implicit in the decision that this balance has been struck, and that elimination of the inducement outweighed any possible "benefit" to defendants as a class. But even though the *Jackson* decision itself seems to preclude use of the "benefit" rationale, it is still obvious that the Court's suggested alternative scheme is diametrically opposed to the notion that a defendant should not be put to death upon his own admission.

If the death penalty is to be allowed upon a defendant's own admission, then the practical effect may be a substantial reduction in the incidence of use of the guilty plea.[62] A defendant who pleads guilty would stand forewarned that he automatically faces the possibility of death. On the other hand, a defendant, by asserting his right to trial, would be assured that no punishment could be imposed unless the prosecution sustained the burden of affirmatively proving his guilt. Thus the possibility of an acquittal would insulate him from direct exposure to punishment, and even if he were convicted following a trial, the possible sanctions would

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that the trial judges's power to reject coerced guilty pleas would act as a safeguard. However, the *Jackson* Court expressly repudiated this line of reasoning.

[60] In addition to acquittal, "successful" in this context means conviction of a lesser included offense, or a lighter sentence than would have been imposed had the defendant pleaded guilty.

[61] 52 N.J. at —, 245 A.2d at 188.

[62] Empirical support of this hypothesis would be desirable, but precise data on guilty pleas are difficult to establish. It has been estimated that ninety per cent of all criminal convictions are by pleas of guilty. D. NEWMAN, THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 4 (1966). However, the percentage of guilty pleas in capital cases is substantially lower. A recent three year study in California, a state in which death may be imposed following a guilty plea, indicated that in murder cases there was a 32 per cent disposition by guilty plea. See J. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 113 (1966). Even this statistic may be misleading if it is taken as an indicator of the number of defendants who plead guilty in the face of a possible death sentence, for a portion of the 32 per cent may have entered the plea with the understanding that the prosecutor would not seek or the judge impose the death sentence. It would be interesting to compare the California statistics with those from a state that had a death-free guilty plea. While such data has not been found, it seems that the percentage of defendants who avail themselves of the death-free plea would be much higher.

be the same as they would have been on a guilty plea—either death or life imprisonment. Under this analysis, unless it could be shown that for some reason the probability of receiving the death sentence rather than life imprisonment would be substantially greater following a trial on the merits, a defendant would have much to gain and nothing to lose by contesting rather than admitting his guilt.

Concomitant with a reduction of guilty pleas is the erosion of many of the policy considerations upon which the plea is based. The additional burden on our already crowded courts that would result from a reduction of guilty pleas testifies to the need for maintaining the expediency that the plea lends to the guilt-determining process. And, quite apart from notions of expediency, it has been suggested that the determination of guilt without trial serves a number of other values.[63] It thus becomes paradoxical that *Jackson*, a decision in which the Court expressly recognized the utility of the guilty plea,[64] may have the practical effect of discouraging guilty pleas.

Since abolition of the death-free guilty plea may be destructive of legitimate interests, then the value of these interests should be weighed against the statutory scheme's inhibiting effect upon constitutional rights. In striking this balance it is significant to observe that the degree of inducement under the state statutes seems far more severe than that of the Kidnapping Act.[65] Under the provisions of the Kidnapping Act

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> [T]he plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea will make it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.
>
> ... Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. . . . Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.
>
> It may thus be concluded that the frequency of conviction without trial not only permits the achievement of legitimate objectives . . . but also enhances the quality of justice in other cases as well.

AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2-3 (Tent. Draft 1967).

[64] See note 27 *supra* and accompanying text.

[65] Brief for Appellant at 9, Alford v. North Carolina, — F.2d — (4th Cir. 1968). The circuit court in *Alford* agreed with appellant's contention. "Greater encouragement is inevitable in a New Jersey-type statute than in the federal statutes held invalid . . . in *Jackson* . . . ." Alford v. North Carolina, — F.2d — — (4th Cir. 1968).

a defendant had two avenues of escape from the death penalty—he could either plead guilty, or plead not guilty and waive jury trial. Under the latter alternative an accused could thus avoid the death penalty, while still retaining the right to contest his guilt. Thus, it would seem that a defendant who could escape the death penalty by agreeing to contest his guilt before a judge rather than a jury would be under little pressure to plead guilty. However, such is not the case in the context of the state statutory schemes. Under them the guilty plea is the only avenue of escape, and thus there is an inherently greater inducement to plead guilty.

Of course the most desirable solution (assuming a negative view as to the propriety of capital punishment) would be to abolish the use of the death penalty. Even the *Jackson* Court fell short of this. But an analysis of the legislative history of the Kidnapping Act did enable the *Jackson* Court to conclude that Congress would not have chosen "to discard the entire statute if informed that it could not include the death penalty clause now before us."[66] The answer was thus to sever the death penalty provision and leave the remainder of the Act as operative law, with the maximum penalty being life imprisonment. However, severance may not be the answer for many state court schemes. For example, the *Forcella* court pointed out the New Jersey dilemma: "[W]e could hardly accept the extraordinary proposition that the 1893 act or the 1917 act, or any general revision of the laws, spelled out an intent that the death penalty should fall if the introduction of the non vult plea created a constitutional impasse."[67]

Conclusion

In *Jackson* the Court stated that the provisions of the Federal Kidnapping Act *needlessly* encouraged waivers of jury trial and guilty pleas. Alternative statutory schemes can eliminate the inducement to forego these rights and at the same time preserve the policy reasons for having jury-imposed capital punishment. It is submitted, however, that the suggested alternative scheme may be destructive of other policies that favor a death-free guilty plea. It may be that "other values come into play and . . . demonstrate that the incidental impact . . . is not 'needless'. . . ."[68] The inhibiting effect of these statutes should be balanced against the policy that forbids imposition of the death penalty upon a defendant's own admission, and against the undesirable impact upon the administration of

[66] 390 U.S. at 586.
[67] 52 N.J. at —, 245 A.2d at 191.
[68] *Id.* at —, 245 A.2d at 186.

criminal justice that a reduction in guilty pleas would surely entail. It is therefore arguable that *Jackson* should not be read as a per se invalidation of state statutes such as the ones in question. With the abundance of litigation that the *Jackson* decision is engendering, the Supreme Court will undoubtedly have ample opportunity to address itself to these issues.

JAMES G. BILLINGS

Domestic Relations—Complementary Adjudication of Marital Incidents in Divorce Proceedings

The recent decision of the North Carolina Supreme Court in *Fleek v. Fleek*[1] illustrates once more that insisting that a divorce action and its incidents be made to fit precisely the traditional in rem-in personam categories may obscure the truly relevant jurisdictional factors inherent in divorce litigation.

Her husband having toured Switzerland and Italy some twelve years, Mrs. Fleek, a North Carolina domiciliary, sued in Durham County for divorce and child support. In accordance with the statute providing for service of process in proceedings "for . . . divorce . . . or other relief involving . . . domestic status . . . ,"[2] she published notice in the local newspapers and sent copies of the complaint and summons to his last known addresses. While granting her *ex parte* divorce, the trial court declined to order child support on the basis that the statute did not authorize a judgment in personam on such service. In affirming, the supreme court stated that "the court is without power to enter a judgment *in personam* unless and until the defendant is before the Court in person, that is, by personal service of process, or by a general appearance before the Court."[3] The underlying jurisdictional problem here is whether something more than domicile of the plaintiff-spouse—a sufficient basis, assuming due process notice out of the state, for jurisdiction to grant the divorce—is required to render valid a child support order against the absent spouse. The court's decision is technically correct; the statute invoked did not *specifically* authorize an exercise of jurisdiction on substituted service in the child support aspect of the case.[4] But to the extent the opinion

[1] 270 N.C. 736, 155 S.E.2d 290 (1967).
[2] N.C. GEN. STAT. § 1-98.2(3) (Supp. 1967).
[3] 270 N.C. at 738, 155 S.E.2d at 292.
[4] As a matter of simple statutory interpretation, no fundamental quarrel can be made with a holding that the language, "service of process by publication or