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United States v Jackson Guilty Pleas and Replacement Capital Punishment Provisions

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UNITED STATES v. JACKSON: GUILTY PLEAS AND REPLACEMENT CAPITAL PUNISHMENT PROVISIONS

In *United States v. Jackson*[1] the Supreme Court held that the death penalty provision of the Federal Kidnaping Act[2] unconstitutionally burdened the right to defend before a jury and was severable from the remainder of the statute. Under this statute,[3] capital punishment could be imposed only on the jury's recommendation, which was binding on the trial court, while life imprisonment was the maximum penalty after either a plea of not guilty with a waiver of a jury trial or a plea of guilty.[4]

The exact basis of the *Jackson* holding is not clear. Imposing a higher penalty after the assertion of the right to a jury trial patently burdens that right, and the Court agreed with the district court[5] that the defendant's exercise of his sixth amendment right[6] is needlessly chilled by the threat of death.[7] It is not entirely clear, however, that *Jackson* is also applicable when the assurance of life is offered for a complete waiver of trial by entry of a plea of guilty; the Court did not explore the source and degree of any prohibitions against needless encouragement of guilty pleas.

I

STATUTES ALLOWING DEFENDANTS TO AVOID THE DEATH PENALTY BY PLEADING GUILTY NEEDLESSLY ENCOURAGE GUILTY PLEAS

A recent New Jersey case, *State v. Forcella*,[8] held that *Jackson* does

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1 390 U.S. 570 (1968).

2 18 U.S.C. § 1201(a) (1964), commonly called the Lindbergh Kidnaping Act.

3 Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnaped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnaped 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. *Id.*

4 Other statutory schemes may be affected by the *Jackson* holding. *See e.g.*, N.H. REV. STAT. ANN. §§ 585:4, 585:5 (1955); WYO. STAT. ANN. § 6-59 (1957).

5 United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967). Direct appeal to the Supreme Court was taken under 18 U.S.C. § 3731 (1964).

6 "The Court holds that the section of the statute here applicable to defendants who are about to be put to plea does violate their Sixth Amendment right." United States v. Jackson, 262 F. Supp. 716 (D. Conn. 1967).

7 "We agree with the District Court that the death penalty provision of the Federal Kidnaping Act imposes an impermissible burden upon the exercise of a constitutional right . . . ." 390 U.S. at 572.

8 52 N.J. 263, 245 A.2d 181 (1968). Consolidated and decided with this case were

not reach statutory schemes that allow a defendant to escape the threat of death by entering a plea of guilty. Although in murder cases New Jersey does not permit guilty pleas or waivers of jury trials,[9] there is a provision for a "non vult or nolo contendere" plea,[10] which indicates that the defendant will not contest the issue and will stand for sentencing. The non vult plea is "tantamount to a plea of guilty."[11] The statute provides that after a plea of not guilty and a jury determination of guilt, the death penalty is mandatory unless the jury recommends life imprisonment.[12] After a plea of non vult, however, the maximum penalty is specifically set at life imprisonment.[13]

In deciding that the punishment provisions of the New Jersey murder statute did not unconstitutionally encourage guilty pleas, Chief Justice Weintraub, writing for the majority, distinguished between the scope of the fifth and sixth amendments. He assumed that the sixth amendment protects only the right to a jury trial,[14] and that it is the fifth amendment right against self-incrimination which protects the defendant against needless encouragement to plead guilty.[15] Because all murder defendants in New Jersey must be tried before a jury,[16] Chief Justice Weintraub concluded that there is "no pressure on one who stands trial to forego his right to a jury,"[17] and therefore providing for a maximum sentence of life imprisonment after a non vult plea does not offend the sixth amendment.

State v. Ornes, State v. Perez, and *State v. Funicello.* Forcella and Funicello had been convicted of first degree murder and sentenced to death. Their sentences had been affirmed, and the instant case is a post-conviction attack based on *Jackson.* Ornes and Perez are under indictment for murder, and the *Jackson* issue was raised by motions to eliminate the death penalty from their trials.

9 N.J. STAT. ANN. § 2A:113-3 (1953); N.J.R.R. 3:7-1(a) (1958).

10 N.J. STAT. ANN. § 2A:113-3 (1953).

11 52 N.J. at ———, 245 A.2d at 185.

12 N.J. STAT. ANN. § 2A:113-4 (1953): "Every person convicted of murder in the first degree . . . shall suffer death unless the jury shall by its verdict . . . recommend life imprisonment . . . ."

13 N.J. STAT. ANN. § 2A:113-3 (1953): After a non vult plea "the sentence to be imposed, if such plea be accepted, shall be . . . imprisonment for life . . . ."

The non vult plea and its consequent avoidance of the death sentence is widely used in New Jersey. As of May, 1968, of the 539 prisoners in jail on convictions of murder, 341 pleaded non vult. 52 N.J. at ——— n.7, 245 A.2d at 189 n.7.

14 The sixth amendment right to jury trial applies to the states through the due process clause of the fourteenth amendment, Duncan v. Louisiana, 391 U.S. 145 (1968).

15 52 N.J. at ———, 245 A.2d at 185. Chief Justice Weintraub seems to agree with the *Jackson* Court that the fifth amendment right involved is the right against self-incrimination, applied to the states through the due process clause of the fourteenth amendment by *Malloy v. Hogan,* 378 U.S. 1 (1964).

16 N.J.R.R. 3:7-1(a) (1958).

17 52 N.J. at ———, 245 A.2d at 184.

Chief Justice Weintraub argued that *Jackson* never reached the question of the degree of protection afforded guilty pleas by the fifth amendment, since the statute in *Jackson*, by imposing an extra penalty on one who demanded jury trial, was clearly void under the sixth amendment alone.[18] Because there was no distinct fifth amendment holding in *Jackson*, he concluded that any reference to that amendment was dictum. He argued further that the dictum is not relevant to future application of *Jackson*, since "not all members of the majority were ready to say that a statute which did no more than limit the penalty upon acceptance of a guilty plea must violate the Fifth Amendment."[19]

Under Chief Justice Weintraub's theory, the fifth amendment does not bar the states from encouraging defendants to plead guilty with an offer of lighter penalties. Although he conceded that the sixth amendment right to a jury trial is needlessly chilled by *any* burden upon its exercise, the interest of the state in minimizing trial time and expenses justifies inducing defendants to waive their fifth amendment right against self-incrimination.[20] A broader interpretation of the fifth amendment right, he warned, might terminate the useful and prevalent technique of plea bargaining.[21]

This analysis limits the scope of *Jackson* to exclude situations in which a lesser penalty is conditioned on a guilty plea.[22] The right to a

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18 "To impose upon one who pleads not guilty an extra penalty because he insists upon a jury is so patently bad that no more need to be said." 52 N.J. at ———, 245 A.2d at 184.

19 52 N.J. at ——, 245 A.2d at 185-86.

20 As to the Sixth Amendment right of jury trial, the burden of the federal statute could only be "needless," for it can serve no legitimate end to make the penalty turn on whether the accused defended before a jury or before a judge alone. But when the focus is upon the Fifth Amendment, i.e., the impact upon the *right to defend*, other values come into play and may demonstrate that the incidental impact upon that right is not "needless" or "unnecessary" or "excessive."

52 N.J. at ——, 245 A.2d at 186 (emphasis by the court).

21 We should not deny a justified leniency for the many, merely to be positive that no man is needlessly encouraged not to defend. But if the Fifth Amendment bars a lesser penalty when guilt is admitted, then all of this must be wrong.

52 N.J. at ——, 245 A.2d at 188 (footnote omitted).

22 *Jackson* suggests that the Court intended unnecessary encouragement of guilty pleas to be forbidden: "The inevitable effect of [the death penalty 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." 390 U.S. at 581 (footnote omitted). Other courts interpret *Jackson* as reaching guilty pleas. *See, e.g.*, Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), where the Arkansas murder statute was upheld because a defendant could not avoid the threat of death by pleading guilty; Robinson v. United States, 394 F.2d 823 (6th Cir. 1968), where the court listed those categories of convicted kidnapers who may contest their convictions: Those who pleaded guilty, those

jury trial seems to be a most crucial right in such situations, and the sixth amendment forbids its infringement, whatever form that infringement may take.[23] A major purpose of the guilty plea is waiver of the trial and all its facets, including the right to a jury. Application of the sixth amendment only to situations in which the decision to go to trial has already been made limits that amendment's broad protection of the right to a jury.[24] Although the majority in *Jackson* may not have explicitly made this analysis, the dissent recognized that the right to a jury is protected from needlessly-encouraged guilty pleas:

> [C]onfining the power to impose the death penalty to the jury alone is held to burden impermissibly the *right to a jury trial* because it may either coerce or encourage persons *to plead guilty* or to waive a jury and be tried by the judge.[25]

If the full scope of the sixth amendment is to be preserved, statutes encouraging a defendant to plead gnilty must be held to violate the sixth amendment under *Jackson*.

Even if the sixth amendment has no application to the guilty plea issue, the fifth amendment right against self-incrimination may be sufficient to invalidate guilty pleas encouraged by the threat of death.[26]

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who waived a jury trial, and those who are now under sentence of death, *id.* at 824; State v. Boggs, 103 Ariz. 328, 441 P.2d 778 (1968), where the court stated that the infirmity in the Federal Kidnaping Act was that death could be imposed by a jury, but that it set forth "no procedure for imposing the death penalty upon a defendant who waives the right to a jury trial, or upon one who pleads guilty." *Id.* at ——, 441 P.2d at 784; State v. Peele, 274 N.C. 106, 161 S.E.2d 568 (1968), where the defendant was not allowed to complain of a *Jackson*-type statute because he had pleaded not guilty, gone before a jury, been convicted, and the jury recommended life imprisonment.

23 This would seem especially true with statutes like New Jersey's, under which there can be no judge trials and under which the plea of non vult automatically excludes the possibility of a jury trial.

24 The district court noted this point: "[I]f [defendants] assert their constitutional right to jury trial . . . the price for assertion of such constitutional right is the risk of death." 262 F. Supp. at 718.

At least one other court has recognized that a guilty plea may threaten the right to jury trial. Spillers v. State, —— Nev. ——, 436 P.2d 18 (1968). Decided after the district court opinion in *Jackson*, and cited by the Supreme Court, this case invalidated Nevada's death penalty provision for rape cases, NEV. REV. STAT. § 200.360(1) (1965), as a "lopsided penalty scheme," —— Nev. at ——, 436 P.2d at 22. The court noted that a defendant "is compelled to pay a terrible price for exercising his constitutional right to a jury trial—the possibility of death. . . . Indeed in some instances the compelling force may be so great as to cause one who is not guilty to plead guilty . . . ." *Id.*

25 390 U.S. at 591-92 (White, Black, JJ., dissenting) (emphasis added).

26 It is already established, of course, that coerced guilty pleas, whether the coercion is physical or mental, are forbidden. *See, e.g.*, Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956). Our subject involves not coercion but only undue encouragement of waiver of rights, as the *Jackson* Court recoguized: "[T]he evil in the . . . statute

Although Chief Justice Weintraub argued that there was no separate holding in *Jackson* based on the fifth amendment, a discussion of that amendment was included by the Court, even though the district court's opinion failed to mention it.[27] And the Court's intermingling of fifth and sixth amendment language is consistent with the theory that the amendments overlap in the area of death-encouraged guilty pleas. Each amendment is applicable and sufficient alone, although the Court did not feel compelled to discuss them separately. Chief Justice Weintraub fears that use of the fifth amendment to invalidate guilty pleas encouraged by the threat of death would eliminate plea bargaining. This fear is inapposite, since plea bargaining involves a situation where a defendant is allowed to plead guilty to a *lesser crime* carrying a lesser penalty. In the *Jackson-Forcella* situation, however, there is statutory imposition of a higher penalty on one who defends than on one who waives his defense to the *same* crime. True plea bargaining is not invalid under *Jackson,* and has no real relevance to *Forcella.* Moreover, the choice between the threat of death and guaranteed life is so uniquely destructive of an atmosphere of free choice that its elimination need not necessarily outlaw an analogous choice involving only different terms of years.[28]

II

Replacement Provisions

Assuming that the foregoing analysis is correct, the future of capital punishment will depend to some extent on the nature of the replace-

is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S. at 583 (emphasis by the Court).

The Court also recognized that exercise of the right need not be excluded in order for the right to be impermissibly burdened. 390 U.S. at 583. Unconstitutionality is shown if the statute exacts a penalty for exercising a constitutional privilege, if it "cuts down on the privilege by making its assertion costly." Griffin v. California, 380 U.S. 609, 614 (1965). *See also* Malloy v. Hogan, 378 U.S. 1 (1964).

27 The facts of *Jackson* suggest that the guilty plea issue was included in the holding. The defendants had entered no plea before making the motion to dismiss, and so the Court had to consider all the pleading alternatives open to them, including the plea of guilty.

28 Chief Justice Weintraub attempted to mitigate the pressure on the defendant to plead non vult by pointing out that the trial court has discretion to refuse to accept the plea only if it appears likely that the death sentence will not be imposed by the jury. N.J. Stat. Ann. § 2A:113-3 (1953); State v. Martin, 92 N.J.L. 436, 106 A. 385 (E. & A. 1919). However, *Jackson* pointed out that in the federal system the trial court has discretion to refuse to accept a plea of guilty. Lynch v. Overholser, 369 U.S. 705, 719 (1962); Fed. R. Crim. P. 11. *Jackson* rejected this form of protection as insufficient: "The power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity . . . of the . . . Act." 390 U.S. at 583.

ment provisions formulated by courts and legislatures in states with death provisions invalid under *Jackson*. Since reconstruction of the statute in *Jackson* was within the Court's competence as the court of last resort in the federal system, the Court severed the death penalty from the statute. In cases involving state statutes, however, the only issue before the Court will be whether a defendant can be put to death under a statutory scheme which imposes death or the possibility of death only if he asserts his constitutional right to defend before a jury. Presumably in such a situation, the Court would either commute the defendant's sentence to life imprisonment or, if he had yet to be tried, order the death sentence stricken from his forthcoming trial leaving any permanent changes in the statutory provisions to the states.[29] Presumably, state courts in this situation will make remedial reconstructions until their respective legislatures enact new statutes.[30]

Because death cannot constitutionally be imposed only on those defendants who assert their rights, the new statutes are likely to provide identical possibilities of punishment for all convicted defendants—regardless of how their guilt was determined. An obvious possibility is a mandatory penalty of death. Although some states have this provision for particular offenses,[31] it seems unlikely that a state would legislate such a harsh provision now.

An alternative which would still satisfy the requirements of *Jackson* is granting the judge discretion to impose the death sentence after a not guilty plea with a trial before a judge, after a guilty plea, or after a plea of non vult.[32] Since under this plan a judge can impose as severe a penalty as a jury, a defendant has nothing to gain by waiving

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29 Witherspoon v. Illinois, 391 U.S. 510 (1968); Griffin v. California, 380 U.S. 609 (1965). The Court must eventually decide *Jackson's* retroactive effect. Courts have already split on this issue. *See, e.g.*, United States *ex rel.* Buttcher v. Yeager, 288 F. Supp. 906 (D.N.J. 1968) (*Jackson* has no retroactive effect); Natale v. United States, 287 F. Supp. 96 (D. Ariz. 1968) (*Jackson* has retroactive effect); King v. Cook, —— Miss. ——, ——, 211 So. 2d 517, 519 (1968) (*Jackson* has no retroactive effect).

30 One difficulty with this method will be a period of uncertainty concerning capital statutes. Since the eventual replacement provisions will come from legislatures, uncertainty will continue until a court determines what portion of its statute remains until the legislature acts, the legislature passes a new statute, and the new replacement provision survives challenge in the courts.

31 *See, e.g.*, ALA. CODE tit. 14, § 319 (1958); ARK. STAT. ANN. § 41-2304 (1964); OHIO REV. CODE ANN. §§ 2901.09, 2901.10 (1953).

32 *See, e.g.*, 18 U.S.C. § 1992 (1964); ARIZ. REV. STAT. ANN. § 13-453 (1956); CONN. GEN. STAT. REV. § 53-10 (Supp. 1968); FLA. STAT. ANN. § 919.23 (1944); IND. ANN. STAT. §§ 9-1819, 10-3401 (1956); KAN. STAT. ANN. § 21-403 (1964); MD. ANN. CODE art. 27, § 413 (1957); MONT. REV. CODES ANN. § 94-2505 (1947); NEB. REV. STAT. § 28-401 (1964); N.H. REV. STAT. ANN. § 585:5 (1955); N.M. STAT. ANN. § 40A-29-2 (1953); OKLA. STAT. ANN. tit. 21, § 707 (1951); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1963); S.D. CODE § 13.2012 (Supp. 1960).

a jury trial or by pleading non vult or guilty. Although a provision for judge-imposed death would be constitutionally permissible under *Jackson*, and presently exists in a number of states,[33] it violates several concepts of modern penology.[34] Statutes like those in *Jackson* and *Forcella* were originally passed to supersede statutes which allowed a judge to impose the death sentence;[35] a single man passing on the life of another man seemed barbaric to members of many modern legislatures.[36] Also, this alternative has been ineffective in many jurisdictions because many judges refused to order execution.[37]

Another alternative is to abolish the guilty plea in capital cases and thereby force every defendant to stand trial and risk the death penalty.[38] In a lengthy dictum in *Forcella*, the New Jersey Supreme Court decided that if the case should be reversed, the statute should be repaired by eliminating the non vult plea.[39] Chief Justice Weintraub reached this result by a mechanical application of the legislative history of the statute; since the non vult plea was added by separate amendment, only that provision would be void, with the rest of the statute remaining in full force and effect.[40] Thus, at least until the legislature has an oppor-

33 *Id.*

34 *See, e.g.*, Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50, 52-53 (1964); Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 969 (1967).

35 52 N.J. at ——, 245 A.2d at 188-89.

36 The New Jersey procedure exhibits "a legislative policy which deems it unwise to allow a judge acting alone to impose the death penalty." Laboy v. New Jersey, 266 F. Supp. 581, 585 (D.N.J. 1967).

37 Even when judge-imposed death was allowed, many judges refused to accept the responsibility:

> [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. Thus in practical effect the 1893 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 . . . ."

52 N.J. at ——, 245 A.2d at 188.

38 *See, e.g.*, HAWAII REV. LAWS § 291-4 (1955). This argument assumes that complete abolition of the guilty plea is constitutional. In *Jackson* the Court considered this provision and found that it may be unfair to defendants. It is possible that some defendants wish to avoid a fullfledged trial, and the Court termed forced trial in such a situation "cruel." 390 U.S. at 584.

39 52 N.J. at ——, 245 A.2d at 190-92.

40 Since Chief Justice Weintraub claimed that the *Jackson* result "was indicated by the history of the statute," 52 N.J. at ——, 245 A.2d at 190, he reached the opposite result through an analysis of the New Jersey statute's legislative history. The non vult plea was added to the mandatory death sentence provision, N.J. REVISION 1709-1877, CRIMES ¶ 69, by an amendment in 1893 eliminating the guilty plea. N.J. LAWS 1893, c. 36. A 1916 amendment authorizing the jury to recommend life imprisonment, N.J. LAWS 1916, c. 279, would, under Chief Justice Weintraub's approach, also continue in effect.

For a history of capital punishment in New Jersey, see State v. Sullivan, 43 N.J. 209, 242-45, 203 A.2d 177, 194-97 (1964).

tunity to consider the problem, all murder defendants in New Jersey will stand trial before a jury. The penalty upon conviction will be death unless the jury recommends life imprisonment. However, other state courts and legislatures may reject this approach, since a full jury trial for every capital defendant would be a considerable expense for the state.[41] Despite the possibility that not all defendants will contest their guilt at trial, most murder cases would result in full trials, since the defense has little to lose by contesting.[42] And although there may be few capital cases in any single state, the legislature must consider the value of the increased expense.

Yet another alternative would partially limit the expense by requiring a jury determination of the sentence, regardless of the method by which guilt is determined.[43] After a determination of guilt by a judge trial, or a plea of guilty or non vult, a jury would be convened to hear evidence relevant only to sentencing.[44] If guilt was determined by a jury trial, the same jury could retire again after hearing new evidence to determine the penalty,[45] or a new penalty jury could be convened.[46] Under this procedure, no additional penalty burdens the exercise of defendant's constitutional right to plead not guilty and to demand a jury trial; if a defendant waives his rights, he does not do so from fear of the death penalty. *Jackson* considered this alternative with approval,[47] but refused the Government's request to institute it, saying that only Congress could make that policy decision.[48] One state court, however, instituted this bifurcated system after an attack on the penalty provisions of its murder statute. In *State v. Harper*,[49] the Supreme Court of South Carolina pointed out that defendants who pleaded

41 Each of the 341 New Jersey murder defendants who pleaded non vult, *see* note 13 *supra*, would have had to receive a separate trial under the replacement provision suggested by Chief Justice Weintraub.

42 Even if the defendant is found guilty, events at trial may influence the jury to be more lenient in imposing the penalty.

43 *See* Note, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50 (1964).

44 *See, e.g.*, COLO. REV. STAT. ANN. § 40-2-3(c) (1963); TENN. CODE ANN §§ 39-2404, 39-2405 (1955); WASH. REV. CODE §§ 9.48.030, 10.01.060, 10.49.010 (1961).

45 *See, e.g.*, CAL. PENAL CODE § 190.1 (West Supp. 1967); CONN. GEN. STAT. REV. § 53-10 (Supp. 1968); PA. STAT. ANN. tit. 18, § 4701 (Purdon 1963); S.D. CODE § 13.2012 (Supp. 1960).

46 *See, e.g.*, CAL. PENAL CODE § 190.1 (West Supp. 1967); CONN. GEN. STAT. REV. § 53-10 (Supp. 1968).

47 390 U.S. at 582 n.23. The Court apparently approved the Washington and California procedures.

48 *Id.* at 576-81. One concurring judge in *Forcella* thought the court had the authority to and should institute a bifurcated trial system. 52 N.J. at ——, 245 A.2d at 197-98.

49 —— S.C. ——, 162 S.E.2d 712 (1968).

guilty received life imprisonment,[50] while those who stood jury trial and were found guilty were punished by death unless the jury specifically recommended them to the mercy of the court, in which case only life imprisonment could be imposed.[51] The court, citing *Jackson*, severed the guilty plea penalty provisions and substituted a requirement for penalty juries to sentence murder defendants pleading guilty.[52] All South Carolina murder defendants will now be sentenced at the recommendation of a jury, regardless of how guilt is determined: "[O]ne who pleads guilty, as well as the one who pleads not guilty and is found guilty by the jury, can escape the penalty of death only after a jury has heard the matter and recommended mercy."[53]

Of course, before enacting a statute that allows the death penalty to be imposed by a jury, as in the last two alternatives, legislatures must consider the probability that a jury will impose the death penalty. The recent case of *Witherspoon v. Illinois*[54] held unconstitutional dismissal of a prospective juryman for cause solely on the grounds that he has religious or conscientious scruples against capital punishment. Henceforth, a dismissal for cause in capital cases will necessitate a showing by the prosecution that a prospective juryman will *automatically* vote against the death penalty.[55] Thus, some jurors will be generally opposed to capital punishment, and it may be more difficult for the prosecution to obtain a jury willing to sentence a man to death.

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50 S.C. CODE ANN. § 17-553.4 (Supp. 1967).

51 S.C. CODE ANN. § 16-52 (1962).

52 The court opted for severance after an analysis of the relevant statutory history. The basic murder statute providing for the death sentence unless the jury recommends mercy, S.C. CODE ANN. § 16-52 (1962), was enacted in its present form in 1894, while S.C. CODE ANN. § 17-553.4 (Supp. 1967), providing that on a plea of guilty the penalty shall be that which would be imposed if a jury recommended mercy, in this instance life imprisonment, was added in 1962. The statutes were held separate and severable, and S.C. CODE ANN. § 17-553.4 (Supp. 1967) was held unconstitutional, at least "where the death penalty is involved." —— S.C. at ——, 162 S.E.2d at 714.

53 —— S.C. at ——, 162 S.E.2d at 714.

54 391 U.S. 510 (1968). *See also* Bumper v. North Carolina, 391 U.S. 543 (1968).

55 391 U.S. at 520 (dictum). Rather than excusing a prospective juror for voicing general objections to the death penalty, the trial court must now examine the strength and degree of his beliefs, such as whether his scruples are so strong that they might influence the vote on the issue of guilt. The jury must be drawn from a cross-section of the community, *see, e.g.*, Brown v. Allen, 344 U.S. 443, 474 (1953); Fay v. New York, 332 U.S. 261, 299-300 (1947) (dissent); Smith v. Texas, 311 U.S. 128, 130 (1940); Labat v. Bennett, 365 F.2d 698, 719-20 (5th Cir. 1966); Comment, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, and that cross-section must not exclude those who are opposed to capital punishment in theory. Witherspoon v. Illinois, 391 U.S. 510, 520 (1968).

Whether the issue is being faced by courts rewriting temporary provisions or by legislatures formulating permanent replacements, a final alternative for state courts and legislatures, and probably the one which would "more clearly conform to the tenor and rationale of *Jackson*,"[56] is the complete abolition of capital punishment.[57] If legislative history is to be significant in court-determination of new statutes, the long-range intent of legislatures demonstrates a definite trend toward leniency. Indeed, the New Jersey statute which added the non vult plea was intended "to ameliorate the course of capital punishment."[58] But, statutory history need not control this result. The Nevada Supreme Court in *Spillers v. State*[59] recently ignored statutory history and simply eliminated the death penalty from Nevada's rape statute. And *Jackson's* severance of the death penalty as the last-enacted provision of the statute may not necessarily imply that the Court was controlled by the Federal Kidnaping Act's legislative history. Rather, the Court assumed that the death penalty would fall[60] because severance would leave "completely unchanged [the statute's] basic operation"[61] and noted the statute's history only because it "confirms what common sense alone would suggest."[62] Indeed, the Court may have indicated the path it will follow, at least where federal statutes are involved, by eliminating the death penalty provisions of the Federal Bank Robbery Act[63] in *Pope v. United States*.[64] The Court did not mention the statute's history and cited only *Jackson*. Finally, a strict legislative history

56 State v. Forcella, 52 N.J. 263, ——, 245 A.2d 181, 200 (dissent).

57 *See, e.g.*, ALASKA STAT. § 11.15.010 (1962); IOWA CODE ANN. § 690.2 (Supp. 1968); ME. REV. STAT. ANN. tit. 16, § 2651 (1964); MICH. STAT. ANN. § 28.548 (1954); MINN. STAT. ANN. § 609.185 (1964); ORE. REV. STAT. § 163.010 (1967); W. VA. CODE ANN. § 61-2-2 (1966); WIS. STAT. ANN. § 940.01 (1958).

58 52 N.J. at ——, 245 A.2d at 188. The *Forcella* dissenters point out that the legislature "ever since 1893 . . . has declared that a murder defendant shall have the right to tender a non vult plea which, if accepted, will preclude the possibility of the death penalty." *Id.* at ——, 245 A.2d at 200.

59 —— Nev. ——, 436 P.2d 18 (1968).

60 The Court cited McDowell v. United States, 274 F. Supp. 426, 429 (E.D. Tenn. 1967), where that court reasoned that the death penalty alone should be severed from the Federal Kidnaping Act.

61 390 U.S. at 586.

62 *Id.*

63 18 U.S.C. § 2113(e) (1964).

64 392 U.S. 651 (1968). This case indicates that the infirmity of these statutes is the imposition of a harsher penalty on one who asserts his rights. The defendant had been sentenced to death, but because the penalty was an extra burden on his assertion of his right to a jury, the case was remanded. On remand, Pope v. United States, 397 F.2d 812 (8th Cir. 1968), vacated the death sentence and further remanded to the district court for resentencing. Query: Does this case indicate that the Court will opt for complete retroactive effect of *Jackson*?

application, whether considered by court or legislature, overlooks the real infirmity of these statutes. The concededly useful non vult and guilty pleas are not the problem. It is the imposition of the threat of death on one who asserts his right to defend which is being challenged. Courts and legislatures can assure the defendant's rights by simply eliminating the increased penalty.

Perhaps the Court, by its rulings in *Jackson* and *Witherspoon*, is attempting to do away with the death sentence by making it more difficult for a state to obtain; the majority has been criticized for its veiled "dislike of the death penalty"[65] and challenged to hold "forthrightly"[66] that the death penalty is unconstitutional.[67] The Court's real motive may be imperceptible, but these and succeeding cases will at least compel a careful re-examination by many state courts and legislatures of their capital punishment provisions. They can maintain the death penalty, but the Court is forcing them to face the issue squarely. No longer can a state exonerate its collective conscience by leaving the choice of facing death in the hands of the defendant about to enter a plea.

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65 Witherspoon v. Illinois, 391 U.S. 510, 542 (1968) (White, J., dissenting).

66 *Id.* at 532 (Black, J., dissenting).

67 The Supreme Court of California recently ruled that capital punishment did not constitute cruel and unusual punishment. *In re* Jackson, —— Cal. 2d ——, —— P.2d ——, —— Cal. Rptr. 2d —— (1968).