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ARTICLES

PLEA BARGAINING IN THE SHADOW OF DEATH

Joseph L. Hoffmann,* Marcy L. Kahn,** & Steven W. Fisher***

INTRODUCTION

On July 20, 2000, a ruling by the Third Department of the New York Supreme Court, Appellate Division, effectively banned all plea bargaining in New York capital cases. The ruling, in the case of People v. Edwards,1 was based on the Third Department's interpretation of the landmark 1998 New York Court of Appeals decision in Matter of Hynes v. Tornei.2 Taken together, Edwards and Hynes have thrown the day-to-day administration of the death penalty in New York into a state of confusion.3

Edwards and Hynes involved the same set of fundamental questions: What are the constitutional implications of plea bargaining in the shadow of death? Can the threat of the death penalty ever be used as leverage to persuade a defendant to waive his constitutional right to a jury trial and enter a plea of guilty? If so, when and under what circumstances?

In an attempt to find answers to these difficult questions, the Edwards and Hynes courts looked primarily to the United States

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Supreme Court's 1968 decision in United States v. Jackson. There, the Court struck down the death-penalty provision in the Federal Kidnaping Act, because the Act provided that the death penalty could be imposed only after conviction at a jury trial, but not after conviction at a bench trial or upon a guilty plea. This statutory sentencing disparity, according to the Jackson Court, "impose[ed] an impermissible burden" on the exercise of Fifth and Sixth Amendment rights by defendants who sought a jury trial. The statute's constitutional flaw was that it "needlessly encourage[d]" defendants to waive their Fifth and Sixth Amendment rights, even if many of the resulting guilty pleas were not necessarily coerced under traditional standards of voluntariness. The proper remedy for this constitutional flaw, according to the Jackson Court, was to excise the offending death-penalty provision and thus allow the remainder of the Act—with a reduced maximum punishment of life imprisonment—to survive.

In Hynes, the New York Court of Appeals squarely addressed a Jackson challenge to the New York death-penalty statute. The New York statute, like the Federal Kidnaping Act, had the effect of limiting the death penalty to those defendants who were convicted of the capital crime (in this case, first-degree murder) at a jury trial. The statute created this effect by prohibiting bench trials for defendants charged with first-degree murder, and by further providing that defendants could plead guilty to first-degree murder only upon the prior agreement of the trial judge and prosecutor that the death penalty would not be imposed.

The Hynes court concluded that because the New York statute failed to provide for the possibility of a death sentence after a guilty plea, it created exactly the same kind of statutory sentencing disparity that was held unconstitutional in Jackson. In Hynes, however, the

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6. See Jackson, 390 U.S. at 570-72.
7. Id. at 583.
8. Id. (emphasis omitted).
9. Id.
10. Id. at 591.
11. Act of Mar. 7, 1995, ch. 1, 1995 N.Y. Laws 1 ("An Act to amend the penal law, the criminal procedure law, the judiciary law, the county law, the correction law and the executive law, in relation to imposition of the death penalty . . . .").
court chose to remedy the constitutional flaw not by eliminating the death penalty, but instead by striking the plea provisions from the death-penalty statute. As a result, "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending;" in other words, once a notice of intent is filed, a guilty plea to first-degree murder is permitted only after the prosecutor withdraws the request for the death penalty. The court added, however, that defendants remain free to plead guilty to lesser offenses not punishable by death, such as second-degree murder, even while they are facing the possibility of a death penalty under a first-degree murder charge.

In Edwards, the Third Department addressed a post-Hynes situation in which the prosecutor and defendant, in a first-degree murder case with a pending notice of intent to seek the death penalty, reached a pretrial agreement through plea negotiations. Pursuant to this agreement, the defendant first proffered a guilty plea to first-degree murder and made a complete allocution. Next, the prosecutor consented to the plea and withdrew the notice of intent to seek the death penalty. Finally, the trial judge accepted the defendant's plea and entered a judgment of conviction.

Although this complicated procedure seemed to meet the letter of the law set forth in Hynes—because the defendant's plea was not actually entered until the death notice had been withdrawn—the Edwards court concluded that "it overlooks the essence of the Hynes-Jackson infirmity." According to the Edwards court, "[i]f a prosecutor who has served a death notice is permitted to delay its withdrawal until after a defendant's plea allocution, then the choice to plead guilty has been made under compulsion of the death notice and a defendant's Fifth and Sixth Amendment rights have been impermissibly burdened." The court held that, under Hynes and Jackson, "it is constitutionally impermissible for prosecutors to negotiate guilty pleas to murder in the first degree while a notice of intent to seek the death penalty is pending."

15. Id. at 629, 706 N.E.2d at 1208-09, 684 N.Y.S.2d at 184-85.
16. There remains an open question whether a notice of intent to seek the death penalty is considered to be "pending," under Hynes, during the 120-day period within which the prosecutor may, according to New York law, file such a notice of intent, but before the prosecutor has elected to do so. See People v. Mower, 719 N.Y.S.2d 780 (3d Dep't 2001); People v. Owes, No. 2000-0161 (Monroe County Ct. Sept. 27, 2000); see also infra Part III.G (discussing Owes and Mower).
19. Id.
20. Id. at 757, 712 N.Y.S.2d at 75.
21. Id.
22. Id. at 758, 712 N.Y.S.2d at 75.
Edwards and Hynes may both appear, at first glance, to be logical applications of Jackson to the New York death-penalty statute. But the holding in Edwards—that there can be no plea bargaining in the shadow of death, at least under the New York statute\footnote{Id. at 757-58, 712 N.Y.S.2d at 75. As will be discussed later, the Edwards decision, relying on the authority of Hynes, appears to leave open a single, small window of opportunity for plea bargaining where the notice of intent to seek the death penalty has been filed—namely, the chance that the prosecution and defense may reach an agreement under which the defendant will plead guilty to the lesser crime of second-degree murder. See infra note 309 and accompanying text; see also supra note 16 (noting the open question of whether plea negotiations may take place within the 120-day period for filing a notice of intent to seek the death penalty, but before such a notice has been filed).}—not only changed the prevailing rule and practice in New York capital cases, but also runs directly contrary to the virtually universal day-to-day practice in every other American death-penalty jurisdiction.

Moreover, the holding in Edwards seems inconsistent with several post-Jackson United States Supreme Court decisions. For example, in Brady v. United States,\footnote{397 U.S. 742 (1970).} a defendant who had pleaded guilty to avoid the death penalty under the Federal Kidnapping Act—the very same statute that was involved in Jackson—was held to have made a voluntary and constitutionally valid plea. And in North Carolina v. Alford,\footnote{400 U.S. 25 (1970).} a defendant who had pleaded guilty to a lesser, non-capital offense to avoid the death penalty under a North Carolina murder statute that was later held unconstitutional under Jackson, but who had steadfastly maintained his innocence throughout his plea proceedings, likewise was held to have made a voluntary and constitutionally valid plea. If, as the Edwards court held, plea bargaining in the shadow of death is constitutionally impermissible under Hynes and Jackson, then how can Brady and Alford be explained?

The problem is that the United States Supreme Court has never attempted to reconcile its decision in Jackson with Brady, Alford, or several other post-Jackson decisions—including Parker v. North Carolina,\footnote{397 U.S. 790 (1970); see infra notes 62-67 and accompanying text.} Atkinson v. North Carolina,\footnote{403 U.S. 948 (1971); see infra Part I.C.} Bordenkircher v. Hayes,\footnote{434 U.S. 357 (1978); see infra Part I.D.} and Corbitt v. New Jersey\footnote{439 U.S. 212 (1978); see infra Part I.E.}—that might similarly be interpreted as having either altered or undermined the constitutional rule established in Jackson. A complete understanding of Jackson’s contemporary significance thus requires a close examination of these post-Jackson decisions—some well known but others nearly forgotten, and all rendered more than two decades ago.
Given the above, it is not at all surprising that the New York courts, in Edwards and Hynes, struggled to make sense of Jackson and the United States Supreme Court's post-Jackson decisions. The Court's rulings in this area generated significant jurisprudential tension in the late 1960s and 1970s, and since that time, the Court has never been compelled to resolve the tension—until now, that is. The peculiar characteristics of the New York death-penalty statute\(^3\) have exposed the long-dormant conflicts between Jackson and the post-Jackson decisions. At this point in time, the New York courts face considerable difficulty in finding their own workable solution to the Jackson problem created by the New York statute. As a result, the recent developments in New York may ultimately force the United States Supreme Court to revisit Jackson and resolve the jurisprudential tension that has long lingered in its wake.

In this article, we begin by reviewing Jackson and the United States Supreme Court's post-Jackson decisions. We chronicle the pertinent history of the death penalty in New York, as well as the law and practice of plea bargaining under the current New York death-penalty statute. We then describe in full detail the relevant New York case law on plea bargaining in the shadow of death, up to and including the decisions in Hynes and Edwards. Finally, we analyze the contemporary significance of Jackson, taking into account the post-Jackson decisions, in the hope that this analysis might prove helpful to the New York courts as they continue to grapple with the "Hynes-Jackson" issue.

I. BACKGROUND—UNITED STATES v. JACKSON

As noted in the introduction, Edwards and Hynes were based primarily on United States v. Jackson. But the story of Edwards and Hynes actually began three years before Jackson, in 1965, when the United States Supreme Court decided Griffin v. California.\(^3\) Although Griffin did not involve plea bargaining at all, and although the presence of the death penalty in Griffin was irrelevant to the legal issues therein, the case nevertheless set the stage for Jackson and, many years later, Edwards and Hynes.

In Griffin, the defendant in a capital murder case chose not to testify at his guilt-innocence trial.\(^3\) The trial judge instructed the jury that the defendant had the constitutional right not to testify, but went on to tell the jury that "if he does not testify... the jury may take that failure into consideration... as indicating that among the inferences that may be reasonably drawn [from evidence or facts that the defendant might be expected to deny or explain] those unfavorable to

\(^{30}\) See supra notes 12-13 and accompanying text.

\(^{31}\) 380 U.S. 609 (1965).

\(^{32}\) Id. at 609.
the defendant are the more probable.” In addition, the prosecutor, at closing, stressed that the defendant—who had been seen in an alley with the victim on the night of the murder—would have known certain facts and circumstances about the victim’s situation. The prosecutor strongly suggested to the jury that the defendant’s failure to testify about such facts and circumstances was an indication of his guilt. The defendant was convicted and sentenced to death.

The Supreme Court reversed. In a majority opinion by Justice Douglas, the Griffin Court held that the trial judge’s and prosecutor’s comments on the defendant’s silence violated the Fifth Amendment privilege against self-incrimination. The Court explained that “comment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice,’ which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.”

In Jackson, the Court found good reason to apply the Griffin rationale to certain provisions contained in the Federal Kidnaping Act. The Act provided:

> 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.

In Jackson, the defendant was charged with a kidnaping for ransom in which the victim was harmed, thus making him eligible for a possible death sentence. Prior to trial, the defendant argued that the Act, as quoted above, was unconstitutional under Griffin because it attached a price to the defendant’s assertion of his constitutional right to a jury trial. The trial court accepted this argument and dismissed the kidnaping charge.

The Supreme Court agreed that the Act unconstitutionally burdened the defendant’s exercise of his constitutional rights, although the Court chose a different remedy than had the trial court. According to the Court, in a majority opinion by Justice Stewart, “the

33. *Id.* at 610 (internal quotes omitted).
34. *Id.* at 610-11.
35. *Id.*
36. *Id.* at 611.
37. *Id.* at 614 (citation and footnote omitted).
39. 18 U.S.C. § 1201(a) (1964) (emphasis added). The italicized portion of the statute had been interpreted to limit the death penalty to those cases where a defendant had been found guilty after a jury trial, and where the jury had then recommended a death sentence.
40. *Jackson*, 390 U.S. at 571.
41. *Id.*
defendant's assertion of the right to jury trial may cost him his life, for the federal statute authorizes the jury—and only the jury—to return a verdict of death."42

Under the Federal Kidnapping Act,... the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.43

In the key section of the opinion, the Court concluded that the Act violated the defendant's constitutional rights in much the same way as had the trial judge's and prosecutor's comments in Griffin:

Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. 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. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide.

The Government suggests that, because the Act thus operates "to mitigate the severity of punishment," it is irrelevant that it "may have the incidental effect of inducing defendants not to contest in full measure." We cannot agree. Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary and therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which

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42. Id. at 572. The Court rejected, as a matter of statutory interpretation, the Government's claims that, under the Act, (1) a jury's recommendation of death could lead to imposition of a death sentence only if the trial judge agreed with the jury's recommendation, and (2) even without a jury trial, as in the case of a plea bargain or bench trial, the trial judge could still convene a special sentencing jury, and thus the defendant would still face the possibility of a death sentence. Id. at 572-78. The Court also declined the Government's invitation to reform the statute to allow for such a special sentencing jury. Id. at 578-81.
43. Id. at 581.
a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial. In some States, for example, the choice between life imprisonment and capital punishment is left to a jury in every case—regardless of how the defendant’s guilt has been determined. Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnaping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See Griffin v. California, 380 U.S. 609.

It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For 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 the assertion of a constitutional right. Thus the fact that the Federal Kidnaping Act tends to discourage defendants from insisting upon their innocence and demanding trial by jury hardly implies that every defendant who enters a guilty plea to a charge under the Act does so involuntarily.44

In a footnote, at the end of the quoted passage, the Court again cited Griffin:

So, too, in Griffin v. California, 380 U.S. 609, the Court held that comment on a defendant’s failure to testify imposes an impermissible penalty on the exercise of the right to remain silent at trial. Yet it obviously does not follow that every defendant who ever testified at a pre-Griffin trial in a State where the prosecution could have commented upon his failure to do so is entitled to automatic release upon the theory that his testimony must be regarded as compelled.45

In other words, Griffin and Jackson were not necessarily about coerced testimony or compelled guilty pleas, respectively. Instead, they were about the fact that the particular practices at issue imposed a burden—or, to put it differently, set a price—on the defendant’s exercise of his constitutional rights. And, at least in Jackson, the burden was a needless one, since the same legitimate goal could have been achieved without imposing such a burden.46

44. Id. at 581-83 (citations and footnotes omitted).
45. Id. at 583 n.25.
46. This particular aspect of Jackson might be seen as a limitation of Griffin, since Griffin never discussed the concept of “needless” encouragement. In Jackson, the Court acknowledged that at least some burdens on constitutional rights might nevertheless be upheld—so long as those burdens served important, legitimate goals and were not “needless.” Id. at 582.
The Court rejected the Government's request to remedy the constitutional defect by simply ordering federal trial judges not to accept guilty pleas or jury trial waivers in capital cases under the Act.47 The Court acknowledged that defendants do not have a constitutional right to plead guilty or waive jury trial, but noted that the Government’s preferred remedy would have a “cruel impact” on defendants who truly did not want to contest their own guilt, and by eliminating guilty pleas would “rob the criminal process of much of its flexibility.”48 At the same time, however, the Court rejected the trial judge’s position that the entire Act must be invalidated. Instead, the Court held that the proper remedy was to strike the death-penalty provision, which had been added to the statute two years after its original enactment, but leave in place the remainder of the Act.49

II. THE UNITED STATES SUPREME COURT'S POST-JACKSON DECISIONS

A. Brady v. United States and Parker v. North Carolina

Shortly after the decision in Jackson, the Court had the opportunity to clarify its observation in Jackson that not all guilty pleas rendered to avoid the death penalty are necessarily coerced or involuntary.50 In Brady v. United States,51 the defendant had pleaded guilty in 1959 to a charge of kidnaping under the very same Federal Kidnaping Act that was at issue in Jackson. After the decision in Jackson, he sought post-conviction relief on the ground, inter alia, that his guilty plea was coerced.52 The Supreme Court refused to overturn the defendant’s conviction, holding that Jackson did not require the invalidation of all guilty pleas entered to avoid the (now-unconstitutional) death penalty provision under the Federal Kidnaping Act.53 According to the Court:

47. Id. at 583.
48. Id. at 584 (internal quotations omitted).
49. Id. at 585-91. The Court noted that the death-penalty provision was added to the statute in 1934, two years after the original enactment of the Federal Kidnaping Act, evidencing that Congress would likely have supported its severability from the remainder of the Act. Id. at 586-89.
One year after its decision in Jackson, the Court faced an identical challenge to the Federal Bank Robbery Act in Pope v. United States, 392 U.S. 651 (1968). The Solicitor General admitted that the statute in Pope “suffers from the same constitutional infirmity” as the one in Jackson, and the Court, in a brief per curiam opinion, invalidated the death-penalty provision in that statute as well. Id. at 651 (quoting Jackson).
50. Jackson, 390 U.S. at 583.
52. Id. at 744.
53. Id. at 747.
The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it. One of these circumstances was the possibility of a heavier sentence following a guilty verdict after a trial. It may be that Brady, faced with a strong case against him and recognizing that his chances for acquittal were slight, preferred to plead guilty and thus limit the penalty to life imprisonment rather than to elect a jury trial which could result in a death penalty. But even if we assume that Brady would not have pleaded guilty except for the death penalty provision [in the Act], this assumption merely identifies the penalty provision as a "but for" cause of his plea. That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act.\footnote{54. Id. at 749-50 (citations and footnote omitted).}

The Court noted that "[t]he State to some degree encourages pleas of guilty at every important step in the criminal process."\footnote{55. Id. at 750.} Some defendants plead guilty because they know that they broke the law; others do so only after the shock of being arrested and charged with a crime; still others do so to avoid the agony and expense of a trial when the evidence of guilt is strong. "All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas . . . ."\footnote{56. Id.}

The Court proceeded to expound on the general value of plea bargaining, even though Brady itself did not involve traditional plea bargaining but a statutory "discount" for defendants who chose to plead guilty.\footnote{57. Traditional plea bargaining involves a discretionary process of negotiation between the prosecutor and the defendant (through defense counsel), in the hope of reaching an agreement that will benefit both parties. The prosecutor usually benefits by not having to go to trial, and the defendant usually benefits by obtaining a discounted punishment. Statutory "discounts," on the other hand, are created by the legislature and written into statutes. Such statutes may take several forms. For example, some statutes, as in Jackson and Brady, do not require prosecutorial consent to the entry of the guilty plea and the consequent discounting of the defendant's punishment. See id. at 743-44; United States v. Jackson, 390 U.S. 570, 584-85 (1968). In such schemes, the defendant is under no particular obligation to negotiate with the prosecutor; the discount can be obtained through unilateral action by the defendant. Other statutes, as in Atkinson v. North Carolina, require prosecutorial consent and thus may encourage a modicum of negotiation (because the defendant must obtain prosecutorial consent in order to obtain the discount). Atkinson v. North Carolina, 403 U.S. 948 (1971), rev'g State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969). These statutory differences, and others, will be examined later in this article. See infra notes 411-20 and accompanying text.}

The Court stated its view that guilty pleas entered to avoid the possible negative consequences of a trial are "inherent in the criminal law and its administration," and provide significant advantages to both the State and the defendant.\footnote{58. Brady, 397 U.S. at 751-52.}
It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury. . . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.  

Finally, as to the argument that Brady's guilty plea was not intelligently made, because he did not know at the time he entered his plea that the death-penalty provision of the Act would later be held unconstitutional in Jackson, the Court pointed out that plea decisions "frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." Given that Brady had been properly advised by defense counsel, and given that the Government had never misrepresented the range of possible punishments Brady faced, the subsequent ruling in Jackson did not affect "the truth or reliability of his plea."  

Justice Brennan, concurring in the result in Brady and dissenting in the companion case of Parker v. North Carolina, differentiated between statutory "discounts" for pleading guilty and traditional plea bargaining. According to Justice Brennan, the difference is that plea bargaining represents a "give-and-take negotiation . . . between the prosecution and defense, which arguably possess relatively equal bargaining power." His opinion also acknowledged, however, that by involving potential death sentences, both types of penalty schemes, including those at issue in Parker and Brady, injected a factor of considerable gravity absent from most plea-bargaining situations. Justice Brennan emphasized that "the threat of a death penalty [is] a factor to be given considerable weight in determining whether a defendant has deliberately waived his constitutional rights," drawing a parallel with the Court's decision in Fay v. Noia. This 1963 decision rejected the notion that a federal habeas corpus petitioner confronted by the "grisly choice" of waiving his appellate rights or facing a possible death sentence if his appeal was successful could be

59. Id. at 752-53 (footnote omitted).  
60. Id. at 756-57.  
61. Id. at 757.  
63. Id. at 809 (Brennan, J., dissenting) (internal quotations omitted).  
64. Id. at 810 (Brennan, J., dissenting).  
barred from seeking federal habeas review based upon his failure to pursue state appeals. Under Justice Brennan’s view, relief from guilty pleas entered pursuant to any “legislatively mandated unconstitutional death penalty scheme,” whether made in response to a pure statutory “discount” (as in Brady) or through a statutorily-authorized mechanism more closely resembling traditional plea bargaining (as in Parker), should be constitutionally required whenever the defendant can demonstrate that the unconstitutional death-penalty scheme played a significant role in his determination to plead guilty.\(^6^7\)

B. North Carolina v. Alford

In North Carolina v. Alford,\(^6^8\) the Court faced a situation virtually identical to the ones in Brady and Parker. The only potentially meaningful differences between Alford and Parker, which involved the same North Carolina statute, were that (1) Alford pleaded guilty not to the original charge, but to a lesser-included offense—namely, second-degree murder—under the statute which the Court had not yet invalidated under Jackson\(^6^9\) (although the Jackson problem with the statute had already been acknowledged by the court below\(^7^0\)), and (2) Alford maintained throughout the plea proceedings that he was innocent of the murder, and claimed later that the “principal motivation” for his plea was fear of the death penalty.\(^7^1\)

Citing Brady, the Court flatly rejected Alford’s claim that his plea was involuntary because it was made primarily to avoid the death penalty:

That [Alford] would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant’s advantage.\(^7^2\)

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66. Parker, 397 U.S. at 812 (Brennan, J., dissenting).
67. Id. at 812-13 (Brennan, J., dissenting).
69. The North Carolina statute allowed defendants to plead guilty to a charge of first-degree murder but mandated a punishment of life imprisonment, rather than death, in such cases. This statute was repealed in 1969, six years after Alford’s conviction of second-degree murder upon a guilty plea. See Alford, 400 U.S. at 27 n.1. One year after the Supreme Court's decision in Alford, the Court invalidated the North Carolina statute—setting aside a series of death sentences imposed under that statute—in Atkinson v. North Carolina, 403 U.S. 948 (1971).
71. Alford, 400 U.S. at 28, 30.
72. Id. at 31.
The Court also rejected the related claim that the plea was involuntary because Alford had refused to admit his guilt.3

The Court in *Alford* proceeded to explain that the reasoning of the lower court—that a guilty plea is invalid if "principally motivat[ed]" by the death penalty—would have the necessary effect of invalidating not only a plea to first-degree murder, but also (as in *Alford* itself) a plea to second-degree murder.74 The Court rejected the view of the lower court that *Jackson* should have such a broad impact:

The States in their wisdom . . . may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.75

C. Atkinson v. North Carolina

In *Atkinson v. North Carolina*76 and its companion cases,77 the Supreme Court addressed a *Jackson* challenge to the same North Carolina statute at issue in *Parker*. Under that statute, if a defendant wished to plead guilty to murder, he was required to tender a signed guilty plea; the plea would be formally entered only if the prosecutor, with the trial court’s approval, accepted it.78 If the prosecutor accepted the plea, the defendant would receive life imprisonment; if the prosecutor rejected the plea, however, the defendant would go to trial and would face a possible death sentence. The Court held—in a summary disposition without any discussion or analysis—that the North Carolina statute was unconstitutional under *Jackson*.79

D. Bordenkircher v. Hayes

In 1978, in *Bordenkircher v. Hayes*80 (not a capital case), the Court finally addressed squarely, and upheld, the constitutionality of plea bargaining. In *Hayes*, the defendant was initially charged with "uttering a forged instrument," a crime normally carrying a potential

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73. *Id.* at 31-39.
74. Indeed, the Court noted that although the North Carolina statute allowing defendants to avoid the death penalty by pleading guilty to first-degree murder had been repealed in 1969, "it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge." *Id.* at 27 n.1.
75. *Id.* at 39.
76. 403 U.S. 948 (1971).
79. See *Atkinson*, 403 U.S. at 948.
sentence of two to ten years in prison. Because Hayes had two prior felony convictions, however, he could have been indicted under the Kentucky Habitual Criminal Act, which would have required a mandatory sentence of life imprisonment. The prosecutor threatened to seek such an indictment if Hayes did not agree to plead guilty to the original charge and accept a five-year sentence. Hayes refused to plead guilty and was indicted under the Habitual Criminal Act, found guilty at a jury trial, and sentenced to life imprisonment.

The Supreme Court found no constitutional violation in the prosecutor's use of the Habitual Criminal Act as leverage to try to obtain a guilty plea from Hayes. The Court noted that because the prosecutor told Hayes the truth about his intentions, the case was essentially identical to one in which the defendant was initially charged under the Habitual Criminal Act and the prosecutor then offered to drop that charge in exchange for a guilty plea. Distinguishing earlier cases that condemned retaliatory acts by prosecutors against defendants who asserted their constitutional rights, the Court explained:

In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant...—a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."... To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.... But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.

The Court concluded:

While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

81. Id. at 358.
82. Id. at 358-59.
83. Id. at 359.
84. See id. at 365.
85. See id. at 364-65.
86. Id. at 362-63 (Brennan, J., dissenting) (citations omitted) (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970)).
87. Id. at 364 (citation omitted).
E. Corbitt v. New Jersey

In 1978, in Corbitt v. New Jersey (another non-capital case), the Supreme Court faced a situation that—at least on the surface—appeared to resemble closely the one presented in Jackson. The Corbitt case involved a New Jersey homicide statute that distinguished, for punishment purposes, between defendants who were convicted at a jury trial and those who were convicted on the basis of non vult or nolo contendere pleas. For defendants convicted of murder at a jury trial, the jury was required to determine whether the murder was in the first or second degree; first-degree murder was punished by mandatory life imprisonment, whereas second-degree murder was punished by a term of no more than thirty years. For defendants convicted of murder on the basis of non vult or nolo contendere pleas, on the other hand, the trial judge was authorized to impose, at his discretion, either a life sentence or a term of no more than thirty years. Corbitt was convicted at a jury trial of murder, which the jury found to be in the first degree, and was thus sentenced to life imprisonment. Relying heavily on Jackson, Corbitt argued on appeal that, because a defendant convicted for the same crime on a non vult or nolo contendere plea could be given a lesser sentence by the trial judge, the New Jersey statute imposed an unconstitutional burden on his Fifth Amendment right not to be compelled to incriminate himself as well as his Sixth Amendment right to a jury trial.

The Supreme Court disagreed, holding that the New Jersey statute was not unconstitutional under Jackson for several reasons. The "principal" reason, according to the Court, was that "the pressures to forgo trial and to plead to the charge in this case are not what they were in Jackson." For one thing, the New Jersey statute, unlike the one in Jackson, did not provide for a possible death sentence. The Court described this information as a "material fact," but not necessarily a dispositive one. Moreover, the defendant in Corbitt could not entirely avoid the maximum punishment of life imprisonment by pleading non vult or nolo contendere, since the trial judge could still impose that punishment (although it would no longer be mandatory). Having noted these important differences between Corbitt and Jackson, however, the Court admitted that the defendant in Corbitt could (and did) nevertheless make a credible Jackson-type

89. Id. at 215 (citing N.J. Stat. Ann. § 2A:113-3 (West 1969)).
90. Id. at 215-16.
91. Id. at 216.
92. Id. at 217.
93. Id.
94. Id.
argument that the New Jersey statute unconstitutionally burdened his Fifth and Sixth Amendment rights.\textsuperscript{95}

The Court then turned to the general subject of plea bargaining, which it had not discussed at all in \textit{Jackson} but had discussed extensively in intervening cases like \textit{Brady}, \textit{Alford}, and \textit{Hayes}. The \textit{Corbitt} Court wrote:

The cases in this Court since \textit{Jackson} have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid. Specifically, there is no \textit{per se} rule against encouraging guilty pleas. We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea. The plea may obtain for the defendant "the possibility or certainty . . . [not only of] a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty . . . ," but also of a lesser penalty than that \textit{required} to be imposed after a guilty verdict by a jury.\textsuperscript{96}

In a footnote to the above passage, the Court observed that "[d]ecisions after \textit{Jackson} sustained practices that, although encouraging guilty pleas, were not 'needless,'"\textsuperscript{97} The Court cited, as examples, numerous plea-bargaining cases such as \textit{Brady}, \textit{Chaffin v. Stynchcombe},\textsuperscript{98} \textit{McMann v. Richardson},\textsuperscript{99} \textit{Parker, Alford, Santobello v. New York},\textsuperscript{100} and \textit{Hayes}.

Based on these post-\textit{Jackson} plea-bargaining cases, the \textit{Corbitt} Court concluded:

"[B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."

There is no difference of constitutional significance between \textit{Bordenkircher [v. Hayes]} and this case. . . . In \textit{Bordenkircher [v. Hayes]}, as permitted by state law, the prosecutor was willing to forgo the habitual criminal count if there was a plea, in which event the mandatory sentence would have been avoided. Here, the state law empowered the judge to impose a lesser term either in connection with a plea bargain or otherwise. In both cases, the defendant gave up the possibility of leniency if he went to trial and was convicted on the count carrying the mandatory penalty. In \textit{Bordenkircher [v. Hayes]}, the probability or certainty of leniency in return for a plea did not invalidate the mandatory penalty imposed after a jury trial. It should not do so here, where there was no

\textsuperscript{95} See id. at 225 & n.15.  
\textsuperscript{96} Id. at 218-20 (omissions and alteration in original) (citation omitted) (quoting \textit{Brady v. United States}, 397 U.S. 742, 751 (1978)).  
\textsuperscript{97} Id. at 219 n.9.  
\textsuperscript{98} 412 U.S. 17 (1973).  
\textsuperscript{100} 404 U.S. 257 (1971).
assurance that a plea would be accepted if tendered and, if it had been, no assurance that a sentence less than life would be imposed. Those matters rested ultimately in the discretion of the judge, perhaps substantially influenced by the prosecutor and the plea-bargaining process permitted by New Jersey law.

Bordenkircher [v. Hayes], like other cases here, unequivocally recognized the State's legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining, a process mutually beneficial to both the defendant and the State. In pursuit of this interest, New Jersey has provided that the judge may, but need not, accept pleas of non vult and that he may impose life or the specified term of years. This not only provides for discretion in the trial judge but also sets the limits within which plea bargaining on punishment may take place. The New Jersey Supreme Court observed [below] that the "encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program." Its conclusion was that in this light there were substantial benefits to the State in providing the opportunity for lesser punishment and that the statutory pattern could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of United States v. Jackson.

We are in essential agreement with the New Jersey Supreme Court.101

Justice Stewart, the author of Jackson, concurred in the judgment in Corbitt. He agreed with the majority that Jackson was not controlling, based (in his view) on the absence of the death penalty and the fact that the sentencing judge remained free to impose the same maximum punishment of life in prison that would have been mandatory after conviction by a jury trial.102 He disagreed, however, with the majority's view that the effect of the New Jersey statute was constitutionally indistinguishable from the practice of plea bargaining that had been upheld in Hayes. According to Justice Stewart (and echoing Justice Brennan's separate opinion concurring in Brady and dissenting in Parker), there is a "vast difference" between the effect of a statutory "discount" for guilty pleas and the individualized "give-and-take" of plea negotiations:

Could a state legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not-guilty plea? I would suppose that such legislation would be clearly unconstitutional under United States v. Jackson.103

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102. Id. at 226 (Stewart, J., concurring).
103. Id. at 227-28.
The three dissenters (Justices Stevens, Brennan, and Marshall) characterized the New Jersey statute as providing a punishment for "'false' not-guilty plea[s]" (i.e., a punishment—namely, mandatory life imprisonment—that applies only to defendants who plead not guilty and are then convicted by a jury trial). They rejected the majority's claim that the New Jersey statute was functionally equivalent to plea bargaining by a prosecutor, and they concluded that Jackson was violated because "a plea cannot at once be criminally punishable and constitutionally protected." The three dissenters claimed that, as a result of the majority's decision in Corbitt, "[t]he holding in Jackson, though not specifically overruled, has been divorced from the rationale on which it rested."

Corbitt was the last significant Supreme Court decision to rely upon, or interpret, Jackson. Because all pre-Jackson death-penalty statutes were invalidated by Furman v. Georgia in 1972, and because all post-Furman death-penalty statutes were drafted with Jackson in mind, no significant Jackson problem arose in the capital-case context after Corbitt. Additionally, because plea bargaining by prosecutors—which was upheld in Brady and Alford, even in the shadow of the death penalty—became even more ubiquitous after Brady and Hayes, largely eliminating the need for statutory "discounts," no significant Jackson problem arose in the non-capital-case context after Corbitt either. This caused the Jackson issue to recede into virtual dormancy for more than twenty years between Corbitt and the current controversy over the New York death-penalty statute.

III. The New York Experience with Plea Bargaining in Death-Penalty Cases

A. The History of the Death Penalty in New York

In 1995, New York became the thirty-eighth state in the modern era to enact a capital punishment law, authorizing the imposition of the death penalty for the commission of twelve specified categories of intentional murder. Capital punishment is not new to New York, however, as the state's use of the death penalty dates from colonial
days, and has changed dramatically over the intervening centuries to reflect the political and social climate of the times.

Over the three centuries during which New York has had a death penalty, the crimes punishable by death gradually diminished from a nearly indiscriminate list in the seventeenth century, following the approach then prevalent in England and the American colonies, to a more restrictive list by 1788. Perhaps as a consequence of a growing movement to abolish the death penalty in mid-nineteenth century New York, by 1862, the number of capital crimes in New York had been reduced to two—first-degree murder and treason—and remained so until kidnaping was added after the Lindbergh case in 1933. By 1965, capital punishment was available only in certain limited classes of murders.

Three particular strands of New York's capital jurisprudence intertwined to create the tapestry which informed the New York Court of Appeals opinion considering the continuing vitality of Jackson in Matter of Hynes v. Tomei. These three concepts—mandatory death sentencing, the unwaivable requirement of trial by jury, and the ban on guilty pleas in potential capital cases—were each deeply enmeshed in New York's earlier capital jurisprudence, helped define the state's new capital punishment law, and served as the backdrop for the Court's decision.


112. In 1788, the New York Legislature limited capital crimes to murder, treason, rape, buggery, burglary, larceny from a church, arson, mayhem, and certain types of counterfeiting and forgery. Commission Report, supra note 110, at 81-83.

113. No fewer than thirteen legislative committees considered the question of complete abolition of capital punishment during the mid-nineteenth century, and approximately half of them endorsed the concept. Id. at 83-84; see, e.g., John L. O'Sullivan, Report in Favor of the Abolition of the Punishment of Death by Law, Made to the Legislature of the State of New York (2d ed. 1841), reprinted in Criminal Justice In America 8 (Robert M. Fogelson et al. eds., 1974). The Select Committee chaired by Assemblymember O'Sullivan prepared the report in response to a gubernatorial request, and concluded that "the punishment of death by law ought to be forthwith and forever abolished by the State of New York; the penalty of imprisonment for life, at labor, in solitude, and beyond the reach of the possibility of Executive clemency, being substituted therefor." Id. (emphasis omitted).


116. See infra notes 125-26 and accompanying text.


Despite its limited number of death-eligible crimes during the latter nineteenth and early twentieth centuries, the New York law was one of the more severe in the country, as its death sentence was mandatory.\textsuperscript{118} Neither the jury nor the judge had any authority to impose a sentence of life imprisonment.\textsuperscript{119} By 1937, the mandatory sentencing requirements had been relaxed to the extent that the jury could make a recommendation to the trial court of a sentence of imprisonment for first-degree murder based on theories of felony murder or depraved recklessness, and for kidnaping.\textsuperscript{120} Courts were free to reject the jury’s recommendation, however, and impose a death sentence.

Although New York’s death-penalty laws remained unchanged for the next quarter century, by the 1950s, the popularity of capital punishment had again begun to wane, and the New York Legislature repeatedly entertained the possibility of abolishing it entirely.\textsuperscript{121} In 1963, the New York Legislature enacted major changes in the state’s capital punishment law at the behest of the Temporary Commission on Revision of the Penal Law and Criminal Code (“Temporary Commission”).\textsuperscript{122} Among its changes, the new legislation repealed the mandatory death sentence for the crime of premeditated murder, authorized a sentence of life imprisonment in any capital case unless the jury unanimously recommended a sentence of death, and made the jury’s recommendation binding upon the court.\textsuperscript{123} The new

\textsuperscript{118} Commission Report, \textit{supra} note 110, at 84.

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} Act of Mar. 17, 1937, ch. 67, sec. 2, § 1045-a, 1937 N.Y. Laws 121. With respect to those crimes, the law provided that “[a] jury... may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life.” \textit{Id.} Treason and all other forms of first-degree murder continued to carry a mandatory sentence of death.

\textsuperscript{121} Commission Report, \textit{supra} note 110, at 84-85; Acker, \textit{supra} note 111, at 522 & n.38. Professor Acker also reports that bills to abolish the death penalty were introduced in the New York State Legislature every year from 1950 through 1962. \textit{Id.} at 522 & n.39.


legislation thereby effectively changed the presumptive sentence for capital crimes committed in New York from death to life.\textsuperscript{124} In 1965, with the movement to abolish the death penalty continuing, the Temporary Commission recommended that "capital punishment in the State of New York be abolished by appropriate legislation with an immediately effective date."\textsuperscript{125} The Legislature responded by drastically limiting the death penalty, abolishing it except in cases of murders of police or corrections officers acting in the line of duty, and murders by life-term inmates.\textsuperscript{126}

By 1972, New York was one of many states that left the imposition of the death penalty entirely to the jury's discretion. That year, the United States Supreme Court, in \textit{Furman v. Georgia},\textsuperscript{127} declared that state death-penalty laws reposing unfettered discretion in the sentencer resulted in arbitrary imposition of the death penalty in violation of the Eighth and Fourteenth Amendments. One year later, in \textit{People v. Fitzpatrick},\textsuperscript{128} the New York Court of Appeals struck down New York's capital punishment law as violative of the principles set forth in \textit{Furman}.

New York's legislature then adopted the view, expressed by the Court of Appeals in \textit{Fitzpatrick} and shared by a minority of other states,\textsuperscript{129} that the lesson of \textit{Furman} was that only a mandatory death sentence could satisfy the guided discretion requirements of the federal Constitution.\textsuperscript{130} In 1974, the New York legislature enacted a new death-penalty law which restored the mandatory imposition of death for virtually the same types of murder as did the previous statute.\textsuperscript{131}

\begin{itemize}
  \item \textsuperscript{124} Act of May 3, 1963, ch. 994, secs. 2, 3, §§ 1045-a, 1250, 1963 N.Y. Laws 3018, 3018-19. Once the defendant had been convicted of a capital crime, a separate penalty-stage trial procedure was authorized to enable the jury to consider the possible sentencing alternatives of life imprisonment and death. \textit{Id.; see Interim Report, supra note 123}, at 15-16.
  \item \textsuperscript{125} Commission Report, \textit{supra} note 110, at 68.
  \item \textsuperscript{126} Act of June 1, 1965, ch. 321, sec. 1, § 1045(4), 1965 N.Y. Laws 1021, 1022.
  \item \textsuperscript{127} 408 U.S. 238 (1972); \textit{see infra} notes 369-71 and accompanying text.
  \item \textsuperscript{130} \textit{Fitzpatrick}, 32 N.Y.2d at 512-13, 300 N.E.2d at 145-46, 346 N.Y.S.2d at 802.
  \item \textsuperscript{131} Act of May 17, 1974, ch. 367, sec. 2, 1974 N.Y. Laws 1209, 1209-10 (amending Penal Law § 60.06); \textit{Id. sec. 5} at 1210 (amending Penal Law § 125.27). Death became the mandatory sentence for the redefined crime of first-degree murder, which was limited to three types of intentional murders: the killing of a police officer engaged in performing official duties, the killing of a correctional employee engaged in performing official duties, and a killing committed by an inmate serving a life term of incarceration. In a background letter explaining the legislative goals of the bill, the principal drafter advised the Governor's counsel that the mandatory death sentence feature was "made necessary" by \textit{Furman}:
\begin{quote}
[T]he surest method to provide New York State with a constitutional death
\end{quote}
\end{itemize}
New York's legislature misjudged the direction of the constitutional jurisprudence, however, and did not anticipate the Supreme Court's rejection in 1976 of mandatory sentencing schemes for failing to allow individualized sentencing. Applying the Supreme Court's rulings in these cases, the New York Court of Appeals invalidated New York's statute soon thereafter. From that time until the enactment of the current statute in 1995, the death penalty was not authorized in New York.

2. Waiver of Jury Trial

Until 1938, New York law did not permit defendants in criminal cases to elect to forego jury trials, as the right was deemed essential for the defendant's protection. That year, the State Constitutional Convention amended the New York State Constitution to allow most criminal defendants to waive a trial by jury. The new provision nonetheless continued the ban in cases in which death was a possible sentence. The Bill of Rights Subcommittee to the Constitutional Convention, which drafted this provision, explained that its determination to withhold the jury waiver right from capital defendants derived from the notion "that the Constitution will still not permit this choice to a defendant in a capital case, and regards such a

penalty was to provide a mandatory death sentence for specific and carefully defined cases. This would establish a legislative determination that these crimes could only be deterred by the death penalty. The alternative was to provide specific and detailed standards for juries to follow in determining whether a death sentence should be imposed. This approach was rejected as one which would not in fact eliminate the capricious, wanton and freakish imposition of the penalty which was the basis for Justices Stewart's and White's opinions in the Furman case. It was felt that detailing mitigating circumstances such as impaired capacity to appreciate wrongfulness of conduct, substantial duress and minor participation, or aggravated circumstances such as prior convictions, commission in a heinous, cruel or depraved manner, would merely give the jury the opportunity to exercise the same broad discretion they now exercise with none of these sentencing criteria set forth in the law.

Letter from Dale M. Volker, Assemblymember, to Michael Whiteman, Counsel to the Governor (May 14, 1974) (on file with author).


135. N.Y. Const. art. I, § 2 ("A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death . . . .").
prohibition against waiver as a measure for the protection of the defendant."\textsuperscript{136}

In September 1967, the Temporary Commission promulgated a Proposed New York Criminal Procedure Law\textsuperscript{137} which, \textit{inter alia}, included a statutory ban on jury trial waivers in cases in which the defendant faced a potential death sentence.\textsuperscript{138} The provision incorporated a procedure by which the court would determine whether or not the indictment charged such a crime.\textsuperscript{139} The proposal was enacted when the Criminal Procedure Law was adopted in 1970.\textsuperscript{140}

The 1970 provision was repealed when the Legislature adopted the mandatory death penalty for first-degree murder in 1974.\textsuperscript{141} At that point, given the 1974 law's mandatory sentence of death upon conviction of first-degree murder, there was no need for a procedure to determine whether the charge was one for which a death sentence could be imposed, and it was abandoned. In a departure from the constitutional language forbidding non-jury trials where "the crime charged may be punishable by death,"\textsuperscript{142} the new provision prohibited jury waivers "where the indictment charges the crime of murder in the first degree."\textsuperscript{143} Although the language of the two provisions


\textsuperscript{138.} \textit{Id.} Proposed Criminal Procedure Law § 165.10(1) provided: "Except where the indictment charges a crime for which a sentence of death may be imposed upon conviction, the defendant . . . may at any time before trial waive a jury trial and consent to a trial without a jury in the superior court in which the indictment is pending." \textit{Id.}

\textsuperscript{139.} Proposed Criminal Procedure Law § 165.10(3) provided that the indictment charged "a crime for which a sentence of death may be imposed" when there was "some possibility" that the elements of capital murder were present. \textit{Id.} It then provided:

\texttt{In determining whether there is some possibility of the existence of the factors specified in this subdivision so as to preclude a waiver of a jury trial, the court must, in addition to examining the indictment, examine the minutes of the grand jury proceeding underlying the indictment and conduct any further inquiry which may be necessary to acquire the information essential to such determination.}

\textit{Id.}

\textsuperscript{140.} Act of May 20, 1970, ch. 996, 1970 N.Y. Laws 3117, 3229 (enacted as N.Y. Crim. Proc. Law § 320.10(3) (McKinney 1993)).

\textsuperscript{141.} \textit{See supra} note 131 and accompanying text; \textit{infra} notes 162-66 and accompanying text.

\textsuperscript{142.} N.Y. Const. art. I, § 2.

\textsuperscript{143.} Act of May 17, 1974, ch. 367, sec. 15, 1974 N.Y. Laws 1209, 1213 (enacted as amended at N.Y. Crim. Proc. Law § 320.10(1) (McKinney 1993)). Section 320.10 was amended to read: "Except where the indictment charges the crime of murder in the first degree, the defendant . . . may at any time before trial waive a jury trial and consent to a trial without a jury . . . ." \textit{Id.} (emphasis omitted).
diverged, in view of the statutory framework, the distinction was without any substantive effect.

3. Availability of Guilty Pleas

Prior to 1881, criminal defendants in New York were not required to enter formal pleas, but merely to state at arraignment upon the indictment whether or not they were demanding a trial.144 In 1881, New York's legislature enacted a new Penal Code and a new Code of Criminal Procedure which made sweeping changes in the state's substantive and procedural criminal law.145 These new laws codified for the first time the types of pleas that could be entered upon an indictment.146

In 1889, the new plea provision was amended, and for the first time in New York the right to enter a plea of guilty was eliminated for crimes punishable by death or life imprisonment.147 The sole reported decision interpreting this provision rejected a claim that the statute barred a plea of guilty to manslaughter, which carried a sentence of a term of years, where the indictment charged murder in the first degree.148

In 1897, the Legislature amended the plea provision once again, this time limiting the ban on pleas to cases in which death was a potential punishment.149 The language that had been added in 1889 was modified to read: "A conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death."150

146. Act of June 1, 1881, ch. 442, 1881 N.Y. Laws 601. The Code of Criminal Procedure section 332 provided:
There are three kinds of pleas to an indictment:
1. A plea of guilty.
2. A plea of not guilty.
3. A plea of a former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of not guilty.
147. Act of June 6, 1889, ch. 384, sec. 1, § 332, 1889 N.Y. Laws 532, 532. Section 332 of the Code of Criminal Procedure was amended to read:
There are three kinds of pleas to an indictment; a plea of (1) guilty, (2) not guilty, (3) a former judgment of conviction or acquittal of the crime charged, which may be pleaded either with or without the plea of not guilty. But no conviction shall be had upon a plea of guilty where the crime charged is or may be punishable by imprisonment in a State prison for the term of life.
Id. (Emphasis added, designating new text).
149. Act of May 14, 1897, ch. 427, sec. 1, § 332, 1897 N.Y. Laws 569, 570.
150. Id.
No legislative history exists to explain the origin of New York's proscription of guilty pleas in potential death-penalty cases in the late nineteenth century. One possible explanation is that the ban on guilty pleas in cases involving potential death sentences, like the prohibition of bench trials in capital cases, was meant to protect the capital defendant from bypassing a jury trial in favor of a course of action tantamount to state-sanctioned suicide. Another possible explanation may be found in the general reluctance of legislators in the late nineteenth century to permit the imposition of a death sentence solely on the basis of the defendant's confession, without judicial scrutiny or some corroborating evidence. States that did permit pleas to crimes carrying sentences of death generally required the production of evidence in court before a sentence of death could be pronounced. This requirement protected against the possibility that human error in the charging decision, or pressures on the defendant to plead guilty, might result in the execution of an innocent.

151. See Interim Report, supra note 123, at 16 ("The spirit and purpose of [section 332] are to outlaw any possibility of a defendant pleading himself into the electric chair."). The experience of New York's neighboring state of New Jersey around the same time may also hold parallels to the origin of New York's policy. In Hallinger v. Davis, 146 U.S. 314 (1892), the Supreme Court rejected a constitutional challenge to a capital murder conviction. The conviction was based upon a guilty plea under a New Jersey statute which permitted a plea of guilty followed by the court's examination of witnesses to determine the degree of murder committed, and, concomitantly, whether a death sentence was appropriate. The Supreme Court noted that similar statutes were in effect in other states, and found no intrusion on the right to either due process of law or trial by jury. Id. at 318.

The following year, New Jersey amended its law, eliminating the right to plead guilty where death was a possible sentence. The new statute provided:

[A]nd in no case shall the plea of guilty be received upon any indictment for murder, and if, upon arraignment, such plea of guilty should be offered it shall be disregarded and a plea of not guilty entered, and a jury, duly impaneled, shall try the case in manner aforesaid; provided, however, that nothing herein contained shall prevent the accused of pleading non vult or nolo contendere to such indictment; the sentence to be imposed, if such plea be accepted, shall be the same as that imposed upon a conviction of murder of the second degree.

Act of Mar. 1, 1893, ch. 36, sec. 1, § 68, 1893 N.J. Gen. Pub. Laws 82, 83. Where the prosecutor did not accept the non vult or nolo contendere plea (and its accompanying second-degree murder non-death sentence), however, the defendant was required to proceed to a jury trial. Id. In State v. Genz, 57 N.J.L. 459, 31 A. 1037 (1895), the New Jersey Supreme Court upheld the constitutionality of this new provision, which had forced the defendant into the jury trial he wished to avoid by attempting to plead guilty at arraignment. Addressing the purpose of the no-guilty-plea policy, the court cited Blackstone's Commentaries as evidence that "[f]rom the earliest times, in these capital cases, judges have manifested a disinclination to proceed to judgment on the mere admission of the prisoner of his guilt." Id. at 462-63, 31 A. at 1038. The policy was founded on the presumption "in favorem vitae," and in order to protect defendants from "a ready and facile road to the gallows." Id. at 462, 31 A. at 1038.

152. See, e.g., People v. Lennox, 67 Cal. 113, 7 P. 260 (1885) (upholding death sentence after guilty plea based on court's having heard testimony of witnesses prior to pronouncing sentence). See generally Annotation, Pleas of Non Vult Contendere or Guilty in Capital Case, 6 A.L.R. 694 (1920).
person. Finally, the desire to protect the defendant from an irrevocable decision also may have been a factor.\textsuperscript{153}

New York's ban on pleas in cases involving potential death sentences continued unchanged well into the next century.\textsuperscript{154} With the profound revisions to New York's capital punishment scheme in 1963, which created an alternative sentence of life imprisonment for all capital crimes,\textsuperscript{155} however, the Legislature lifted the blanket ban on guilty pleas in cases involving a possible death sentence, creating a statutory avenue for negotiated guilty pleas in potential capital cases. The operative provisions permitted a defendant, with the consent of both the court and the prosecutor, to plead guilty where the promised sentence was incarceration rather than death.\textsuperscript{156} Conforming changes were made in 1965\textsuperscript{157} and 1967.\textsuperscript{158}

The Criminal Procedure Law proposed by the Temporary Commission in 1967 and adopted by the Legislature in 1970 included a further amendment to the capital-plea provisions designed to expand the plea opportunities for defendants charged with murder. In recognition that guilty pleas were then authorized for any offense, but available as of right only where no death penalty was possible, and that only a small class of murders remained death eligible,\textsuperscript{159} the new

\begin{footnotes}
\footnotetext{153. Cf. Mounts v. Commonwealth, 89 Ky. 274, 12 S.W. 311 (1889) (affirming conviction on plea of guilty despite defendant's effort to withdraw plea after sentencing jury heard evidence and fixed punishment at death).}
\footnotetext{154. See, e.g., People v. La Barbera, 274 N.Y. 339, 8 N.E.2d 884 (1937); People v. McIntosh, 173 Misc. 2d 727, 731, 662 N.Y.S.2d 214, 217 (Dutchess County Ct. 1997).}
\footnotetext{155. See supra text accompanying notes 122-24.}
\footnotetext{156. Act of May 3, 1963, ch. 994, 1963 N.Y. Laws 3018. Penal Law section 332 was amended to read: "A conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death, except as otherwise provided in sections ten hundred forty-five and twelve hundred fifty of the penal law." \textit{Id.} sec. 5, \S 332, at 3023 (emphasis omitted).
Penal Law section 1045(2) was amended to afford the following plea option: "When the court and the district attorney consent, a defendant indicted for murder in the first degree may plead guilty to murder in the first degree with a sentence of life imprisonment, in which case the court shall sentence him accordingly." \textit{Id.} sec. 1, \S 1045(2), at 3018 (emphasis omitted).
Penal Law section 1250(B) was similarly amended to include the following language allowing for guilty pleas in capital kidnaping cases:

\begin{quote}
When the court and the district attorney consent, a defendant indicted for kidnaping upon whom the death penalty would otherwise be imposed, may plead guilty thereto with a sentence of imprisonment for an indeterminate term the minimum of which shall be not less than twenty years and the maximum of which shall be for his natural life, in which case he shall be sentenced accordingly.
\end{quote}
\textit{Id.} sec. 3, \S 1250(B), at 3020 (emphasis omitted).

157. With the elimination of any potential sentence of death for kidnaping in 1965, the reference to conditional pleas in capital kidnaping cases was eliminated from the Code of Criminal Procedure section 332, and the alternative sentences for the remaining crime of capital murder were death or life imprisonment. Act of June 1, 1965, ch. 321, sec. 6, \S 332, 1965 N.Y. Laws 1021, 1025.


159. Temporary Commission, Proposed New York Criminal Procedure Law, \S
measure required the court, upon a defendant's offer to plead guilty to a murder indictment, to conduct an investigation to determine whether the death penalty was a possible sentence, and thus whether the prosecutor's consent to a plea bargain involving a life sentence was required. This measure referenced and incorporated the procedures established in the Commission's proposal for investigating the availability of jury trial waivers in murder cases.

The next change in New York's capital-plea provisions occurred as part of the state's 1974 post-\textit{Furman} legislative response. This new measure incorporated a complete prohibition of guilty pleas to the crime of first-degree murder, since the sole available sentence upon conviction was now death. The supporting memorandum of Assemblymember Dale Volker, the legislative sponsor, said merely that the amendments to the Criminal Procedure Law were to "insure that defendants charged with murder in the first degree may not plead guilty to such crimes, nor may they waive jury trial in such cases."

\begin{enumerate}
\item[115.10, Staff Comment (1967); see \textit{supra} text accompanying note 126.]
\item[160. Temporary Commission, Proposed New York Criminal Procedure Law, § 115.10, Staff Comment (1967). Section 115.10(3) provided:]
\begin{quote}
When a defendant desires to enter a plea of guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law, the court must determine, in the manner provided in subdivision three of section 165.10 of this chapter, whether a possibility exists that the defendant, following a verdict of guilty of murder after trial, could ultimately be sentenced to death pursuant to the provisions of section 125.30 and 125.35 of the penal law. If the court finds that such a possibility does not exist, the defendant may as a matter of right enter a plea of guilty to the indictment. If the court finds that such a possibility does exist, the defendant may enter a plea of guilty to the indictment only with both the permission of the court and the consent of the people.
\end{quote}
\item[161. See \textit{supra} note 139 and accompanying text.]
\item[162. See \textit{supra} note 131 and accompanying text.]
\item[163. The 1974 amendment added the following mandatory sentencing provision to Penal Law section 60.06: "When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death." Act of May 17, 1974, ch. 367, sec. 2, § 60.06, 1974 N.Y. Laws 1209, 1209. It also amended Criminal Procedure Law section 220.10(6)(c) by adding the following language restricting guilty pleas: "A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law." \textit{Id.} sec. 10, § 220.10(6)(c).
\item[164. The sponsor of the 1974 legislation was Dale Volker, then a member of the Assembly, who was later to serve as the Senate sponsor of New York's post-\textit{Gregg} legislation from 1977 until its enactment in 1995. This fact may explain the 1995 statute's utilization of key provisions of the 1974 law. See \textit{infra} notes 183, 187 and accompanying text. \textit{But see infra} notes 166, 190 and accompanying text.]
\item[165. Memorandum of Assemblyman Dale M. Volker, A. 11474A, 1974 N.Y. Legis.]
\end{enumerate}
In a letter to the Governor's counsel, however, Volker explained that the bill was designed to prevent defendants from entering guilty pleas to first-degree murder:

The purpose is to insure that a jury has heard the case and determined guilt before capital punishment can be imposed. The provision gives additional specific protection to the defendant beyond article 1, §2 of the State Constitution which states that a jury trial may be waived by the defendant in all criminal cases except those in which the crime charged may be punishable by death. It was also felt that allowing a defendant to plead guilty to a capital offense with the understanding that he could receive a life sentence only upon a plea of guilty, would run afoul of U.S. v. Jackson, 390 U.S. 570...\(^{166}\)

This language supports the premise that protection against state-sponsored suicide was a traditional goal of both New York's proscription of guilty pleas and its requirement of jury trials in potential capital cases, and one that the drafters of the 1974 legislation sought to preserve. It also suggests that the Legislature's focus in 1974 was to reestablish the death penalty in New York in conformity with the perceived requirements of Jackson, without endeavoring to promote plea bargaining in murder cases.

**B. The Current New York Death-Penalty Statute**

From 1977 through 1994, New York was without a death-penalty statute. In each of those eighteen years the Legislature passed capital punishment legislation only to have it vetoed by the Governor.\(^{167}\) Although Governors Hugh Carey and Mario Cuomo proposed alternative legislation every year providing for life imprisonment without parole, this legislation was never passed by both houses of the Legislature.\(^{168}\) Finally, with the election of George Pataki as
Governor in 1995, New York once again enacted a capital-punishment law,169 redefining murder in the first degree,170 for which the potential punishments of either death or life without parole are both available.


New York's new statute gives the district attorney the exclusive and unreviewable discretion to decide whether or not to seek the death penalty in any case of first-degree murder.171 The prosecutor has 120 days after arraignment on an indictment charging first-degree murder to give the defendant notice of the intention to seek the death penalty, with timely notice being a precondition of the defendant's eligibility to receive a death sentence.172 Notice may be withdrawn at any time, but once retracted, may not be refiled.173

170. N.Y. Penal Law § 125.27 (McKinney Supp. 2001). Essential elements of the crime include that the defendant be over eighteen years old, act with intent to kill, kill the person intended or another person, and that one of twelve statutorily-defined aggravating circumstances be present. Id.
172. New York Criminal Procedure Law section 250.40(2) provides:
In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant’s arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice. Id. § 250.40(2).
173. Id. § 250.40(4).
176. The aggravating factors to be weighed at the sentencing proceeding are entirely statutory and comprise the twelve aggravating elements of the crime of first-degree murder under Penal Law section 125.27. N.Y. Crim. Proc. Law § 400.27(3) (McKinney Supp. 2001).
177. Subdivision 9 of section 400.27 contains a list of five statutory mitigating factors, N.Y. Crim. Proc. Law § 400.27(9)(a)-(e) (McKinney Supp. 2001), and also adds a catchall provision allowing proof of "any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime." Id. § 400.27(9)(f). This provision is slightly more expansive than the mitigation requirement which the Supreme Court found mandated by the Eighth Amendment in Lockett v. Ohio, 438 U.S. 586, 604 (1978) (requiring "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").
sentencing decision. A bifurcated process reminiscent of the 1963 law is established, separating the jury's determination as to guilt or innocence from its sentencing decision. The narrowing function required to eliminate the arbitrariness condemned in *Furman v. Georgia* is essentially accomplished through the jury's verdict at trial, convicting or acquitting the defendant of the aggravated elements of the murder charge. In the second phase, or sentencing proceeding, the jury engages in the individualized sentencing required by *Woodson v. North Carolina* and *Roberts v. Louisiana* to arrive at its decision.

2. Waiver of Jury Trial

The 1995 legislation effected no change in the 1974 statutory prohibition on bench trials in first-degree murder cases, despite the fact that death is no longer the exclusive, mandatory sentence for first-degree murder. In view of the modifications made to the 1974 statute's absolute prohibition on guilty pleas in first-degree murder

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178. See N.Y. Crim. Proc. Law § 400.27 (McKinney Supp. 2001). Before it may return a sentence of death, the jury must engage in a two-step process. It must first determine unanimously, and beyond a reasonable doubt, that aggravating factors substantially outweigh mitigating factors, and second, it must also decide unanimously that the death penalty should be imposed. *Id.* § 400.27(11).

179. 408 U.S. 238 (1972).


182. The judge generally has no power to override the jury's determination. Where the court holds a hearing and determines that the defendant is mentally retarded, however, the court may set aside a death sentence and impose a sentence of either life without parole, or an indeterminate term of incarceration with a minimum of twenty to twenty-five years and a maximum of life in prison. N.Y. Crim. Proc. Law § 400.27(12)(c), (e) (McKinney Supp. 2001). In the event that the jury is unable to reach unanimous agreement on either a sentence of life without parole or a sentence of death, the court must impose an indeterminate sentence of incarceration with a minimum term of twenty to twenty-five years and a maximum term of life in prison. See N.Y. Crim. Proc. Law § 400.27(10) (McKinney Supp. 2001).

183. See N.Y. Crim. Proc. Law § 320.10(1) (McKinney Supp. 2001); *supra* note 143. *People v. Elliot*, 173 Misc. 2d 795, 662 N.Y.S.2d 701 (Sup. Ct. Kings County 1997), addressed the inconsistency thus created by having the statute, but not the Constitution, ban bench trials in non-capital first-degree murder cases. There the court noted that through its utilization of the notice-of-intent provision of Criminal Procedure Law section 250.40, the 1995 statute contemplates a class of non-capital first-degree murder cases that clearly did not exist at the time the 1974 mandatory death sentence provisions were enacted for first-degree murder. Acknowledging that Article I, section 2 of the Constitution gives defendants the right to waive a jury in all cases, except where a death sentence is possible, and recognizing that the purpose of the constitutional provision is to protect the defendant from imposition of the ultimate punishment by a single governmental official, the court held that once death has been removed from the case pursuant to section 250.40, there is no logical or constitutional reason not to allow the defendant to opt for a non-jury trial. See *also* Peter Preiser, Supplementary Practice Commentaries, N.Y. Crim. Proc. Law § 320.10, at 496 (McKinney Supp. 2001).
cases discussed below, the failure to amend the parallel jury waiver provision must be deemed inadvertent.\textsuperscript{184}

3. Availability of Guilty Pleas

The 1995 law places unique restrictions on the ability of the defendant to plead guilty. The blanket prohibition against guilty pleas to the crime of first-degree murder, enacted in 1974 as part of the mandatory death-penalty scheme New York passed in response to \textit{Furman}, was re-instated, but with a proviso reminiscent of the 1963 law. Under the terms of these new provisions, a defendant charged with murder in the first degree cannot enter a plea of guilty to the entire indictment as of right,\textsuperscript{185} and may plead guilty to a charge of murder in the first degree only with the permission of the court and the consent of the prosecution, and only when the agreed sentence is a term of imprisonment.\textsuperscript{186} The requirement that the plea be entered with the permission of the court and the consent of the people pertains despite the fact that death would not be a possible sentence in the case at the time of the plea entry.\textsuperscript{187}

\textsuperscript{184} See \textit{supra} note 163 and accompanying text; \textit{infra} text accompanying notes 185-87. The court in \textit{People v. Elliott} found that the Legislature’s failure to amend section 320.10(1) to conform to the new statutory scheme was “inadvertent.” \textit{Elliott}, 173 Misc. 2d at 799, 662 N.Y.S.2d at 704.

\textsuperscript{185} Cf. \textit{N.Y. Crim. Proc. Law} §§ 220.10(2) & (5), 220.60(1) (McKinney Supp. 2001) (making this right available to all other criminal defendants).

\textsuperscript{186} Act of Mar. 7, 1995, ch. 1, sec. 10, 1995 N.Y. Laws 1, 4 (amending New York Criminal Procedure law section 220.10(5)(e), dealing with a plea of guilty to entire indictment); \textit{id.} sec. 11 (amending New York Criminal Procedure Law section 220.30(3)(b)(vii), dealing with a plea of guilty to part of indictment). Those sections provide:

\begin{quote}
A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. \textit{Id.} sec. 10 (emphasis omitted).
\end{quote}

\textsuperscript{187} By retaining the language of the 1974 law prohibiting a guilty plea “to the crime of murder in the first degree.” \textit{id.}, the 1995 statute’s plea provisions created a problem analogous to its bench trial proscription. \textit{See supra} note 183. In requiring prosecutorial consent to the defendant’s entry of a guilty plea to non-capital first-degree murder, the 1995 statute re-instituted an exception to New York’s century-old policy that a defendant charged with any non-capital crime could plead guilty to the entire indictment as of right. The right to plead guilty where death was not a possible sentence had been available in New York consistently since 1897, with the sole exception of the brief period from 1963 to 1970, when the consent of the court and prosecutor were preconditions to guilty pleas in first-degree murder cases, notwithstanding the fact that the potential sentence was life imprisonment. \textit{See supra} notes 149-66 and accompanying text. In 1970, as previously noted, the Legislature adopted the Temporary Commission’s recommendation. \textit{See supra} notes 159-60 and accompanying text. This recommendation was designed to afford greater opportunities for murder case defendants to plead guilty. It does so by allowing
The 1995 statute itself generated minimal legislative history. Owing perhaps to New York's eighteen-year legislative debate on the relative merits of capital punishment and life without parole, only a single day was devoted to the debate of the measure in the Legislature, and only three brief memoranda were generated in support of the bill. In none of these sources, however, is there any evidence that *United States v. Jackson* was ever considered by the drafters.

The new statute thus continues New York's century-old proscription of guilty pleas where a death sentence is possible, while permitting them where death is not a possible sentence and the permission of the court and consent of the prosecutor are obtained. By utilizing the language of the 1974 mandatory death-penalty law, however, the current provision departs from its 1970 precursor, foreclosing a guilty plea in a non-capital first-degree murder case as of right and requiring prosecutorial consent in every instance. Although the new law's reliance on the parallel provision of the 1974 statute's similarly restrictive jury trial requirement has met with judicial opposition, the guilty plea provisions requiring prosecutorial consent, even where the possibility of death has been removed from the case, do not lend themselves to similar judicial repeal, given the express requirement of prosecutorial consent. In addition, the determination of death eligibility in each case, which, under the 1970 law, lay with the court and could trigger the right of the defendant to plead guilty, now rests exclusively with the prosecutor.

defendants, without any prosecutorial involvement, to enter guilty pleas as of right upon the court's determination that the case is not potentially capital. See supra note 160 (discussing New York Criminal Procedure Law sections 220.10(3) and 320.10(3), in effect between 1971 and 1974). The 1995 law reverts to the more restrictive prosecutorial consent requirements of 1963, and extends them to bar guilty pleas as of right, even where death is eliminated from the case by operation of law due to a prosecutor's failure to file a timely notice of intent pursuant to New York Criminal Procedure Law section 250.40, and even where the prosecutor never entertains the possibility of seeking a death sentence. See Preiser, supra note 183, § 320.10, at 193-94.

188. See N.Y.S. Assembly 1995 Codes Committee Bill Memorandum, A. 4843, S. 2850 (Mar. 6, 1995); Memorandum of New York State Executive Department, 1995 N.Y. Laws 1777 (Mar. 7, 1995); New York State Senate Memorandum in Support (Revised), S. 2649; see also Record of Proceedings, New York State Assembly, Bill No. 4843 (Mar. 6, 1995); New York State Senate Death Penalty Debate, Bill No. 2850 (Mar. 6, 1995).

189. See supra note 183.

190. The failure to include even a mention of *Jackson* is surprising, given its consideration by the same legislative sponsor during the drafting of New York's 1974 law. See supra notes 164-66 and accompanying text. It is unclear whether this omission was inadvertent or reflected a belief by the drafters of the 1995 law that the Supreme Court's post-*Jackson* decisions on plea bargaining had eliminated the concerns which the Court had expressed in *Jackson*, see supra Part II.D, and with which the Assembly had concerned itself in 1974. See *Zimring*, supra note 167; supra text accompanying note 167.

191. See supra note 183.

192. See supra notes 139, 160 and accompanying text.

193. See supra notes 171-72 and accompanying text.
The new framework revives the concept utilized in New York's 1963 statute, enacted prior to *Jackson*, of permitting guilty pleas only on consent of the court and prosecutor and only with a maximum sentence of life imprisonment. A product of New York's cycle of choosing and then rejecting mandatory death sentences, the 1995 law also incorporates the state's protective policies prohibiting defendants from unilaterally resolving their cases by choosing a death sentence, as well as from receiving a death sentence imposed by a single judge. In view of New York's constitutional prohibition of bench trials in capital cases, New York's 1995 death-penalty law thus permits a defendant to be sentenced to death only after a trial by jury.

Although the statute itself does not clearly reveal the purposes behind this limitation, the constraint apparently serves two separate and legitimate goals. First, the statute seeks to insure that death sentences will be imposed only upon a jury's determination to do so. Second, the statute incorporates New York's century-old protective policy of preventing defendants from condemning themselves to death, by prohibiting guilty pleas where death is a potential sentence.

C. Early Responses to the Jackson Problem Created By the Current Statute

In 1998, in *Matter of Hynes v. Tomei*, the New York Court of Appeals held the new plea provisions to be violative of the Fifth and Sixth Amendments, relying principally on the Supreme Court's decision in *United States v. Jackson*. In doing so, the Court reversed declaratory judgments of two intermediate appellate courts that had found the sections to be compliant with *Jackson* and its progeny, resolving a heated controversy among the lower courts.

In rejecting the defendant's *Jackson* argument, the Appellate Division, Second Department, in *Matter of Hynes v. Tomei* had
distinguished the Federal Kidnaping Act from New York’s death-penalty statute based upon the federal law’s provision of a unitary trial of guilt and punishment. This provision allowed the defendant to unilaterally avoid the death penalty, in contrast to New York’s bifurcated trial and sentencing proceedings. Under the bifurcated process, the court reasoned, the defendant could insist on a jury trial at the guilt phase, and agree to a sentence after exercising the rights to maintain innocence and have a jury determine guilt. The Appellate Division also relied upon the Supreme Court’s post-Jackson decision in *Brady v. United States* 201 which upheld a guilty plea under the Federal Kidnaping Act in the face of a Jackson challenge.

The Appellate Division, Fourth Department, in *Matter of Relin v. Connell*, 202 distinguished Jackson on the ground that the New York statute required the defendant to obtain the permission of the court and consent of the prosecutor before pleading guilty, while the Federal Kidnaping Act did not require the prosecutor’s consent. According to the court, which also relied upon *Brady* and *Corbitt v. New Jersey* 203 for its holding, this difference prevented the New York first-degree murder defendant from unilaterally pleading guilty, thereby eliminating any potential for coercion occasioned by a choice between proceeding to jury trial and risking death, on the one hand, and pleading guilty and avoiding death, on the other. 204

D. *The New York Court of Appeals’ Decision in Matter of Hynes v. Tomei*

*Hynes* and *Connell* were consolidated for appeal by the New York Court of Appeals which, reversing them both, held that the New York provisions shared the same constitutional defect as the federal kidnaping and robbery acts: two maximum penalties existed for the crime at issue, and “by statutory mandate, the death penalty [hung] over only those who exercise[d] their constitutional rights to maintain innocence and demand a jury trial.” 205 Rejecting the reasoning of the Appellate Division decisions, the Court held that bifurcation does not eliminate the “chilling effect” on a defendant’s exercise of these constitutional rights, which effect the Court found to have been created by the statutory framework itself. The Court stated: “Capital defendants under the New York statute who are awaiting trial and are

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205. *Hynes*, 92 N.Y.2d at 626, 706 N.E.2d at 1207, 684 N.Y.S.2d at 183. The Court found that only New York, among the thirty-nine death-penalty jurisdictions, provides for two different maximum punishments, one of which is death. *Id.* at 620 n.1, 706 N.E.2d at 1203 n.1, 684 N.Y.S.2d at 179 n.1.
offered a plea are still faced with the choice Jackson declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death.\textsuperscript{206} Furthermore, the Court observed, even after exercising the right to trial at the guilt phase, a defendant can never be assured that a prosecutor will agree to a plea bargain and forego a death sentence once a jury has determined guilt.\textsuperscript{207}

Examining the post-Jackson decision of the Supreme Court in Brady, the Court explained that Jackson did not establish a new test for the validity of guilty pleas, but rather prohibited the unnecessary burdening of a defendant’s constitutional rights to remain silent and demand a jury trial.\textsuperscript{208} Referring to Brady, Alford,\textsuperscript{209} and Parker,\textsuperscript{210} the Court noted the Supreme Court's holding that a guilty plea that is in all other respects voluntary will not be invalidated merely because it was entered pursuant to a Jackson-violative statute, even if it was induced by a fear of the death penalty.\textsuperscript{211} The Court cited the Supreme Court's comment in Jackson that its ruling "hardly implies that every defendant who enters a guilty plea... under the Act does so involuntarily,"\textsuperscript{212} and noted that in Brady, the Supreme Court had explained that Jackson neither held that all pleas “encouraged” by the fear of a possible death sentence were “involuntary,” nor that such “encouraged” pleas are necessarily invalid.\textsuperscript{213} Absent other signs of involuntariness, the Court of Appeals reasoned, Brady’s affirmance of a guilty plea under the Federal Kidnaping Act involved a mere application of the traditional Boykin v. Alabama\textsuperscript{214} standards that guilty pleas be both “voluntary” and “intelligent” to be valid, and established that review of Jackson-violative pleas would be done on a case-by-case basis.\textsuperscript{215}

The Court of Appeals similarly rejected the notion that the interposition of the prosecutor in New York’s plea-bargaining process eliminated the constitutional defect. First of all, the Court noted that judicial approval was required on the pleas under the Federal Kidnapping Act, and in any case, “the statute’s infirmity was not coercion of guilty pleas and jury waivers but needless encouragement

\begin{footnotes}
\item[206] Id. at 626, 706 N.E.2d at 1207, 684 N.Y.S.2d at 183.
\item[207] This situation has occurred twice since the Court of Appeals’ decision. See People v. Bonton, No. 4152/98 (Sup. Ct. Kings County Apr. 6, 2000); People v. Page, No. 9833/96 (Sup. Ct. Kings County Oct. 28, 1998); infra text accompanying notes 286-89.
\item[208] Hynes, 92 N.Y.2d at 623 n.3, 706 N.E.2d at 1205 n.3, 684 N.Y.S.2d at 181 n.3.
\item[211] Hynes, 92 N.Y.2d at 623 n.3, 706 N.E.2d at 1205 n.3, 684 N.Y.S.2d at 181 n.3.
\item[212] United States v. Jackson, 390 U.S. 570, 583 (1968); see Hynes, 92 N.Y.2d at 623, 706 N.E.2d at 1205, 684 N.Y.S.2d at 181.
\item[215] Id. at 242-43.
\end{footnotes}
of them."216 Additionally, the Court noted that in Atkinson the Supreme Court had reversed five death sentences imposed under the North Carolina statute on Jackson grounds, attaching no constitutional significance whatsoever to the fact that the North Carolina law required acceptance of the plea by both the court and the prosecutor.217 The Court of Appeals concluded that the constitutional infirmity lay in New York's statutory scheme itself and the evil was that Fifth and Sixth Amendment rights were impermissibly burdened by the possibility of a death sentence, resulting in the needless encouragement of pleas.218

Considering the appropriate remedy for this constitutional defect, the Court of Appeals declined the defendants' invitation to invalidate the entire statute, citing its severability provision.219 While acknowledging that the Supreme Court had stricken only the death-penalty provisions of the Federal Kidnaping Act at issue in Jackson and Pope v. United States,220 the Court similarly rejected the defendants' request to strike the death-sentence provisions of the New York statute.221 The Court found a significant difference in the underlying purposes of the two legislative measures, noting that Congress had appended the death penalty to the federal measure as an afterthought, while New York lawmakers were motivated principally by a desire to restore capital punishment in their state. The Court of Appeals thus viewed the excising of the death-penalty portions of the act as tantamount to eviscerating "the very purpose of the Legislature and Governor in enacting the statute."222

The Court further declared it unnecessary to strike the statute's capital-punishment provisions in order to satisfy Jackson's mandate, as two alternative avenues remained for compliance with Jackson. Either defendants who plead guilty to first-degree murder could be made eligible for a death sentence, or guilty pleas to first-degree murder could be entirely prohibited whenever death is a possible

216. Hynes, 92 N.Y.2d at 623, 706 N.E.2d at 1205, 684 N.Y.S.2d at 181 (citation omitted) (emphasis added).
217. Id. at 624, 706 N.E.2d at 1205, 684 N.Y.S.2d at 181.
218. Id. at 623, 626, 706 N.E.2d at 1205, 1207, 684 N.Y.S.2d at 181, 183.
219. Id. at 628, 706 N.E.2d at 1208, 684 N.Y.S.2d at 184 (citing L. 1995, ch. 1, § 37).
221. The same remedy was employed in the North Carolina cases discussed earlier, see supra notes 76-77 and accompanying text, as well as in the more recent state court decisions upon which the Court of Appeals relied in Hynes. See Commonwealth v. Colon-Cruz, 393 Mass. 150, 470 N.E.2d 116 (1984); Spillers v. State, 84 Nev. 23, 436 P.2d 18 (1968); State v. Johnson, 134 N.H. 570, 595 A.2d 498 (1991); State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972), cert. denied sub nom. New Jersey v. Presha, 408 U.S. 942 (1972); State v. Frampton, 95 Wash. 2d 469, 627 P.2d 922 (1981). Although the Hynes Court characterized these state cases as having invalidated "capital plea provisions," Hynes, 92 N.Y.2d at 626-27, 706 N.E.2d at 1207, 684 N.Y.S.2d at 183, each in fact employed the Jackson Court's remedy of striking the death-penalty provisions, leaving the plea provisions intact.
sentence in the case. As the New York statutory scheme established that only a jury could impose a death sentence, yet afforded no avenue for impaneling a jury to determine sentence upon a defendant's guilty plea, the Court chose the latter course. It declared that "excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by Jackson, since without those provisions there is only one maximum penalty for first degree murder." The Court summarized its holding by stating:

Thus, while a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending, or to first degree murder in the absence of a notice of intent, remains unaffected.

While predicting that pleas in first-degree murder cases would now be more difficult to obtain, the Hynes Court did not further define when a notice of intent would be deemed to be "pending."

While the Court felt itself bound by Jackson, it also observed that the case had not received the Supreme Court's attention for some twenty years and, the Court acknowledged, might be decided differently today given the changes in the Supreme Court's attitudes toward plea bargaining and the death penalty. Despite the clear opportunity that Hynes presented for the Supreme Court's use of New York's unique statute to announce its current view of Jackson, the Supreme Court denied a petition for writ of certiorari in the case.

E. Early New York Trial-Court Responses to Matter of Hynes v. Tomei

Before the New York Court of Appeals decided Matter of Hynes v. Tomei, plea bargaining in first-degree murder cases in New York was shaped largely by whether the death penalty remained a possibility in the case. Where the prosecution had no intention of seeking a death sentence, plea agreements almost invariably involved parole-eligible sentences because defendants had little incentive to accept life without parole in a plea bargain when that was the maximum sentence they faced after trial. The Court of Appeals' holding had little effect on plea negotiations in those cases.

223. Id. at 628-29, 706 N.E.2d at 1208-09, 684 N.Y.S.2d at 184-85.
224. Id. at 629 n.7, 706 N.E.2d at 1208-09 n.7, 684 N.Y.S.2d at 184-85 n.7 (citing N.Y. Crim. Proc. Law § 400.27 (McKinney 1993)).
225. Id. at 628, 706 N.E.2d at 1208, 684 N.Y.S.2d at 184.
226. Id. at 630, 706 N.E.2d at 1209, 684 N.Y.S.2d at 185.
227. See id. at 629-30, 706 N.E.2d at 1209, 684 N.Y.S.2d at 185; supra note 16 (noting the open questions of what constitutes "pending" under Hynes).
228. Id. at 629, 706 N.E.2d at 1209, 684 N.Y.S.2d at 185.
By contrast, when plea negotiations were conducted while the possibility of a death sentence was still in the case—either because the prosecutor had filed a statutory notice of intent or because the time to do so had not yet expired—a guilty plea carrying a promised sentence of life without parole was a more likely outcome. In those cases, just as defendants bargained to avoid exposure to the death penalty, prosecutors often bargained to foreclose the possibility of parole. In such situations, the presence of a possible death sentence provided a powerful incentive for defendants to agree to plead guilty. At first blush, plea bargaining in those cases seemed to have been dramatically affected by the Court of Appeals’ holding—sometimes to the substantial dismay of both sides.

In Hynes, after striking the two plea-bargaining provisions, the Court wrote that “[u]nder the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending.” A less-heralded, but no less important, consequence of the holding was the elimination of the only statutory requirement that a guilty plea to first-degree murder have the prosecutor’s consent. The elimination of that requirement left only the general New York rule that a prosecutor’s consent was necessary when a plea was offered to less than all pending charges, but not when the defendant’s guilty plea embraced the entire indictment.

In this post-Hynes v. Tomei environment, prosecutors and defendants in capital cases continued their attempts to chart a course to successful plea bargaining for life sentences in lieu of potential capital punishment, whether or not a notice of intent to seek the death penalty had as yet been filed in the case. Where the prosecutors had not yet announced a decision on death eligibility, and defendants would offer the court a guilty plea to the entire indictment without the prosecutors’ knowledge or consent, the proffers would be rejected. Where a notice of intent had been filed, and prosecutors and defendants would join forces in seeking court approval of their plea bargain, the parties generally would receive court approval of the negotiated disposition of a life-without-parole sentence.

231. Hynes, 92 N.Y.2d at 629, 706 N.E.2d at 1208, 684 N.Y.S.2d at 184 (striking N. Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii)).
232. Id. at 629, 706 N.E.2d at 1208-09, 684 N.Y.S.2d at 184-85.
233. Both of the statutes that were stricken prohibited guilty pleas to the crime of murder in the first degree, but contained the identical proviso “that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence” is other than death. N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii) (McKinney Supp. 2001); see supra notes 186-87 and accompanying text.
235. See id. § 220.10(2).
1. Defendants' Unilateral Plea Efforts

In the first example of a defendant's unilateral plea-bargaining effort after Hynes, Dutchess County, New York defendant Kendall Francois attempted to use the general rule on pleading guilty as of right to the entire indictment to secure a sentence of life without parole and shield himself from exposure to the death penalty.236 Francois stood indicted, inter alia, on eight counts of first-degree murder. Following his arraignment, his lawyers began negotiating with prosecutors in an attempt to persuade them not to seek the death penalty and to allow the defendant to plead guilty with a promised sentence of life without parole.237 Negotiations had not gone well, however, and on December 21, 1998, one day before the release of the Court of Appeals' decision in Hynes, defense counsel was notified that statutory notice of intent to seek the death penalty would be filed in early January, well within the 120-day time limit.238

On December 23, 1998, however, defense counsel came to court and, citing the Court of Appeals' newly-announced decision, demanded that the defendant's case be advanced so that he could plead guilty to the entire indictment. Counsel offered a three-pronged argument: (1) after Hynes, the defendant had the right to plead guilty to the entire indictment, including the eight counts of first-degree murder, without the prosecutor's consent; (2) the defendant's proposed guilty pleas to the first-degree murder counts could be accepted consistent with the Court of Appeals' holding because, having not yet been filed, the promised statutory notice of intent was not then "pending;" and (3) because a death sentence could not be imposed in the absence of a notice of intent,239 the maximum sentence the defendant faced on each count of murder in the first degree was life without parole.240

The trial court rejected both the argument and the guilty plea. The court reasoned that to do otherwise would require holding that the Court of Appeals had implicitly rendered meaningless the statute giving the prosecution 120 days within which to file and serve a notice of intent to seek the death penalty.241 Moreover, finding that the meaning of the word "pending" included "awaiting an occurrence," the court held that, when the plea was proffered, a notice of intent was indeed "pending" even though none had yet been filed.242 The court concluded that a defendant could plead guilty to first-degree murder only if the prosecutor (1) had failed to file a notice of intent within 120

237. Id.
241. Id.
242. Id. (quoting Black's Law Dictionary (6th ed. 1990)).
days of the defendant’s arraignment on the indictment, (2) had affirmatively announced that the death penalty would not be sought, or (3) had withdrawn a previously-filed notice of intent.243

Francois then brought a proceeding in the Appellate Division of the State Supreme Court under article 78 of New York’s Civil Practice Law and Rules seeking a judgment in the nature of mandamus or prohibition compelling the trial court to accept his guilty plea. The Appellate Division, Second Department, denied the petition and dismissed the proceeding without reaching the merits, finding that the petitioner lacked any clear legal right to have the trial court accept his plea.244

In a second such case, People v. Schroedel,245 the defendant’s motion to plead guilty to the entire indictment under the general plea provisions without prosecutorial consent, and before the expiration of the 120-day period for filing a notice of intent, met a similar fate. The trial judge denied the motion, finding that the notice-of-intent provision246 effectively stayed the defendant’s rights under the general plea provisions, preventing the defendant from pleading guilty until the prosecutor either declined to file a notice of intent, consented to the entry of the plea, or was time-barred from seeking the death penalty in the case.247

Schroedel also sought to compel the trial court to accept the plea by seeking relief in the nature of mandamus. The Appellate Division, Third Department, rejected the defendant’s interpretation of the “pendency” of a death notice under Hynes, holding that that concept should include both the period after the filing of a notice and the 120-day window within which the People have the right to file it.248 Otherwise, the court reasoned, the purpose underlying the death-penalty statute would be defeated, as the defendant, not the prosecutor, would determine death eligibility in a particular case.249 Noting the dearth of authority on the question, the appellate court followed the Second Department’s holding in Matter of Francois v. Dolan250 and found the claim barred due to the absence of a legal right to have the plea accepted.251

The New York Court of Appeals, however, soon eliminated the uncertainty. Upon reviewing Francois’ petition for mandamus or

243. Id.
245. 182 Misc. 2d 154, 697 N.Y.S.2d 904 (Sullivan County Ct. 1999).
247. Schroedel, 182 Misc. 2d at 157, 697 N.Y.S.2d at 906.
249. Id.
250. 263 A.D.2d 483, 693 N.Y.S.2d 198 (2d Dep’t 1999).
prohibition, the Court of Appeals affirmed the intermediate appellate court and rejected the defendant's argument that the general guilty-plea provisions created an unqualified right to plead guilty in first-degree murder cases. In *Francois*, the court held that until the completion of the statutorily provided deliberative process, either by the filing of a death penalty notice, announcement of an intention not to seek that sanction, or by the expiration of the statutory period to make that decision, a capital defendant does not have an unqualified right to plead guilty to the entire indictment.

The court went on to hold that in any conflict between the New York Criminal Procedure Law's general plea provisions of sections 220.10(2) and 220.60(2), on the one hand, and the death-penalty notice provision of section 250.40, on the other, the latter provision would prevail. Examining the legislative history of the 1995 death-penalty legislation, the unanimous court characterized the "prosecutorial authority [to exercise the right to seek the death penalty] and the statutory time frame for its exercise" as "central feature[s] of the bill" which would be upended if a defendant could unilaterally eliminate the possibility of a death sentence from the case. The court reiterated that its ruling in *Hynes* prohibited capital defendants from pleading guilty as of right to avoid a sentence of death, suggesting that the defendant's application was clearly barred under the principles of *Jackson* and *Hynes*. Decrying the "inevitabl[e]" and "unseemly race to the courthouse" which would ensue if defendants could unilaterally decapitalize first-degree murder cases by proffering guilty pleas, the court dismissed the petition on the merits, without addressing the procedural hurdles which the lower courts had viewed as bars to relief.

2. Prosecutors' and Defendants' Joint Plea Efforts

Most of the litigation spawned by *Hynes* has grown out of plea negotiations conducted after a statutory notice of intent has been filed. Prosecutors quickly came to believe that withdrawal of the notice prior to the guilty plea undermined much of their plea-bargaining leverage. This was so, they reasoned, because the statutory provision that "[o]nce withdrawn the notice of intent to seek the death penalty may not be refiled" suggested that withdrawal of the notice took the death penalty out of the case forever.

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253. *Id.*
254. *Id.*
255. *Id.* at 38, 731 N.E.2d at 617, 709 N.Y.S.2d at 901.
256. *Id.* at 36-38, 731 N.E.2d at 615-16, 709 N.Y.S.2d at 899-900.
257. *Id.* at 39, 731 N.E.2d at 617, 709 N.Y.S.2d at 901.
Prosecutors feared that, as a consequence of withdrawing the notice of intent, defendants who had agreed to plead guilty and accept life without parole to avoid a potential death sentence would suddenly lose all incentive to enter the plea. The open invitation to defendants to renege on plea agreements made prosecutors less willing to enter them. As a result, when both sides expressed genuine interest in a plea bargain involving life without parole, the parties searched for new ways to give prosecutors meaningful assurances against last-minute renunciations.

In one case, the prosecutor sought such an assurance through a "conditional" withdrawal. In *People v. Van Dyne*, both the prosecution and defense presented applications to the court to permit the defendant to plead guilty and receive a sentence of life without parole. The defendant signed a written plea agreement and colloquy, and acknowledged under oath his guilt of the crime, his waiver of *Boykin* rights and his right to appeal, his awareness of the *Hynes* decision, and that he was pleading guilty for four reasons: 1) he was remorseful; 2) he wished to spare his family and the victim's family the ordeal of a trial; 3) he was aware of the strength of the People's case; and 4) he did not wish to face the death penalty.

The prosecutor withdrew his section 250.40 notice but "specifically condition[ed] the withdrawal of the notice of intent to seek the death penalty upon the entry of a plea of guilty [to first-degree murder] and reserve[d] the right to reinstate the notice if the plea is not entered or is withdrawn." The defendant, having previously offered to plead guilty and accept a sentence of life without parole, and having given a full allocution, immediately asked the court to accept his plea. The court did so, holding that "the plea may be accepted based upon the defendant's knowing, intelligent and voluntary waiver of rights and consistent with the recent decision of the Court of Appeals." As the court immediately entered the plea, the viability of the prosecutor's purported conditional withdrawal of the death eligibility notice was never tested.

In *People v. Edwards*, prior to the Court of Appeals' decision in *Hynes*, the defendant pleaded guilty to first-degree murder in exchange for a sentence of twenty-five years to life in prison. In *Edwards*, the trial court, citing *Jackson*, refused to accept a plea to first-degree murder where the notice of intent to seek the death

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259. 179 Misc. 2d 467, 685 N.Y.S.2d 591 (Monroe County Ct. 1999).
262. *Id.* at 469, 685 N.Y.S.2d at 593.
263. *Id.* at 470, 685 N.Y.S.2d at 594.
penalty was not withdrawn until the time of sentencing. The district attorney then expressly agreed to withdraw the notice of intent at the plea allocution. The defendant offered his plea allocution upon the understanding that the notice would be withdrawn immediately thereafter and would not be refiled, even if the defendant did not adhere to the terms of the plea agreement or if the court did not ultimately accept the plea. After the defendant's plea allocution and waiver of his rights to appeal, but prior to the entry of the plea, the prosecutor withdrew the notice of intent without purporting to reserve the right to refile it. The trial court then, upon considering the plea allocution and the withdrawal of section 250.40 notice, accepted the defendant's guilty plea as intelligent and voluntary and allowed it to be entered.

Once the Court of Appeals issued its decision in *Hynes*, however, the defendant moved to withdraw his guilty plea on the basis of that decision. The trial court denied the motion, finding no violation of *Hynes*, because "when the plea was entered, the notice of intent had been withdrawn with no conditions attached which would allow for reinstatement," and since the "plea [was] entered after the notice of intent was withdrawn, or entered in conjunction with the withdrawal of the notice of intent, [it] remains valid under the precepts of *Matter of Hynes v. Tomei*." By finding that the plea was entered in the absence of a notice of intent, the court found that it was made when only one maximum punishment for the crime was available, whether by plea or by trial, thus satisfying the requirements of *Jackson* and *Hynes*. Finally, the court rejected the defendant's application for relief from his plea by reference to the Supreme Court's refusal to invalidate the otherwise voluntary and intelligent pleas made under *Jackson*-violative statutes in *Alford, Parker, and Brady*, relying on *Alford*’s instruction that "[t]he prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve."

In another case, the court employed the approach used in *Edwards* to reject the prosecution's proposal for a "conditional" withdrawal of the notice of intent, such as that sought in *Van Dyne*. In *People v. Smelefsky*, the court expressed the view that "a 'conditional' withdrawal seemed irreconcilable with the unambiguous statutory

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265. *Id.* at 566, 690 N.Y.S.2d at 405-06.
266. *Id.*, 690 N.Y.S.2d at 406.
267. *Id.* at 566, 690 N.Y.S.2d at 406.
268. *Id.*
269. *Id.* at 567, 690 N.Y.S.2d at 406 (citation omitted).
271. 182 Misc. 2d 11, 695 N.Y.S.2d 689 (Sup. Ct. Queens County 1999).
provision that '[o]nce withdrawn [a] notice of intent to seek the death penalty may not be refilled.' 272 Instead, the court followed the procedure used in Edwards, allowing the District Attorney to withhold consent to the plea and withdrawal of the notice of intent until after the defendant had proffered the plea and had undergone a full allocution. 273 Following the defendant's allocution, the prosecutor consented to the disposition, withdrew the notice of intent, and joined the defendant's application to have the court accept the plea. The court immediately accepted and entered the plea. The court reasoned that the sequence was not inconsistent with the holding of Hynes, as no notice of intent was pending when the guilty plea was accepted and entered, and "it is the acceptance by the court, and not the proffer by the defendant, that makes a guilty plea cognizable." 274 And, the court held, so long as the notice of intent was withdrawn before the plea was accepted and entered, neither Hynes nor its constitutional underpinnings were violated. 275 Moreover, the court in Smelefsky opined that the procedure used would facilitate plea bargaining in capital cases because it "narrowed the window of opportunity for the defendant to renounce the bargain, [and therefore] fortified the prosecutor's resolve to go forward with it." 276

Other cases followed a similar approach. 277 One of them, People v. Irwin, 278 slightly varied the Edwards-Smelefsky procedure in an effort to afford the prosecution even greater assurance that it would not lose control of the case during the plea proceedings. There the defendant made a sworn statement on the record admitting the crime prior to the plea proceeding. The district attorney then withdrew the notice of intent, and the defendant repeated her inculpatory statement in her plea allocution, offering her plea in exchange for a sentence of life without parole, and on the understanding that her sworn allocution could be used against her at trial if the plea did not go forward. 279 The People moved to have the plea accepted by the court. Concluding that this procedure would provide additional protection for the |

272. Id. at 14, 695 N.Y.S.2d at 691 (alterations in original) (quoting N.Y. Crim. Proc. Law § 250.40(4) (McKinney 1993)).
273. Although the prosecutorial-consent requirement of CPL section 220.10(5)(e) had by then been declared unconstitutional, the District Attorney's consent to the plea was required because the defendant was pleading guilty to less than the entire indictment. See N.Y. Crim. Proc. Law § 220.10(4)(a) (McKinney 1993).
274. Smelefsky, 182 Misc. 2d at 19, 695 N.Y.S.2d at 694.
275. Id., 695 N.Y.S.2d at 694-95.
276. Id., 695 N.Y.S.2d at 694.
277. E.g., People v. Francois, No. 122/98 (Dutchess County Ct. June 21, 2000) (following an Edwards-Smelefsky approach in taking defendant's guilty plea to the entire indictment, including eight counts of first-degree murder, subsequent to the Court of Appeals' denial of defendant's petition for a writ of mandamus or prohibition).
278. No. 80-98 (Sullivan County Ct. Sept. 10, 1999).
279. Id.
prosecutor, the court reviewed the factual allocution and all of the rights being waived, determined that the defendant's plea was voluntary and intelligent, and then entered the plea.280

In People v. Hale,281 the case underlying the Hynes decision, the trial court was also faced with a joint application for a guilty plea. In Hale, however, the district attorney was not willing to risk withdrawing his death notice.282 Following the express authorization in both Hynes283 and North Carolina v. Alford,284 while the death notice continued in effect, the parties in Hale negotiated a plea agreement under which the defendant pled guilty to second-degree murder and related charges in exchange for an indeterminate, parole-eligible life sentence.285

In two other Kings County cases, the parties did not reach a meeting of the minds on a life-without-parole sentence until after the defendant had been convicted of first-degree murder by the jury and was awaiting commencement of the sentencing proceeding. In People v. Bonton286 and People v. Page287 trial judges followed identical procedures in accepting the parties' sentencing agreements. In each case, the parties jointly approached the court with an agreed disposition of a life-without-parole sentence while the jury awaited the start of the penalty phase. In each case, the court received the sworn allocution of each defendant accepting the jury's guilt phase verdict, acknowledging his guilt of first-degree murder and the other crimes of which he had been convicted, waiving his right to appeal all pre-trial, trial, and sentencing determinations, and acknowledging the sentence he would be receiving.288 The prosecution then consented to a life-without-parole sentence, subject to the court's approval, and, in

280. Id. The approach used in Irwin certainly makes it easier for the prosecution to secure a trial conviction if a guilty plea is not entered. In the fourteen capital cases tried under the 1995 New York law through August 23, 2000, however, no defendant was acquitted of all first-degree murder charges. See infra app. As of the time of this writing, of the sixteen capital defendants tried, only one was acquitted of all first-degree murder charges, although he was convicted of murder in the second degree. See People v. Webb, No. 5157/99 (Sup. Ct. Kings County Feb. 8, 2001) (jury verdict). Plea bargaining in capital cases tends to focus more on obtaining the desired sentence than on securing a determination of guilt. Although an admission in court may increase the already high likelihood of conviction, it would add relatively little leverage from the prosecutor's viewpoint in terms of obtaining the desired life-without-parole sentence. Under Irwin, a reneging defendant would suffer relatively little practical penalty, and so would still have minimal incentive to accept a sentence of life without parole in a plea bargain, the maximum sentence possible once the death notice has been withdrawn. Irwin, No. 80-98.

282. Id. at 11.
283. See supra note 23.
286. No. 4152/98 (Sup. Ct. Kings County Apr. 6, 2000).
language reminiscent of that used by the district attorney in Van Dyne, sought to preserve its options by claiming that if either the jury's guilty verdict of first-degree murder or the agreed upon sentence, or both, should be vacated, "the filing of the notice pursuant to 250.40 . . . will stand, survive and serve as a renewed notice of our intention to retry the Defendant for the charge of murder in the first degree and or seek the death penalty for the Defendant's present conviction." The defendant agreed to these terms, executed a written waiver of the right to appeal, and the court accepted the proffered disposition. At no point during the procedure did the prosecution withdraw its death notice.

3. Some Problems with the Early Responses to Matter of Hynes v. Tomei

These initial judicial efforts to preserve needed plea bargaining while avoiding the constitutional pitfalls decried in Jackson and Hynes offered seemingly satisfactory resolutions of capital cases to all concerned. The defendants avoided any possibility of execution; the prosecutors obtained certain convictions, most often with attendant life-without-parole sentences and without the drain on resources that capital trials entail; and the trial courts resolved cases without engaging in the time-consuming process of death-qualifying juries and conducting bifurcated trials. Formal compliance was had with Jackson's mandate that only one maximum penalty be available for the crime at the time the guilty plea is entered, so there was no unnecessary burden on defendants' exercise of Fifth and Sixth Amendment rights. While plea bargaining in New York's capital cases could hardly be considered business as usual, it seemed as though Hynes had changed the legal landscape very little.

Nevertheless, none of the post-Hynes solutions ultimately proved to be totally satisfactory. For openers, all of the procedures used in these early post-Hynes cases fell short of providing complete security to either party to the transaction. Defendants had to actually surrender their Fifth Amendment privilege prior to witnessing the prosecutor withdraw the possibility of a death sentence from the case. And district attorneys were forced into a window of uncertainty, however brief, during which they had irrevocably decapitalized the case but could not be completely sure whether or not the court would accept the plea bargain.

More importantly, in none of these early cases was the shadow of death truly removed from the defendant’s decision-making process. In *Van Dyne, Hale, Bonton*, and *Page*, the prosecutors never completely eliminated defendants' eligibility for the death sentence from the case, and retained through the plea negotiation and allocution process at least a claimed ability to reinsert the death penalty into the case should the proceedings not go as intended. In *Edwards, Smelefsky, Francois*, and *Irwin*, the death penalty was not finally eliminated from the case until after the defendant made a full admission of his guilt of a capital-eligible crime in open court, under oath. While the United States Supreme Court had held in *Alford* that the possibility of a death sentence would not, in itself, raise a constitutional bar to plea bargaining,\(^2\) as a practical matter the New York statute was being used to hold the specter of a death sentence over defendants in order to obtain plea agreements involving the maximum possible sentence available once death was removed from the case. Certainly the plea negotiations, plea agreement, and much of the formal plea process in these cases took place while the possibility of a death sentence still remained in the case, i.e., while two maximum penalties existed for the crime of murder in the first degree, one after trial and one after a guilty plea.

Available empirical evidence strongly suggests that in New York (as in other death-penalty jurisdictions) the possibility of the death penalty provides defendants in potentially capital cases with a substantial incentive to enter into plea bargains that result in the imposition of life without parole. Although the passage of New York’s capital punishment law in 1995 signaled an end to the seventeen-year debate over whether the state should adopt a death-penalty law or a life-without-parole law, the most significant real-world impact of the law, as of this writing, has been to increase the incidence of agreements between prosecution and defense that result in life-without-parole sentences. From September 1, 1995, through August 23, 2000, there were 212 cases in which first-degree murder indictments were concluded.\(^3\) In only thirty-six of the cases did the prosecution ever file a notice of intent to seek the death penalty, and in four of those cases the notice of intent was later withdrawn or otherwise became irrelevant to the outcome of the case.\(^4\) Among the thirty-two defendants against whom a notice of intent was filed, and for whom the existence of the notice of intent might have affected the outcome of the case, fourteen defendants (43.8%) eventually agreed to accept a sentence of life without parole, either as part of a plea


\(^3\) See infra app.

\(^4\) *Id.* In three of the cases, the notice of intent was withdrawn prior to case disposition. In one case, the defendant died before case disposition. *Id.*
agreement or in a sentencing agreement after conviction at trial. Among the much larger total of 176 defendants against whom no notice of intent to seek the death penalty was ever filed, on the other hand, only six defendants (3.4%) agreed to plead guilty and accept a sentence of life without parole—and all six of those defendants entered their pleas at a time when the prosecutor could still have filed a death notice, suggesting at least the possibility of a tacit agreement to do so and thereby avoid any risk of the death penalty. If such cases also can be counted as “agreement” cases, then more than three times as many defendants have agreed to accept a sentence of life without parole (twenty defendants) as have received a death sentence (six defendants) under the New York statute. These statistics strongly suggest that—even after Hynes, and especially in light of Francois, which barred defendants in first-degree murder cases from preempting the prosecutor’s decision to seek the death penalty by entering unilateral guilty pleas before the filing of a death notice—plea bargaining in the shadow of death remains a regular practice in New York, just as it has always been in other death-penalty jurisdictions.

F. The Third Department’s Decision in People v. Edwards

Refuting the notion that all parties to capital case plea bargains were content with the resolutions they had secured, Daniel Edwards appealed his plea and sentence of twenty-five years to life, arguing, as he had in the lower court, that this process transgressed his Fifth and Sixth Amendment rights under Jackson and Hynes. The Appellate Division, Third Department, agreed with him.

In People v. Edwards, the Third Department reached the merits of the case, notwithstanding the defendant’s waiver of his right to appeal. The court found that the defendant’s waiver of his right to appeal was neither knowing nor intelligent, due to its entry pursuant to statutory provisions that were later invalidated.

Without mentioning Brady v. United States, Parker v. North Carolina, or North Carolina v. Alford and without referencing the

295. Id.
296. Id.
297. Id.
298. See supra text accompanying notes 252-57.
300. Id. at 756, 712 N.Y.S.2d at 74; cf. Brady v. United States, 397 U.S. 742, 756-57 (1970) (rejecting notion that defendant’s guilty plea was unintelligent due to his failure to anticipate Jackson’s striking of the maximum penalty then in effect).
discussion of those cases in either Matter of Hynes v. Tomei or the trial court's decision below, the Third Department held the plea procedure used in Edwards unconstitutional.

We find this scheme flawed because it overlooks the essence of the Hynes-Jackson infirmity. That constitutional infirmity arises not from the entry of a guilty plea to murder in the first degree while a death notice is pending, but from the requirement placed upon a defendant to choose between pleading guilty to murder in the first degree or opting for trial while a death notice is pending. If a prosecutor who has served a death notice is permitted to delay its withdrawal until after a defendant's plea allocution, then the choice to plead guilty has been made under compulsion of the death notice and a defendant's 5th and 6th Amendment rights have been impermissibly burdened. In our view, the mere proffer of a plea bargain to murder in the first degree while a death notice is pending presents a capital defendant with the same unconstitutional choice faced by the defendants in Matter of Hynes v Tomei and Matter of Relin v Connell, namely, "exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." Thus, we find that it is constitutionally impermissible for prosecutors to negotiate guilty pleas to murder in the first degree while a notice of intent to seek the death penalty is pending.

Because the choice to plead guilty to first-degree murder was made in the shadow of death, the Third Department vacated Edwards' plea, restored the indictment to its pre-plea status, and, without comment, reinstated the notice of intent to seek the death penalty, despite the prosecution's irrevocable withdrawal of the notice at the time of the plea.

After Edwards, there appears to be little, if any, flexibility for even discussing plea bargaining in first-degree murder cases from the

306. Although not before it, the Edwards court also discussed Smelefsky, a case from a different judicial department in which a nearly identical plea procedure was used, and suggested that the Smelefsky procedure was likewise unconstitutional. Edwards, 274 A.D.2d at 757, 712 N.Y.S.2d at 75.
307. Id. (citations omitted).
308. No claim was advanced in Edwards that the defendant's plea had not been intelligent or voluntary. See Brady v. United States, 397 U.S. 742 (1970); North Carolina v. Alford, 400 U.S. 25 (1970).
309. The Edwards court apparently left open the possibility that a defendant faced with a first-degree murder charge and a death notice might agree to plead guilty to second-degree murder to avoid the death penalty. Such a plea to second-degree murder had been explicitly upheld by the Court of Appeals in Hynes, based on the Hynes Court's interpretation of Alford. See Hynes, 92 N.Y.2d at 629-30, 706 N.E.2d at 1209, 684 N.Y.S.2d at 185. The Edwards court therefore lacked the authority to prohibit it; moreover, the issue was not presented in Edwards. At the same time, such
moment a notice of intent to seek the death penalty is filed\textsuperscript{310} until the prosecutor has, through action or inaction, completely eliminated the defendant’s death eligibility from the case for all time.\textsuperscript{311} Thus, in the view of the Third Department, any plea method that permits a prosecutor to forbear withdrawing a death notice until \textit{after} a defendant has proffered a guilty plea allocution to first-degree murder, forces the defendant into an unconstitutional choice and is impermissible under \textit{Hynes}.\textsuperscript{312} \textit{Edwards} would thus appear to invalidate all of the dispositional avenues discussed above, with the possible exception of the avenues that were followed in the sentencing agreement cases such as \textit{Bonton} and \textit{Page}.\textsuperscript{313}

\textsuperscript{310} As noted previously, \textit{see supra} note 16, there remains an open question whether a notice of intent to seek the death penalty is “pending,” under \textit{Hynes}, during the 120-day period within which the prosecutor has the right to file such a notice, but before the prosecutor has elected to do so. \textit{See People v. Mower, 719 N.Y.S.2d 780 (3d Dep’t 2001); People v. Owes, No. 2000-0161 (Monroe County Ct. Sept. 27, 2000); see also infra Part III.G.}

\textsuperscript{311} The sole exception might be a plea to the lesser crime of second-degree murder. \textit{See supra} notes 23, 309.

The Third Department’s decision will likely be viewed as binding on trial courts throughout the state until a contrary ruling is issued by the Appellate Division in another judicial department or by the Court of Appeals. \textit{See Mountain View Coach Lines, Inc. v. Storms, 102 A.D.2d 663, 664-65, 476 N.Y.S.2d 918, 919-20 (2d Dep’t 1984).} In at least one recent case, however, the ban on plea negotiations while a notice of intent is pending, announced in \textit{Edwards} and reaffirmed in \textit{Mower, see infra Part III.G}, appears simply to have been ignored. \textit{In People v. Schrodel, No. 115/99 (Sullivan County Ct. Apr. 5, 2001), the \textit{Irwin} procedure was used to obtain a guilty plea to first-degree murder charges in exchange for a promised sentence of life without parole, based upon plea negotiations that had occurred during the pendency of the notice of intent.}


\textsuperscript{313} \textit{See People v. Bonton, No. 4152/98 (Sup. Ct. Kings County Apr. 6, 2000); People v. Page, No. 9833/96 (Sup. Ct. Kings County Oct. 28, 1998).} It must be noted that in \textit{Bonton} and \textit{Page}, the defendants did not enter into the plea agreements that allowed them to avoid the death penalty until \textit{after} they had already been found guilty by a jury. Thus, arguably, the defendants in \textit{Bonton} and \textit{Page} did not waive their Fifth and Sixth Amendment rights in order to avoid the death penalty; instead, they received a jury trial, and they were incriminated by the jury’s verdict. \textit{See Bonton, No. 4152/98; Page, No. 9833/96.} Nevertheless, given that the defendants in \textit{Bonton} and \textit{Page} clearly \textit{did} give up important rights that were closely related to their Fifth and Sixth Amendment rights—namely, the right to appeal their convictions and, if successful on appeal, the right to have another jury trial at which their Fifth and Sixth Amendment rights would reattach—it seems more likely that the \textit{Edwards} decision would invalidate the procedure used in \textit{Bonton} and \textit{Page}. This conclusion is perhaps bolstered by the fact that the defendants in \textit{Bonton} and \textit{Page} also gave up the right to have a trial-like capital sentencing procedure, \textit{see Bullington v. Missouri, 451 U.S. 430 (1981)}, at which they would have continued to enjoy the Fifth Amendment privilege against compelled self-incrimination, \textit{see Mitchell v. United States, 526 U.S. 314 (1999)}, and at which they also would have had a statutory right to a jury verdict on the appropriateness of the death penalty.
Edwards undoubtedly represents an extreme response to the Jackson-Hynes constitutional infirmity, and a substantial extension of Hynes. The defendant in Edwards, whose plea was not challenged as unintelligent or involuntary, who was not claiming innocence, and who had waived his right to appeal, was given appellate relief from his plea based upon the burdening of his Fifth and Sixth Amendment trial rights, which he never sought to exercise. Although Brady had established that review of Jackson-violative pleas would be done on an individual basis, and thus allowed for the possibility that a particular case would require such relief, the Edwards court did not base its decision on any individual characteristics of the case before it. The court focused, instead, on what it saw as the empty formalism of the New York trial courts' post-Hynes plea-allocation procedures in failing to alleviate the pressure on the defendant of having to make the choice, while the death notice is still pending, between pleading guilty to first-degree murder with an ensuing life-without-parole sentence or opting for trial with the accompanying risk of death. The Edwards court expressly rejected the procedures used in the case before it and barred even a preliminary discussion of a plea to first-degree murder while the "shadow of death" still hangs over the case. And, finally, the decision in Edwards reinstated the death notice, despite the statutory proscription against its being refiled once withdrawn, and notwithstanding the District Attorney's agreement at the time of the plea that the notice would not be refiled, regardless of whether or not the defendant satisfied his obligations under the plea agreement.

What can explain the unexpected result in Edwards? Perhaps it was the combination of several factors that effectively enlarged the avenue created by Brady, for guilty pleas in the shadow of an unconstitutional death penalty, to a grand boulevard down which the Edwards court simply refused to proceed. These factors include: (1) the unique environment created by the New York Court of Appeals' decision in Hynes not to employ the Jackson remedy of striking the death-penalty provisions of the New York statute; (2) the Hynes Court's choice of remedy was not entirely unique. The issue in South Carolina became essentially moot shortly thereafter, however, due to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972).
by creative New York trial judges, of Hynes' attempted proscription of first-degree-murder pleas while a notice of intent to seek the death penalty is still present in the case; and (3) the impact of New York’s death-penalty statute (both before and after Hynes) on defendants' willingness to enter into plea agreements involving life sentences.

Edwards appears to have managed, at least for the time being, to put teeth (albeit possibly unintended by the Court of Appeals) into the Hynes decision. Edwards purports to have finally and completely eliminated plea bargaining to first-degree murder in cases where a notice of intent to seek death has been filed, through its declaration that “death is different” and its fundamental message that a death-penalty statute cannot be used, consistently with a defendant's constitutional rights, as a life-sentence plea-bargaining statute.

Ironically, however, the Edwards court’s protection of capital defendants’ constitutional rights may have the effect of forcing every defendant to risk death, as its method for eliminating the impact of the death-penalty statute on capital defendants’ guilty pleas would also jettison the ability of those defendants to avoid the possibility of a death sentence through plea negotiations. As the Jackson Court suggested, such an outcome may have a “cruel impact” on those capital defendants who truly do not wish to contest their guilt.

G. Plea Bargaining Post-Edwards: People v. Owes and People v. Mower

Two months after the Third Department’s ruling in Edwards, at least one trial court managed to find a way around the limits that Edwards placed on plea bargaining in capital first-degree murder cases in New York. In People v. Owes, the trial court, making no reference to Edwards, accepted a guilty plea to murder in the first degree without ever requiring the prosecutor to make any 318. But see supra notes 16, 310 (discussing the open question whether a notice of intent is “pending” within the meaning of Hynes during the 120-day period within which it may be filed by the prosecutor, but before it has been so filed).


320. See State v. Funicello, 60 N.J. 60, 82, 286 A.2d 55, 67 (1972) (Weintraub, C.J., concurring) (observing that as a consequence of Jackson, “the Fifth Amendment was found to harbor the grisly proposition that every defendant must risk death, that his privilege against self-incrimination is a noose around his neck”).

321. United States v. Jackson, 390 U.S. 570, 584 (1968). The Court stated: But the fact that jury waivers and guilty pleas may occasionally be rejected hardly implies that all defendants may be required to submit to a full-dress jury trial as a matter of course. Quite apart from the cruel impact of such a requirement upon those defendants who would greatly prefer not to contest their guilt, it is clear—as even the Government recognizes—that the automatic rejection of all guilty pleas “would rob the criminal process of much of its flexibility.”

Id.

representation regarding the as-yet-unfiled notice of intent to seek the death penalty.

In Owes, the prosecutor had only two days left to file the notice of intent to seek the death penalty when both parties jointly advised the trial judge that they had reached an agreement calling for the defendant to plead guilty to murder in the first degree and receive a sentence of life without parole. A written agreement to that effect, signed by the prosecutor, defense counsel, and the defendant, was proffered to the court, and the judge agreed to accept the plea.323

At no time prior to the plea did the prosecutor ever announce an intention not to seek the death penalty.324 Indeed, during the plea colloquy, the court informed the defendant "that the charge presently, Murder in the First Degree, does carry with it a possibility, if notice was filed, of death by lethal injection."325 Defendant fully allocuted to the crime under oath, acknowledged the various rights he was waiving, and indicated his awareness that the plea colloquy could be used against him in the event his guilty plea was not given effect. He subsequently received a sentence of life without parole.

On February 1, 2001, the Third Department—the same appellate court that had decided Edwards—ruled, in People v. Mower,326 that an Owes-type plea procedure does not violate either Hynes or Edwards. In Mower, as in Owes, no notice of intent to seek death was ever filed by the prosecutor, nor did the prosecutor ever expressly waive the right to file such a notice. Instead, on the very last day before the expiration of the time period within which the notice of intent to seek death could be filed, the parties presented the trial judge with a plea agreement pursuant to which Mower would plead guilty to first-degree murder and receive a sentence of life without parole.327 The trial judge agreed, and sentenced Mower to the bargained-upon life sentence.

Mower later sought to vacate his conviction on the ground, inter alia, that his guilty plea was the result of a "mistake of law" because it was made pursuant to a plea agreement that provided for a sentence of life without parole.328 According to Mower's argument, Hynes

323. Id.
326. 719 N.Y.S.2d 780 (3d Dep't 2001).
327. The parties apparently stipulated to a seven-day extension of the 120-day statutory time period for filing of the notice of intent to seek death. The plea agreement was presented to the trial judge on the last day within the seven-day extension. Id. at 781.
328. The original proceedings against Mower took place in late 1996, long before Hynes and Edwards were decided. Id. More than three years later, in early 2000, Mower filed a motion to vacate his conviction based in part on Hynes. Id. The trial judge denied the request to vacate without a hearing, but the Third Department
invalidated the only statutory provisions in New York law that would have allowed for such a sentence to be imposed without a jury verdict of conviction;\textsuperscript{329} thus, he claimed, there was no legal basis for the life-without-parole sentence, and the guilty plea (which was premised on the legality of such a sentence) was invalid.\textsuperscript{330}

The Third Department rejected this argument. More importantly, for present purposes, the appellate court also declared that the plea negotiations in \textit{Mower} did not violate \textit{Hynes} or \textit{Edwards}:

[D]efendant’s argument [about the statutory authority to impose a sentence of life without parole absent a jury conviction] overlooks the provision that “[n]othing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole” (CPL 400.27[1]). As the Supreme Court had the statutory authority to sentence defendant to life imprisonment without parole, \textit{and since the prohibition against pleas and plea negotiations during the pendency of a death penalty notice is not implicated here because no such notice was filed in this case (see, Matter of Hynes v. Tomei, \textit{supra}; People v. Edwards, 274 A.D.2d 754, 712 N.Y.S.2d 71), we find defendant’s argument to be without merit.\textsuperscript{331}

In light of \textit{Owes} and \textit{Mower}, have litigants and trial judges, driven by the desire to reach negotiated dispositions in potential capital cases, finally succeeded in finding a route to plea bargaining that is not constitutionally prohibited under \textit{Jackson}, \textit{Hynes}, and \textit{Edwards}? Is a plea to first-degree murder, entered with the People’s consent prior to the expiration of the prosecutor’s time to file a notice of intent to seek the death penalty, compatible with the letter and spirit of these cases? At this point, the only available appellate authority in New York, \textit{Mower}, suggests that the answer is yes—so long as the parties either reach a “meeting of the minds” on disposition within 120 days of arraignment on the indictment, or succeed in persuading the trial judge that “good cause” exists for an extension of the statutory period.\textsuperscript{332}

It is important to note, however, that there are still two competing theoretical views on the constitutionality of such pleas—neither of which was mentioned or discussed in \textit{Mower}. The first theoretical view sees an \textit{Owes/Mower}-type plea as fully consistent with both

\textsuperscript{329} Namely, the capital plea provisions, N.Y. Crim. Proc. Law §§ 220.10(5)(e) and 220.30(3)(b)(vii) (McKinney Supp. 2001).

\textsuperscript{330} \textit{Mower}, 719 N.Y.S.2d at 781-82.

\textsuperscript{331} Id. at 782 (emphasis added) (third alteration in original).

Jackson and Hynes, and not at all irreconcilable with Edwards. Proponents of this view would read Jackson and Hynes narrowly. Jackson, they would say, holds only that a statute impermissibly burdens a defendant's right to trial if it needlessly encourages him to waive it, and Hynes finds such needless encouragement in New York's statute only when the case is in a posture of having two different maximum sentences for first-degree murder depending upon how guilt is determined. Because the death penalty cannot be imposed unless a notice of intent to seek the death penalty has been timely filed, a case is in the posture of having two different maximum sentences for first-degree murder only when a notice has been filed and remains so. In all other circumstances, there is only one maximum sentence for first-degree murder in New York, namely, life without parole. Therefore, the argument goes, a guilty plea to murder in the first degree may be accepted so long as no timely notice of intent to seek the death penalty has been, and remains, filed at the time of the plea. Since the pleas in Ows and Mower were proffered and accepted before any notice of intent was filed, their acceptance was not prohibited by either Jackson or Hynes.

Those who would hold this view (including, of course, the Third Department itself in Mower) would find support in the language of the Court of Appeals in Matter of Francois v. Dolan. There, without the People's consent, the defendant sought to enter a guilty plea to the entire indictment, including several first-degree murder charges, before the prosecutor filed a notice of intent to seek the death penalty but well within his time to do so. The trial judge refused to accept the plea, holding that it was barred by Hynes' admonition that "a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending." The judge held that the notice of intent, although not filed, was nevertheless "pending" when the defendant's plea was proffered because it was still capable of being filed. Similarly, in Matter of Schroedel v. LaBuda, a case also involving an attempted unilateral guilty plea, the court wrote that "Matter of Hynes v. Tomei . . . should be read to interpret 'pending' as meaning both after the notice of intent is filed and served and during the 120 days in which the People may file the notice."

If these holdings had correctly interpreted what the Court of Appeals meant when it used the word "pending," then the pleas in Owes and Mower should have been rejected as violative of Hynes because, although not unilateral, they were nevertheless offered while the death notice was capable of being filed and therefore was "pending." When the defendant in Francois brought a proceeding in the nature of mandamus to compel the trial judge to accept his plea, however, the Court of Appeals did not endorse this broad interpretation of "pending."338

In Francois, the court held only that the defendant had no unqualified right to have his guilty plea accepted in the 120-day period.339 In the apparent conflict between the statutes generally authorizing guilty pleas to an entire indictment without the prosecutor's consent (Criminal Procedure Law sections 220.10(2) and 220.60(2)) and the newer and more specific provision giving the District Attorney the authority to decide whether to seek the death penalty and a period to deliberate on that decision (Criminal Procedure Law section 250.40), the latter would prevail. Thus, the Court wrote:

For several reasons we... hold that until the completion of the statutorily provided deliberative process, either by the filing of a death penalty notice, announcement of an intention not to seek that sanction, or by the expiration of the statutory period to make that decision, a capital defendant does not have an unqualified right to plead guilty to the entire indictment.340

The Court did not include among those reasons the notion that, during the 120-day statutory period, the notice of intent to seek the death penalty is "pending" within the contemplation of Hynes. Indeed, in recounting what it had done in Hynes, the Court observed: "Because the District Attorney had already filed a notice of intent to seek the death penalty..., we also interpreted the statute as prohibiting a guilty plea to capital murder while such a death penalty notice was pending...."341

Those who support Owes and Mower would read this language to mean that a notice of intent to seek the death penalty is "pending" only when it is filed and remains so. Thus they would reason that an Owes/Mower-type plea, proffered not unilaterally but with the consent of the prosecutor, may be accepted consistent with Hynes at any time before the notice is filed. Edwards, however, raises somewhat different concerns.

339. Id. at 37, 731 N.E.2d at 616, 709 N.Y.S.2d at 900.
340. Id.
341. Id. at 36, 731 N.E.2d at 615, 709 N.Y.S.2d at 899.
Edwards disallowed the practice of delaying the withdrawal of the notice of intent until after a pleading defendant had been fully allocuted on the first-degree murder charge. The Edwards court found that the scheme, which was aimed at reducing the defendant's opportunity to renege on a plea bargain after the notice of intent was irrevocably withdrawn, was flawed because it "overlooks the essence of the Hynes-Jackson infirmity."\(^{342}\) In the court's view:

That constitutional infirmity arises not from the entry of a guilty plea to murder in the first degree while a death notice is pending, but from the requirement placed upon a defendant to choose between pleading guilty to murder in the first degree or opting for trial while a death notice is pending. If a prosecutor who has served a death notice is permitted to delay its withdrawal until after a defendant's plea allocution, then the choice to plead guilty has been made under compulsion of the death notice and a defendant's 5th and 6th Amendment rights have been impermissibly burdened.\(^{343}\)

Edwards holds, therefore, that the choice to plead guilty to first-degree murder is unconstitutionally compelled whenever it is made while a death notice is pending. If, as Edwards suggests, compulsion exerted on the choice to plead is the real issue, the acceptance of an Owes/Mower-type plea could be attacked on the theory that the defendant's choice to plead guilty was unconstitutionally compelled, if not by a pending death notice, then by the fact that the possibility of a death sentence remained in the case.

Proponents of Owes/Mower, however, would not extend Edwards so as to equate a filed notice of intent with a failure to exclude any possibility that one might be filed. Compulsion exerted on the choice to plead, they would argue, was never the issue in either Jackson or Hynes, and the mere possibility of a death sentence has never been held to compel unconstitutionally a defendant's choice to plead guilty.

In Jackson, the Supreme Court struck down the Federal Kidnaping Act, not because the statute coerced guilty pleas, but because it needlessly encouraged them and thereby imposed an impermissible burden upon the assertion of the constitutional right to a jury trial.\(^{344}\) Jackson never suggested that the possibility of a death sentence exerts so coercive an influence on a capital defendant as to render his choice to plead guilty involuntary. Indeed, in Brady v. United States,\(^ {345}\) decided only two years after Jackson, the Supreme Court wrote that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."\(^{346}\) Later that same year, in North

\(^{343}\) Id.
\(^{346}\) Id. at 755.
Carolina v. Alford, the Court upheld the guilty plea of a defendant who not only said he was pleading guilty to avoid the death penalty, but also insisted that he was innocent of the crime. Edwards failed to cite either Brady or Alford.

Moreover, observing that "nothing in Jackson prohibits imposing different penalties for different crimes," the Hynes Court itself wrote that its holding would not prevent a defendant from pleading guilty "to another offense not punishable by death, even when a notice of intent to seek the death penalty is pending." Thus, under Hynes, the choice of a capital defendant in New York to plead guilty to second-degree murder while a death notice is pending is not unconstitutionally compelled. If a filed death notice does not unconstitutionally compel a choice to plead guilty, it is difficult to see why the mere failure to exclude with certainty all possibility of a death sentence would have that effect. Thus, proponents of Owes/Mower would conclude that Edwards' "compelled-choice" analysis would not prevent the acceptance of a guilty plea to first-degree murder that is proffered with the consent of the People, within the 120-day period following arraignment, and before a notice of intent is filed.

The second, competing theoretical view would hold that the distinctions drawn between the Owes and Mower and the Edwards and Francois lines of cases are not of constitutional dimension under Jackson, Hynes, or Edwards. Under this view, the burden on constitutional rights prohibited by Jackson was recreated in Owes and Mower, notwithstanding the invalidation by Hynes of New York's offending statutory provisions. Although for the first time in more than one hundred years, New York is without a statutory bar to guilty pleas for crimes punishable by death, it is clear that a defendant charged with first-degree murder in New York still may not receive a death sentence pursuant to a plea of guilty and faces a maximum sentence of life in prison without parole. Owes/Mower-type pleas thus reintroduce the sentencing disparity between convictions upon guilty pleas and those resulting from jury trials which Hynes, in reliance upon Jackson, found unconstitutional and sought to eliminate by striking the statutory provisions. That is, two potential maximum

349. Indeed, it would seem that, because of the more favorable sentencing range, a plea to the lesser crime of second-degree murder would more likely be compelled by the possibility of a death sentence than would a plea to first-degree murder.
351. See Matter of Francois v. Dolan, 95 N.Y.2d 33, 38, 731 N.E.2d 614, 616, 709 N.Y.S.2d 989, 990 (2000) ("Thus, the only legal sentence upon a guilty plea would be either life imprisonment without parole or a term of years in prison."); see also Hynes, 92 N.Y.2d at 629 n.7, 706 N.E.2d at 1208 n.7, 684 N.Y.S.2d at 184 n.7 ("[O]nly a jury can impose a death sentence . . . ").
punishments exist for the crime of murder in the first degree—life without parole where the defendant pleads guilty, and the possibility of execution where the defendant proceeds to trial—since the prosecution may still file a notice of intent if the plea goes awry.352 The defendant can, with certainty, avoid a death sentence only by waiving his Fifth and Sixth Amendment rights.

In Owes—as in every one of the six similar cases (including Mower) that were concluded during the first five years after the enactment of the New York death-penalty statute—when the defendant pleaded guilty to first-degree murder and received the negotiated sentence of life in prison without parole, without a notice of intent to seek the death penalty ever having been filed, the prosecutor still retained the right to file a death notice at the time the plea was entered.353 In both Owes and Mower, as in the five other such cases, the possibility of a death sentence still hung over the defendant if he chose trial, but not if he pleaded guilty. From a holistic perspective, then, the plea negotiations in Owes and Mower proceeded in the shadow of death every bit as much as they had in Edwards and Smelefsky. As in Edwards, “the choice to plead guilty has been made under compulsion of the death notice and a defendant’s 5th and 6th Amendment rights have been impermissibly burdened.”354

Under this second view, the language in Hynes must be read in context: the Court’s decision “does not prevent pleas of guilty to first degree murder when no notice of intent to seek the death penalty is pending, since defendants in that situation face the same maximum sentence regardless of how they are convicted.”355 This language from Hynes implicitly defines “pendency” to include the time within which notice may be filed, because the only time the same potential maximum sentence exists is after death has been irrevocably taken out of the case. Under this view, then, the pendency of a death notice and the potentiality of a death sentence would be equally present both during the time when the prosecutor may still file the notice, and once the notice has actually been filed. Indeed, it is obvious that if this were not the case, defendants would lack any incentive to agree to Owes/Mower-type pleas.356 Precisely because of its effectiveness as an inducement for defendants to plead guilty in exchange for a lifetime of incarceration, this view would hold that the shadow of death

353. See supra text accompanying note 296. But see infra note 356.
356. But see People v. Godineaux, No. 1845/00 (Sup. Ct. Queens County Jan. 22, 2001) (concerning a defendant who pleaded guilty to first-degree murder, even though the prosecutor had unilaterally and irrevocably agreed not to seek the death penalty). In such cases, it can never be known whether the prosecution and defense may have reached a tacit agreement on the final disposition prior to the prosecutor’s declaration that the death penalty would not be sought.
needlessly burdens the defendant’s Fifth and Sixth Amendment rights in an Owes/Mower-type situation.

Moreover, this contextual view would likely cast Owes and Mower as even more constitutionally troubling than the aforementioned lower-court cases\(^{357}\) that permitted guilty pleas where death was out of the case at the time the plea was entered, so that technical compliance was had with Hynes. In Owes and Mower, the real possibility of a death sentence was \textit{never} eliminated from the case prior to the entry of the defendant’s plea, so in no sense was compliance had with Hynes. Thus, in contrast to Edwards, in Owes and Mower both the negotiations leading to the decision to plead guilty and the entry of the plea itself took place while “the possibility of death”\(^{358}\) still loomed over the case. Finally, the notion that prosecutorial consent could eliminate the constitutional infirmity in the situation, the contextualists would say, was put to rest in Hynes itself\(^{359}\) and is a concept distinct from, and not directly correlated with, the constitutionality, or voluntariness, of plea bargaining.\(^{360}\)

Until the New York Court of Appeals eventually addresses the validity of Owes/Mower pleas under Hynes and Jackson, this theoretical difference of opinion will remain unresolved. Perhaps even more importantly, for present purposes, the theoretical dispute underlying Owes and Mower further evidences the continuing need for Supreme Court clarification of Jackson.

IV. PLEA BARGAINING IN THE SHADOW OF DEATH—MAKING SENSE OF \textit{UNITED STATES V. JACKSON}

The decision of the New York Court of Appeals in Hynes delivered a substantial shock to the administration of New York’s capital punishment system. The Hynes court relied on the United States Supreme Court’s Jackson decision to invalidate the statutory provisions authorizing capital defendants to plead guilty while the prosecutor’s notice of death was pending, so long as the prosecutor and court agreed to drop the death penalty in exchange for the plea.\(^{361}\) Following a brief period of confusion and uncertainty, however, creative New York trial judges began to craft legal solutions to the problems engendered by Hynes. These solutions managed to meet the letter of the law set forth in Hynes and Jackson, while simultaneously preserving the ability of prosecutors, defense

\(^{357}\) See supra Part III.E.2 (citing and discussing relevant cases).
\(^{359}\) Hynes, 92 N.Y.2d at 624, 706 N.E.2d at 1206, 684 N.Y.S.2d at 182 (“[T]he need to obtain approval from the People and the court will not save plea provisions that otherwise violate Jackson.” (citation omitted)).
\(^{360}\) See infra notes 411-20 and accompanying text.
\(^{361}\) See supra Part III.D.
attorneys, defendants, and trial judges to do what they had always done before (in New York and every other death-penalty jurisdiction) in capital cases: reach a universally acceptable compromise, prior to trial, under which the defendant would plead guilty to the charged murder in exchange for his life.362

If Hynes was a shock, Edwards was the equivalent of an atomic bomb. In Edwards, the Third Department of the Appellate Division essentially prohibited the aforementioned legal solution to the Hynes problem. Under Edwards, prosecutors, defense attorneys, defendants, and trial judges must comply with what the Edwards court perceived as the true spirit of Hynes, not merely the letter of the law contained therein. Thus, under Edwards, prosecutors may not even discuss a potential plea bargain to first-degree murder with a defendant facing a notice of intent to seek the death penalty, let alone enter into one.363 Once the prosecutor declares the case to be capital by serving and filing a notice of intent, the capital case must proceed to a jury trial and, upon conviction, to a capital sentencing hearing, unless the prosecutor decides unilaterally (and irrevocably) to drop the notice of death and accept life without possibility of parole as the maximum possible punishment. Presumably, not even a "nudge-nudge, wink-wink" agreement with the defendant can be the basis for the prosecutor's decision to drop the notice of death.364

After Hynes, the day-to-day administration of capital cases in New York could (and did) eventually return to normal; after Edwards, on the other hand, everything must change. Both of these decisions, however, purported to be based on Jackson. How can this be?

A closer analysis of Jackson, together with the Supreme Court's post-Jackson decisions that directly or indirectly involved plea bargaining and the death penalty, reveals that Jackson remains—more than thirty years after it was handed down—a completely mystifying decision. The jurisprudential tensions abound. How can Jackson, which invalidated a death-penalty statutory provision because it "needlessly encourage[d]" guilty pleas,365 be squared with Brady, Parker, and Alford, which upheld the validity of guilty pleas entered to avoid the effects of the very same (in Brady) or a nearly identical (in Parker and Alford) death-penalty statutory provision?366 Moreover, how can Jackson be squared with Hayes, which is routinely viewed today as authorizing prosecutors to threaten defendants, during plea negotiations, with the death penalty in order to encourage them to plead guilty?367 And how can Jackson be squared with

362. See supra Part III.E.
363. Edwards, 274 A.D.2d at 757-58, 712 N.Y.S.2d at 75-76.
364. See supra notes 309-21 and accompanying text.
366. See supra notes 24-25 and accompanying text, Part II.A-B.
367. See supra Part II.D.
Corbitt, a case that—as was obvious to the Corbitt dissenters—seems to undermine Jackson’s jurisprudential foundations, even while declining expressly to overrule it?\(^\text{368}\)

Because the Supreme Court has never had (or has never taken) the opportunity to make sense of Jackson, the New York courts today are faced with the daunting task of trying to figure out the meaning and significance of Jackson for themselves. This task would have been hard enough back in 1968; now, after more than thirty years of subsequent developments, it is all but impossible.

Rather than attempt to evaluate whether or not the New York courts have reached the “correct” resolution of the issues in Hynes and Edwards—an evaluation that would involve largely uninformed speculation, given the absence of meaningful guidance from the Supreme Court over the past thirty years—we propose a completely different approach. Our alternative approach is to try to imagine what the Supreme Court, if it were to revisit the issue in Jackson today, would say about the issues presented in that case. In other words, we propose to address this hypothetical question: How would the current Supreme Court make sense out of Jackson today, especially in light of such later decisions as Brady, Parker, Alford, Hayes, and Corbitt?

We believe that there are at least five competing, theoretically plausible approaches by which the Supreme Court could make sense out of Jackson today—in other words, five competing views about the contemporary significance of Jackson—each of which would lead to vastly different consequences for the New York statute. In this final section, we describe and briefly analyze each of these five competing approaches, starting with the most limited view of Jackson’s contemporary significance and proceeding to more expansive interpretations.

A. Subsequent Developments have Effectively Overruled Jackson

One plausible approach to Jackson would be for the Supreme Court simply to explain that the case no longer constitutes a significant part of the contemporary constitutional jurisprudence of the Court. Perhaps Jackson is best seen as a vestigial remnant of its peculiar times, reflecting a view of capital punishment, and of plea bargaining, that is no longer shared by a majority of the contemporary Court.

Jackson, after all, was decided in 1968, just a few years before the Supreme Court ruled in Furman v. Georgia\(^\text{369}\) that all then-existing state death-penalty statutes violated the Eighth Amendment’s Cruel and Unusual Punishment Clause.\(^\text{370}\) Even before Furman, the death

\(^{368}\) See supra Part II.E.

\(^{369}\) 408 U.S. 238, 239-40 (1972).

\(^{370}\) “Excessive bail shall not be required, nor excessive fines imposed, nor cruel
penalty in America was in serious decline; public support for it was waning, there was a *de facto* moratorium on executions, and many observers believed that legal abolition was close at hand.\textsuperscript{371} Under these circumstances, it would not have been surprising for the Court to view the situation in *Jackson* as merely a minor item on a much more important agenda—the potential elimination of capital punishment altogether. Even if the Court was not yet ready to make such a major and controversial move, *Jackson* may have appeared to the Court as a less controversial ruling, in the same general direction, on which most of the Justices could agree. In short, consistent with the Court’s usual process of incremental constitutional decision-making, *Jackson*—at the time—may have represented merely a small step in the direction of *Furman*.

In addition, it is important to note that *Jackson* was decided before the Court had fully come to terms with the extremely common (but previously largely unreviewed) practice of plea bargaining. The Court’s major decisions in the area—most notably, *Brady v. United States*\textsuperscript{372} and *Bordenkircher v. Hayes*\textsuperscript{373}—were still at least two years away at the time *Jackson* arose. Thus, *Jackson* may reflect not only anticipation of *Furman*’s eventual rejection of the death penalty, but also judicial queasiness about plea bargaining. Ultimately, of course, the Court overcame such queasiness and ruled in favor of the constitutional legitimacy of plea bargaining. And today, plea bargaining is such a ubiquitous practice\textsuperscript{374}—even in capital cases—that it seems unthinkable that the Court would find it constitutionally troubling. This outcome, however, was not at all obvious at the time of *Jackson*, and the Court’s uncertainty over plea bargaining should be seen as part of *Jackson*’s subtext.

Yet another subtext for *Jackson*—perhaps more subtle and easier to overlook—was the novel doctrine of “impermissible burdens” on the exercise of constitutional rights that had first been developed by the Court just a few years earlier in *Griffin v. California*.\textsuperscript{375} At the time of *Jackson*, *Griffin* probably appeared to have a bright future, as the vanguard of a new and potentially far-reaching set of limitations on the powers of government. In the thirty-plus years since *Jackson*, however, *Griffin* has significantly diminished in importance, to the point where it clearly no longer occupies a central role in the Rehnquist Court’s constitutional jurisprudence. Two years ago, in *Mitchell v. United States*,\textsuperscript{376} Justice Scalia sharply criticized the

\textsuperscript{371} See *Furman* 408 U.S. at 299-300 (Brennan, J., concurring).

\textsuperscript{372} 397 U.S. 742 (1970).

\textsuperscript{373} 434 U.S. 357 (1978).

\textsuperscript{374} See Milton Heumann, Plea Bargaining I (1978).

\textsuperscript{375} 380 U.S. 609 (1965).

reasoning of Griffin. And just this past year, in Portuondo v. Agard,\textsuperscript{377} a majority of the Court (in an opinion written by Justice Scalia) rejected the extension of Griffin to ban prosecutorial comment on the fact that a defendant testified at his trial after hearing all other witnesses, on the ground that the challenged comment merely asked the jury to draw an inference that was "natural and irresistible," and hence not unfair.\textsuperscript{378} Agard suggests that the current Court views Griffin as a due process "fundamental fairness" case, rather than a penumbral Fifth Amendment case.\textsuperscript{379} Such a shift in rationale, if it is confirmed in future cases, would further limit the scope of Griffin, since it would mean that only "fundamentally unfair" burdens on constitutional rights would be prohibited.\textsuperscript{380}

Finally, there is the obvious (if slightly extra-legal) fact that the contemporary Supreme Court is a far cry from the one that decided Jackson in 1968. That Court included Chief Justice Earl Warren and Justices Black, Douglas, Brennan, Marshall, and Fortas; on almost any measure, the contemporary Court would seem to be much more pro-death-penalty, much more pro-plea-bargaining, and generally much more anti-defendant than the Jackson Court (although it should be noted that the decision in Jackson was reached by a broad six-vote majority that excluded only Justices White and Black, who dissented, and Justice Marshall, who did not participate).\textsuperscript{381}

On the basis of these historical observations, it seems a safe bet that, if Jackson were to arise today, the current Court would not decide the case the same way it did back in 1968. Even though the Court has neither overruled Jackson nor openly expressed any dissatisfaction with it, perhaps the only reason that the case survives is that there has been virtually no reason for the Court to bury it; after all, no significant Jackson issue has reached the Court since Corbitt back in 1978.\textsuperscript{382} Under this view, if the Court were to revisit Jackson today, it probably would hold that incentives for guilty pleas—whether such incentives arise from the discretionary actions of a prosecutor or from the mandatory effects of a pure statutory "discount" scheme—are necessary and desirable aspects of the American criminal justice system, even in capital cases. And, if the Court ultimately were to adopt this approach, then both Hynes and Edwards—which relied on Jackson's continuing precedential force—obviously would need to be revisited as well.

\textsuperscript{377} 529 U.S. 61 (2000).
\textsuperscript{378} Id. at 67.
\textsuperscript{379} See id. at 65-68.
\textsuperscript{380} See id.
\textsuperscript{381} See United States v. Jackson, 390 U.S. 570, 591 (1968).
\textsuperscript{382} As noted, supra note 229 and accompanying text, in 1999, the Court had the opportunity to review the decision of the New York Court of Appeals in Hynes but declined to grant certiorari. See Hynes v. Tomei, 527 U.S. 1015 (1999) (denying certiorari).
B. Corbitt Limited Jackson to Pure Statutory "Discounts," Involving No Connection Between the Statute and Traditional Plea Bargaining by the Prosecutor

A second plausible approach to Jackson would be for the Supreme Court to emphasize the fact that it subsequently upheld the similar New Jersey statute that was challenged in Corbitt v. New Jersey.\(^\text{385}\) In Corbitt, the Court relied on several post-Jackson plea-bargaining decisions to hold that the New Jersey statute did not impermissibly provide incentives for defendants to waive their constitutional rights and plead guilty:

The New Jersey Supreme Court observed [below] that the "encouragement of guilty defendants not to contest their guilt is at the very heart of an effective plea negotiation program." Its conclusion was that in this light there were substantial benefits to the State in providing the opportunity for lesser punishment and that the statutory pattern could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of United States v. Jackson.

We are in essential agreement with the New Jersey Supreme Court.\(^\text{384}\)

The Corbitt dissenters complained that Corbitt had effectively overruled Jackson,\(^\text{385}\) but the Corbitt majority did not purport to do so. How, then, can Corbitt and Jackson be reconciled? The answer to this question may provide a valuable clue to making sense of Jackson.

One obvious way for the Court to reconcile Corbitt and Jackson would be to focus on the fact that Corbitt, unlike Jackson, involved a maximum sentence of life imprisonment.\(^\text{386}\) But the Corbitt majority cited this distinction as only one of several seemingly independent bases for reaching a different conclusion from the one reached in Jackson.\(^\text{387}\) By so doing, the Court implied that the existence of any one of the several available distinctions might justify upholding the challenged statute. There is no clear indication in Corbitt that the absence of any particular distinction from Jackson, such as the possibility of a death sentence after trial, would have been fatal to the challenged statute's constitutionality.

Along similar lines, another obvious way to reconcile the cases would be to note that Corbitt, unlike Jackson, involved a statute under which defendants who pleaded guilty remained eligible for the same maximum sentence of life imprisonment as those who went to jury

\(^{384}\) Id. at 222-23 (citation omitted).
\(^{385}\) Id. at 229 (Stevens, J., dissenting); see supra text accompanying notes 105-06.
\(^{386}\) Corbitt, 439 U.S. at 217.
\(^{387}\) Id. at 217, 223.
trial (although it was no longer mandatory in plea cases).\textsuperscript{388} Again, however, the \textit{Corbitt} majority did not clearly state whether or not this particular distinction was necessary to the outcome of the case.

A third, perhaps less obvious, way to reconcile \textit{Jackson} and \textit{Corbitt} would be to conclude that \textit{Jackson}—which did not involve plea bargaining at all—survives \textit{Corbitt}, but that any similar statute designed, either in whole or in part, to facilitate or regulate traditional plea bargaining by the prosecutor (and for which there is no equally effective but less burdensome alternative) should, after \textit{Corbitt}, withstand a \textit{Jackson} challenge. This view would be based on the \textit{Corbitt} Court’s oft-repeated recognition of the value of plea bargaining to both the prosecution and the defense, as well as on its acknowledgment that the numerous post-\textit{Jackson} plea-bargaining decisions had upheld practices “that, although encouraging guilty pleas, were not ‘needless’ [within the meaning of \textit{Jackson}].”\textsuperscript{389} Even a statute like the one at issue in \textit{Corbitt}, which did not directly address traditional plea bargaining at all, would survive constitutional review so long as one of its purposes was to “set[] the limits within which plea bargaining on punishment may take place.”\textsuperscript{390}

Under this view, the best example of a case whose outcome would be affected by \textit{Corbitt}—i.e., a case that would most likely be resolved differently under \textit{Jackson}, after \textit{Corbitt}—is \textit{Atkinson v. North Carolina}.\textsuperscript{391} In \textit{Atkinson}, the challenged North Carolina murder statute—although it created a sentencing disparity similar to the one in \textit{Jackson}—was nevertheless closely connected with the practice of traditional plea bargaining, in that the defendant’s tendered guilty plea could not be accepted without the consent of both the prosecutor and the trial judge.\textsuperscript{392} In this sense, like the statute in \textit{Corbitt}, the statute in \textit{Atkinson} served “the State’s legitimate interest in encouraging the entry of guilty pleas and in facilitating plea bargaining.”\textsuperscript{393} If \textit{Corbitt} effectively limited \textit{Jackson}, then it seems likely that, after \textit{Corbitt}, the Court would have construed the North

\begin{itemize}
\item \textsuperscript{388} Id. at 217.
\item \textsuperscript{389} Id. at 219 n.9.
\item \textsuperscript{390} Id. at 222. The New Jersey statute at issue in \textit{Corbitt} indirectly regulated plea bargaining because it provided that defendants who were not convicted by juries would receive, at the judge’s discretion, either a sentence of life imprisonment or a term of no more than thirty years. Id. at 217-18. Presumably, almost all defendants who entered plea agreements with the prosecutor under the statute did so in return for the prosecutor’s promise to recommend to the judge a term of no more than thirty years (because the alternative, life imprisonment, was already the harshest sentence that could have been imposed, even after a jury trial). Thus, the practical effect of the New Jersey statute was to limit the scope of plea-bargaining discussions to recommendations for sentences of no more than thirty years.
\item \textsuperscript{391} 403 U.S. 948 (1971).
\item \textsuperscript{392} See, e.g., id., rev’g State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969).
\item \textsuperscript{393} \textit{Corbitt}, 439 U.S. at 222. See \textit{supra} note 390 for an explanation of why the statute at issue in \textit{Corbitt} effectively regulated plea bargaining.
\end{itemize}
Carolina statute as being more like the New Jersey statute upheld in *Corbitt*—and hence constitutional—than like the statute in *Jackson*. Indeed, if anything, the statute in *Atkinson* was even more obviously aimed at facilitating plea bargaining than was the New Jersey statute that was upheld on that basis (at least in part) in *Corbitt*.

If *Jackson* was indeed limited by *Corbitt*, then the lone remaining category of statutes that would still be governed by *Jackson*, and that would still not pass constitutional muster, would be the narrow category of statutes creating what might be called a "pure" statutory discount—absent any possible connection with the "give-and-take" of traditional plea negotiations between the prosecutor and the defense—for defendants who waive their constitutional rights and plead guilty. This is precisely the same category of statutes that Justice Stewart, the author of *Jackson*, identified in his *Corbitt* concurrence as being most clearly prohibited by *Jackson*.

In conclusion, under this view, if the Court were to revisit *Jackson* today, it would probably hold that *Corbitt* limited *Jackson*. Any statute designed to facilitate or regulate the practice of plea bargaining would pass constitutional muster, even if the statute authorized two different punishments for the same crime, death and non-death, depending on whether or not a defendant pleads guilty. If the Court were to so hold, the New York statute would have to be reexamined carefully to determine whether that statute is designed to facilitate or regulate the practice of plea bargaining, or whether it provides a "pure" statutory discount to those defendants who choose to plead guilty.

C. *Jackson* and *Alford* Remain Good Law, and Continue to Prohibit Legislative Schemes That Authorize Two Different Punishments (Death and Non-Death) for the Same Crime, Depending Upon Whether a Defendant Proceeds to Jury Trial or Pleads Guilty, and That "Needlessly Encourage" the Waiver of Constitutional Rights

A third approach to *Jackson* would be for the Supreme Court simply to reaffirm both that decision and the subsequent decision in *North Carolina v. Alford*, as interpreted and applied by the New York Court of Appeals in *Hynes*. Under this view, the Supreme Court might decide that, despite the passage of time and intervening case law, *Jackson* and *Alford* nevertheless remain good law—and still prohibit, at a minimum, all capital punishment statutes that authorize two different punishments (death and non-death) for the same crime, depending upon whether a defendant proceeds to jury trial or pleads guilty, and that "needlessly encourage" the waiver of constitutional rights.

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394. 439 U.S. at 226-28 (Stewart, J., concurring).
How does one decide whether a particular burden on constitutional rights is "needless"? This issue can perhaps best be understood if one follows the approach of Professor Becker, who has construed Jackson as employing a two-tiered inquiry to determine the constitutionality of plea-bargaining systems. First, does the system have any legitimate purpose, other than chilling the exercise of constitutional rights by penalizing those who assert them? If not, the system fails ab initio. Second, are the particular characteristics of the system necessary to implement the legitimate purposes served? As the Jackson Court stated: "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."

In Jackson itself, the first question was answered in the affirmative: the Federal Kidnaping Act sought to limit imposition of the death penalty to cases in which a jury recommended it, an entirely legitimate goal. The second question, however, garnered a negative response. The Supreme Court reasoned that the purpose of requiring a jury to recommend a sentence of death as a precondition to its imposition could be achieved without burdening the constitutional rights of defendants who maintained their innocence and demanded a jury trial, e.g., by allowing a jury to determine sentence in every case under the statute, regardless of how the conviction was obtained. Thus, the burden on trial rights could not be justified and the statute violated the Constitution.

Turning to the New York death-penalty statute, history suggests that the statutory scheme was designed to serve two separate and legitimate goals. First, as in Jackson, the statute sought to insure that death sentences would be imposed only upon a jury's determination to do so. Second, the statute incorporated New York's longstanding protective policy, dating from 1889, of preventing defendants from condemning themselves to death, by prohibiting guilty pleas where death was a potential sentence. Because these statutory purposes are both clearly legitimate and independent of any desire to encourage the entry of guilty pleas and waiver of constitutional trial rights, the New York statute satisfies the first prong of the Becker test.

Under the second prong of the Becker test, the inquiry turns to whether the particular characteristics of the system are necessary in order to implement the legitimate purposes served. Initially, it must be acknowledged that the New York statute, as written, clearly serves

397. Becker, supra note 396, at 793; see Jackson, 390 U.S. at 581-83.
398. Jackson, 390 U.S. at 582.
399. Id. at 582-83
400. See supra Part III.A.3.
both of the aforementioned legitimate goals. The statute limits the use of the death penalty to cases in which the jury recommends it, and also prevents a defendant from committing state-sanctioned suicide by prohibiting defendants from pleading guilty, except upon a promise of a non-death sentence. Nevertheless, the statute accomplishes its legitimate goals by a particular method that, as recognized by the Hynes Court, has the effect of encouraging defendants to waive their constitutional rights and plead guilty.401

The second prong of the Becker test therefore requires a further determination of whether a viable alternative exists that would also accomplish both of these two legitimate goals without similarly encouraging guilty pleas.402 In other words, are New York's statutory plea-bargaining restrictions necessary to achieve these two legitimate governmental purposes?

With respect to the jury-sentencing goal of the New York statute, as in Jackson, this goal could also be achieved by the establishment of universal jury sentencing procedures applicable to all first-degree murder cases, regardless of the method by which guilt is established. Moreover, the remedy actually adopted by the Hynes Court—namely, the prohibition of guilty pleas to first-degree murder whenever a death notice was pending—also serves to ensure that the death penalty will be imposed only on the basis of a jury's determination. Thus, the jury-sentencing goal does not create a necessity for the burdens imposed upon Fifth and Sixth Amendment rights, and the New York law cannot pass constitutional muster on that basis.

The remaining legitimate statutory goal, protecting against a defendant's state-sanctioned suicide, likewise could be addressed in two alternative ways, depending on how that particular goal is interpreted. First, if the goal is interpreted as simply representing a legislative desire not to allow a defendant to plead guilty to a capital charge and thereby ensure his own execution, then the alternative of universal jury sentencing would also serve this goal, because even if the defendant pleads guilty, such a procedure would still interpose a jury's reasoned sentencing determination between the defendant's unilateral desire to die and the actual imposition of a death sentence.403

Second, even if the goal is interpreted more broadly to include a legislative desire not to allow a defendant to take any substantial step

401. See supra Part III.D.
402. Although it is not necessary to the argument in this section, it should be noted that banning all guilty pleas in potential capital cases, whether or not a death notice has been filed, would not be considered a viable alternative under Jackson. See infra note 428 and accompanying text.
403. For a contrary view, see infra text accompanying notes 426-27, presenting the argument that—under a broader interpretation of the goal of preventing state-sanctioned suicide—universal jury sentencing might not adequately serve this goal.
in the direction of his own execution, then this goal could still be met in the exact same manner that the New York Court of Appeals ultimately chose as its judicially-imposed remedy in \textit{Hynes}, i.e., by prohibiting guilty pleas to first-degree murder until the potential for a death sentence is removed from the case, as was done in the 1970 statute based upon the Temporary Commission's recommendations. Although the \textit{Hynes} Court's chosen remedy for the \textit{Jackson} problem still permits defendants to plead guilty to the lesser crime of second-degree murder, \textit{Alford}, as construed by the \textit{Hynes} Court, stands squarely for the proposition that this is not constitutionally suspect, as disparate penalties are not imposed for the same crime depending upon the exercise or waiver of constitutional trial rights.

Thus, applying Professor Becker's two-part articulation of the \textit{Jackson} inquiry to the 1995 New York death-penalty statute produces the following result: The statutory scheme serves two legitimate purposes other than promoting plea bargaining, but the statute's establishment of death as the maximum penalty for first-degree murder convictions by jury trial but not by guilty plea is not necessary to the achievement of those purposes. For this reason, and as concluded by the New York Court of Appeals in \textit{Hynes}, the New York law "needlessly" encourages guilty pleas and unnecessarily burdens the exercise of Fifth and Sixth Amendment rights in violation of \textit{Jackson}.

Under this view of \textit{Jackson}, which is premised on the continued vitality of both \textit{Jackson} and \textit{Alford}, it should be noted that subsequent Supreme Court decisions, such as \textit{Hayes} and \textit{Corbitt}, are properly distinguishable from the situation in \textit{Jackson}. In \textit{Hayes}, the unique penalty of death was not involved, and the possibility of greater punishment existed only if the prosecutor brought an additional charge. The choice presented to the defendant in \textit{Hayes} therefore did not involve two maximum penalties for the same crime depending upon whether or not Fifth and Sixth Amendment rights were exercised. In \textit{Corbitt}, the majority opinion expressly found it to be "a material fact" that it was not dealing with a death-penalty statutory provision. Furthermore, there was no difference in the maximum punishment available after a trial by jury or a guilty plea to the charge; a jury could, after trial, find a defendant guilty only of a lesser-included offense, thus resulting in the imposition of a lesser sentence, while a trial judge accepting a plea to the charge was still empowered

\footnotesize{404. Under such an interpretation, the alternative of universal jury sentencing would not serve this goal. See infra notes 426-27 and accompanying text.  
405. See supra notes 159-61 and accompanying text.  
407. Id. at 626, 706 N.E.2d at 1207, 684 N.Y.S.2d at 183.  
to impose the maximum life sentence. Thus, again, two different maximum penalties did not exist for the same crime, because the risk of a greater punishment was not automatically avoided by a defendant's entry of a plea to the charge.\footnote{410}

Moreover, under this interpretation of Jackson, the fact that the New York statute involved a statutory plea-bargaining rule, as distinguished from the "legislatively ordained penalty scheme"\footnote{411} involved under the Federal Kidnaping Act, correctly played no role in the Hynes Court's determination. The rationale underlying the Supreme Court's decision in Brady, which involved a statute that "legislatively" imposed the death penalty after jury trial but offered leniency upon the surrender of that right by entry of a guilty plea, focused on the "mutuality of advantage"\footnote{412} engendered by the practice of plea bargaining. The Court expressed its unwillingness to hold it unconstitutional "for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime."\footnote{413} The Court further recognized the legitimacy of plea bargaining as emanating from its assumed reliability,\footnote{414} and declared its disbelief that the encouragement of guilty pleas by offers of leniency would drive defendants to false condemnation.\footnote{415} The Supreme Court majority, in other words, drew no constitutional distinction between the statutory discount scheme at issue in Brady and considerations inherent in plea bargaining generally. Similarly, Justice Brennan concluded in Brady and Parker that neither the participation of the prosecutor nor the interposition of defense counsel in the plea negotiation process would necessarily afford the defendant the equal bargaining power generally envisioned in that process or insulate the defendant from the effects of a statutorily-imposed legislative dilemma.\footnote{416} This conclusion evinced the concern that relief from guilty pleas, whether the result of legislative discounts (as in Brady) or plea bargaining (as in Parker), should be constitutionally required whenever the unconstitutional death-penalty scheme played a significant role in the defendant's determination to plead guilty.\footnote{417} In short, neither Brady nor Parker drew a constitutional distinction or applied a different constitutional

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410. See Hynes, 92 N.Y.2d at 625, 706 N.E.2d at 1206, 684 N.Y.S.2d at 182.
413. Id. at 753.
414. Whether an assumption about the reliability of guilty pleas would find such ready acceptance today is open to question. See infra notes 435-36 and accompanying text.
415. Brady, 397 U.S. at 758.
416. See Parker, 397 U.S. at 803-04 (Brennan, J., dissenting); Brady, 397 U.S. at 756-58.
417. See supra notes 62-67 and accompanying text.
\end{flushright}
standard, depending on whether the statutory scheme involved a statutory discount or statutorily-authorized plea bargaining between the parties. The critical issue, instead, was whether the statute needlessly burdened constitutional rights, and the Court made clear that not all burdens designed to facilitate plea bargaining would be deemed necessary.418

In any case, the Supreme Court's subsequent recognition in Corbitt that "plea bargaining by state prosecutors operates by virtue of state law"419 underscores the fact that any negotiated plea carrying a promise of leniency operates pursuant to statutory limits, with the legislature setting the maximum term for all offenses.420 Seen through this lens, the presence or absence of the prosecutor in the statutorily-authorized process is immaterial. It is the nature of the pressure on the defendant to forgo the assertion of his constitutional rights (i.e., needless pressure to avoid death) that is constitutionally determinative, not its source. For all these reasons, then, there was no basis for the Court of Appeals in Hynes to reject Jackson as applying only to statutory discount cases and not to plea-bargaining cases.

In conclusion, under this view, the Court might hold that both Jackson and Alford remain good law, and that all statutes that "needlessly encourage" the waiver of constitutional rights by authorizing two different punishments (death and non-death) for the same crime, depending on whether or not a defendant pleads guilty, remain unconstitutional under Jackson. This view, of course, represents the exact situation actually faced by the New York Court of Appeals in Hynes—because the Hynes Court was bound to apply both Jackson and Alford as if they remained good law. Thus, if the current Supreme Court were to reaffirm Jackson and Alford, there would be no need for the Court of Appeals to revisit its decision in Hynes, although it would still have to decide whether or not the Third Department's particular applications of Hynes in Edwards and Mower were correct.

D. Jackson Remains Good Law, and—Based on the Underlying Rationale of Griffin—Prohibits All Statutes That "Needlessly Burden" Constitutional Rights

A fourth approach to Jackson would be for the Supreme Court to hold that the essence of Jackson—and Griffin, on which it was based421—is to prohibit all "needless burdens" on the exercise of constitutional rights, whether or not those "needless burdens" result

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418. See Becker, supra note 396, at 793 & n.207.
421. See supra note 46 and accompanying text (explaining the relationship between Griffin and Jackson).
from a statute that creates a two-tiered punishment scheme (death and non-death) for the same crime.

Under this view, the Court might reaffirm the basic wisdom of Griffin and Jackson, but reject the suggestion, seemingly adopted by the Hynes Court, that Alford limited the Jackson rule to those situations where the defendant is encouraged to plead guilty by a statutory punishment scheme that creates two different punishments (death and non-death) for the same crime, depending on whether or not the defendant pleads guilty. Why, after all, should it be unconstitutional for a statute needlessly to encourage a defendant to waive his constitutional rights and plead guilty by creating two different punishments for the same crime, but permissible for a statute needlessly to encourage a defendant to plead guilty to a lesser crime?

If the Court were to revisit Jackson and hold that it extends to all "needless burdens" on constitutional rights, and not only those situations where a statute authorizes two different punishments (death and non-death) for the same crime, then the constitutional analysis of the New York death-penalty statute in Hynes arguably needs to be revisited. Indeed, under this view, it is arguable that New York's capital plea-bargaining system, as it existed before Hynes, did not "needlessly" burden constitutional rights, even when measured under Professor Becker's approach. This is so because the Hynes remedy, although adequately serving both legitimate statutory goals—i.e., allowing a jury to make the life or death decision and preventing state-sanctioned suicide—is not a viable alternative to the statute because it still has the effect of encouraging defendants to waive their right to a jury trial and plead guilty, albeit to the lesser-included offense of second-degree murder.

In Jackson, the only legitimate purpose suggested by the Government in defense of the Act was that it mitigated the severity of capital punishment by limiting the death penalty to cases in which a jury recommends it.422 Although acknowledging that objective as legitimate, the Supreme Court nevertheless held that the Act's selective death-penalty provision could not be justified by its ostensible purpose because that purpose could be achieved without penalizing defendants who plead not guilty and demand a jury trial. As an example of a viable alternative that would achieve that result, the Court pointed to systems in which a jury always determines penalty regardless of how guilt is determined. The availability of this and other alternatives, the Court held, made the Act's encouragement of guilty pleas unnecessary and therefore excessive.423

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423. Id. at 582-83.
By contrast, and as previously noted, New York's statutory structure apparently was designed to serve two legitimate purposes.\footnote{424} First, like the Federal Kidnaping Act, it was designed to mitigate the severity of capital punishment by limiting the death penalty to cases in which a jury recommends it. Second, it was also designed to further New York's longstanding policy against state-sanctioned suicide.

Turning to the second prong of the Becker test, as explained in the preceding section, the New York statute as written clearly serves both of the aforementioned legitimate goals.\footnote{425} So, once again, the Becker test requires a further examination of possible statutory alternatives to see whether the actual statutory scheme is truly "necessary" to the pursuit of those goals.

Such an examination would reveal that the particular alternative suggested in \textit{Jackson}, of having a jury decide the defendant's punishment regardless of how guilt was determined, would accomplish the first statutory goal of limiting the death penalty to cases in which the jury recommends it. The alternative of universal jury sentencing, however, would not achieve the second goal of preventing state-sanctioned suicide—\textit{assuming} that this goal is interpreted broadly to represent a legislative desire to prevent a defendant from taking \textit{any} substantial step in the direction of his own execution.\footnote{426} This is because, when a defendant enters a guilty plea while death remains a possible sentence in the case, he relieves the prosecution of the burden of proving beyond a reasonable doubt that he is death-eligible in the first place. This is especially true under the New York death-penalty statute, where aggravating circumstances are established at the guilt-innocence phase of the two-part trial.\footnote{427} By pleading guilty to a capital crime, therefore, the defendant would relieve the prosecutor of the burden of establishing the very aggravating factors that the prosecutor would later use to convince the penalty-phase jury that it should sentence the defendant to death. Although it would still be up to the jury to determine whether or not actually to impose the death penalty, by pleading guilty the defendant would have taken a substantial step in the direction of his own execution, and thus, the \textit{Jackson} solution of universal jury sentencing would not fulfill the legitimate goal (broadly interpreted) of preventing state-sanctioned suicide.

One example of an alternative system that \textit{would} simultaneously achieve both of the goals of the New York statute would be one that flatly bans all guilty pleas in potential death-penalty cases, whether or
not the death penalty is actually being sought by the prosecutor. In *Jackson*, however, the Court rejected the suggestion of such a system as having a "cruel impact" on defendants who would prefer not to contest their guilt.\footnote{See *Jackson*, 390 U.S. at 584 ("Quite apart from the cruel impact of [a ban on all guilty pleas] upon those defendants who would greatly prefer not to contest their guilt, it is clear—as even the Government recognizes—that the automatic rejection of all guilty pleas 'would rob the criminal process of much of its flexibility.'").} It is therefore difficult to see that alternative system as being not merely viable, but constitutionally compelled.

The only remaining alternative system is the one actually adopted by *Hynes*—namely, the prohibition of guilty pleas to first-degree murder *while a death notice is pending*.\footnote{Matter of *Hynes* v. *Tomei*, 92 N.Y.2d 613, 629-30, 706 N.E.2d 1201, 1209, 684 N.Y.S.2d 177, 185 (1998), cert. denied, 527 U.S. 1015 (1999).} This system would fulfill the first goal of the New York statute, because the death penalty would be imposed only by a jury’s decision. It would also fulfill the second goal, even if that goal is broadly interpreted, because the defendant could not take a substantial step toward state-sanctioned suicide. But this alternative system—like the actual system that prevailed in New York before *Hynes*—still encourages the waiver of constitutional rights. This is because, under *Hynes*, defendants facing the death penalty are still allowed to plead guilty to second-degree murder.\footnote{Id.} In other words, the alternative system adopted by the New York Court of Appeals in *Hynes* does not avoid the very same problem of "burdening" the exercise of constitutional rights that the *Hynes* Court identified in the New York statutory scheme.

The *Hynes* Court felt obligated to approve such guilty pleas to second-degree murder, even in the face of a pending death notice, because it concluded that they had been approved by the Supreme Court in *Alford*.\footnote{If the *Hynes* Court had reached a different conclusion about *Alford*, and had therefore banned all guilty pleas (to first-degree and second-degree murder) while a death notice is pending, such a rule probably would not have run afoul of *Jackson’s* reference to the "cruel impact" of a ban on all guilty pleas. \textit{See infra} note 437.} If the Supreme Court were to revisit and reaffirm *Jackson*, however, and if it were further to hold that *Alford* was merely a case about the voluntariness of guilty pleas and not a limitation on *Jackson*, then the *Hynes* Court’s approach—prohibiting guilty pleas to first-degree murder with a pending death notice, while permitting such pleas to second-degree murder—would be called into question. Both alternatives encourage defendants to plead guilty, so neither alternative can provide a basis for concluding that the other one involves "needless" encouragement.\footnote{This creates the following anomaly: The "broader" or "more expansive" reading of *Jackson* (described in this section) makes it less likely that the New York statute is unconstitutional, whereas the "narrower" or "less expansive" reading of *Jackson* (described in the preceding section) makes the New York statute more likely to be unconstitutional. This is odd, but true. It is because the "broader" reading of
In conclusion, under this view of Jackson, it is at least arguable that, because New York's statutory plea-bargaining system serves two legitimate purposes, and because the particular characteristics of that system are necessary to implement both of those purposes (since no alternative system would serve the same two goals without likewise encouraging guilty pleas), any encouragement of guilty pleas incidental to the operation of the New York statute is not "needless," and therefore the statute would be constitutional. In any event, if the Supreme Court were to revisit Jackson and hold that it prohibits all statutes that impose "needless burdens" on constitutional rights, then the decision of the New York Court of Appeals in Hynes certainly would need to be revisited.

E. All Plea Bargaining in the Shadow of Death Should be Prohibited

The fifth and final approach to Jackson would involve a far-reaching decision by the Court that Jackson, but not Brady, Alford, or Corbitt, represents the most appropriate judicial response to the recurring problem of plea bargaining in the shadow of death. Under this view, and despite what the Court may have said in the post-Jackson plea-bargaining cases, the Court might hold that a capital defendant lacks the true mutuality of advantage necessary to engage in a free-wheeling choice between pleading guilty and going to trial, as contemplated by Corbitt, even with the assistance of able defense counsel at his side.433 In other words, traditional plea bargaining in capital cases can never involve the kind of "give-and-take" negotiation between parties of relatively equal bargaining power that Justice Brennan asserted as the backstop to save capital-case plea bargaining in Brady and Parker. The capital defendant's "choice," in reality, may be no more meaningful than the Hobson's Choice that had been offered to the defendant in Fay v. Noia.434

Jackson would interpret both the pre-Hynes version of the New York statute and the post-Hynes version as burdening the defendant's waiver of constitutional rights. Thus, under the "broader" reading of Jackson, neither version of the New York statute involves "needless encouragement," because both versions are equally (or at least comparably) bad. Whereas, under the "narrower" reading of Jackson (i.e., reading Jackson as limited by Alford to situations involving "two different penalties for the same crime"), the post-Hynes version of the New York statute passes constitutional muster, thus the pre-Hynes version involves "needless" encouragement.

433. Recently, a New York trial judge refused to grant a joint request from the prosecutor and defendant in a capital case to find good cause to extend the 120-day period within which the prosecutor could decide whether to elect to pursue the death penalty in the case, see supra note 172, stating: "District Attorneys throughout the state have such power regarding charging, plea availability, and withdrawal of a notice of intent to seek the death penalty even after a jury's guilty verdict that the court does not feel compelled to find good cause despite the defense consent." People v. Miller, No. 1969/2000, slip op. at 2 (Sup. Ct. N.Y. County Aug. 2, 2000); see also supra text accompanying note 416.

Perhaps, at the time *Brady* and *Parker* were decided in 1970, or when *Alford* was decided in 1971, the Court’s illusion of equal bargaining power between prosecutors and capital defendants could plausibly be maintained—after all, there had been no actual executions in the United States for many years. Even *Corbitt*, in 1978, was handed down at a time when executions remained extremely rare events. Today, however, with an ever-increasing headcount that has now reached nearly one hundred executions per year, the risk of death must seem far more authentic and terrifying to those charged with a capital crime. The previously-cited empirical evidence from New York suggests the substantial impact that this fear has on capital defendants, causing many of them willingly to trade their constitutional rights for a sentence of life without parole.

Under this view, *Jackson* was merely the Court’s first small step in the enlightened direction of constitutionally prohibiting all plea bargaining in the shadow of death. The Court may have temporarily decided to move in a different direction when it upheld the guilty pleas in *Brady* and *Alford*, and when it upheld the New Jersey statute in *Corbitt*, but those decisions were misguided. If the Court today were to revisit *Jackson*, it might finally acknowledge the underlying truth that plea bargaining can never be truly equal—and hence cannot be constitutionally valid—so long as the defendant faces the real possibility of a death sentence. If the Court were to so hold, then the *Edwards* court would be vindicated, because it essentially anticipated the Court’s next move.

It is very likely that this approach to *Jackson* would not only prohibit plea bargaining in capital cases, but also lead, in the end, to more radical restrictions on prosecutorial discretion to seek the death penalty. This is because, as a practical matter, prohibiting plea bargaining in capital cases would prove meaningless if prosecutors remained free to negotiate with defendants prior to the filing of

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436. See supra notes 293-97 and accompanying text.

437. As noted previously, *Edwards* did not fully implement the rule suggested by its reasoning, in that it apparently left open the possibility that a defendant might agree to plead guilty to second-degree murder even while a death notice is pending on a charge of first-degree murder. Such a plea had been explicitly upheld in *Hynes*, based on the *Hynes* Court’s interpretation of *Alford*. See supra note 309 and accompanying text.

Interestingly, if *Hynes* had interpreted *Alford* differently, and had therefore banned all guilty pleas while a death notice is pending—including both pleas to first-degree murder and pleas to the lesser-included offense of second-degree murder—such a rule probably would not have run afoul of *Jackson*’s reference to the “cruel impact” of a ban on all guilty pleas. United States v. Jackson, 390 U.S. 570, 584 (1968). This is because there can be no such “cruel impact” if the only limitation is on a defendant’s ability to plead guilty in a case in which the prosecution is still seeking his execution.
capital charges in a potentially capital case. Numerous studies have shown that the incentives for plea bargaining, among all of the primary actors in the criminal justice system, are strong enough that almost all efforts to prohibit the practice have failed; prosecutors, defense counsel, defendants, and trial courts simply find alternative ways to achieve the same ends. Thus, a prohibition of plea bargaining in cases that are already designated as capital cases would likely serve only to produce a shift to similar plea discussions prior to the point in time when the cases are so designated. The only truly effective way to respond to such a shift would be to regulate the decision to designate a case as a capital case in the first instance—that is, to regulate prosecutorial discretion to seek the death penalty. While this kind of regulation has been suggested by some commentators, courts and legislatures have generally been reluctant to intrude into the traditional realm of prosecutorial charging discretion because of separation-of-powers concerns and the feeling that judicially enforceable legal standards are unavailable.

CONCLUSION

What does the future hold for plea bargaining in New York capital cases? Will Edwards ultimately be upheld as a logical extension of Hynes, ensuring that all capital cases must proceed all the way to jury trial? Or will Edwards be overturned as inconsistent with Hynes, thereby allowing prosecutors and capital defendants in New York to resume the customary “give-and-take” of plea negotiations that may often spare the defendants’ lives, but only in exchange for the surrender of their constitutional rights? And what about the so-called Owes/Mower guilty pleas, entered before a notice of intent to seek death has been filed, but when it still can be filed?

We have not attempted to predict the outcome of the current controversy in New York over plea bargaining in the shadow of death, nor have we attempted to predict what the United States Supreme Court might do with the Jackson issue. The Edwards and Mower decisions are still under review in the New York courts, and we do

438. See, e.g., supra Part III.G (discussing the so-called Owes/Mower guilty pleas).


441. People v. Edwards, 274 A.D.2d 754, 712 N.Y.S.2d 71 (3d Dep’t 2000), leave to
not intend to express any opinions about the proper resolution of the issues presented therein, under either federal constitutional law or state law. Our goal is more modest. We have simply provided what we hope will be useful background information, together with descriptions and brief analyses of five plausible approaches that the Supreme Court could take today if it were to attempt to reconcile \textit{Jackson} with its post-Jackson decisions related to plea bargaining and the death penalty.

\textit{Edwards} and \textit{Hynes}, and the many other New York cases that have attempted to apply them, amply demonstrate the importance of the Supreme Court's revisiting both \textit{Jackson} and the post-Jackson decisions. The confusion and uncertainty currently plaguing the administration of the death penalty in New York is a direct byproduct of the Court's failure to make sense out of \textit{Jackson}. The jurisprudential tension created by \textit{Jackson} and the post-Jackson decisions is palpable and hampers the ability of the New York courts to achieve both doctrinal and practical stability in this important area of the law.

In the end, it seems likely that the Supreme Court itself will have to fix the problem it has created. Sooner or later, the Court will need to explain whether \textit{Jackson} has been effectively overruled, has been limited by \textit{Corbitt}, survives intact as an ongoing manifestation of \textit{Griffin}, or should be extended to prohibit all plea bargaining in the shadow of death. Until the Court finally chooses one of these alternatives, or finds another, the rest of us will simply have to keep guessing.

APPENDIX: FIRST-DEGREE MURDER CASES IN NEW YORK STATE—1995-2000

<table>
<thead>
<tr>
<th>Total First-degree Murder Cases Concluded Between Sept. 1, 1995 and August 23, 2000 in New York State</th>
<th>212</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Total cases where notice of intent was filed:</td>
<td>36</td>
</tr>
<tr>
<td>A. Notice of intent remained in effect at time of case disposition:</td>
<td>32</td>
</tr>
<tr>
<td>1. Cases resulting in agreed life without parole sentences:</td>
<td>14</td>
</tr>
<tr>
<td>a. Guilty plea to first-degree murder prior to trial:</td>
<td>12</td>
</tr>
<tr>
<td>b. Sentencing agreement to life without parole after trial:</td>
<td>2</td>
</tr>
<tr>
<td>2. Cases resulting in guilty pleas with parole-eligible sentences:</td>
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</tr>
<tr>
<td>a. First-degree murder:</td>
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</tr>
<tr>
<td>b. Lesser charges:</td>
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<tr>
<td>3. Cases proceeding to capital trial through sentencing phase:</td>
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</tr>
<tr>
<td>a. Jury verdict of death sentence:</td>
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</tr>
<tr>
<td>b. Jury verdict of life without parole sentence:</td>
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</tr>
<tr>
<td>B. Notice of intent withdrawn before trial:</td>
<td>4</td>
</tr>
<tr>
<td>1. Cases proceeding to non-capital trial:</td>
<td>3</td>
</tr>
<tr>
<td>a. Guilty verdict and sentence of life without parole:</td>
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</tr>
<tr>
<td>b. Complete acquittal:</td>
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</tr>
<tr>
<td>2. Case abated by defendant's death prior to trial:</td>
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</tr>
<tr>
<td>II. Total cases where no notice of intent ever filed:</td>
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</tr>
<tr>
<td>A. Cases resolved by guilty plea:</td>
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</tr>
<tr>
<td>1. Sentence of life without parole:</td>
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</tr>
<tr>
<td>2. Parole-eligible sentences:</td>
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<tr>
<td>B. Cases proceeding to non-capital trial:</td>
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</tr>
<tr>
<td>1. Cases concluded with sentence of life without parole:</td>
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</tr>
<tr>
<td>2. Parole-eligible sentences:</td>
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</tr>
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<td>3. Complete acquittals:</td>
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<td>C. Other dispositions:</td>
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<tr>
<td>1. Dismissals:</td>
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<tr>
<td>2. Plea of not responsible by reason of mental disease or defect:</td>
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</tr>
<tr>
<td>3. Cases abated by defendant's death prior to trial:</td>
<td>2</td>
</tr>
</tbody>
</table>

The New York State Unified Court System Office of Court Administration provided the raw data from which this table was created.