

The Problem with Capital Pleas

William W. Berry III*

ABSTRACT

In United States v. Jackson, the Supreme Court recognized the importance of protecting an individual's jury trial rights in capital plea bargaining. With the subsequent Brady trilogy, however, the Court's plea bargaining doctrine migrated away from Jackson and accepted pleas in capital cases as long as the defendant had counsel.

Over the past twenty years, the capital punishment landscape has significantly narrowed, with an average of only twenty new death sentences a year, most coming from the few counties that have the economic resources to pursue the death penalty. The decreased likelihood of receiving a death sentence could, in theory, convince more capital defendants to go to trial as opposed to entering plea deals, especially as juries, even in Texas, are increasingly disinclined to impose death sentences. But the risk of execution remains too heavy a thumb on the scale. The effect of this dynamic is that prosecutors essentially have the power to impose mandatory life without parole ("LWOP") sentences in homicide cases, simply by threatening to pursue the death penalty.

As such, this essay makes the case that, taken together, the values of the Fifth (right not to plead guilty), Sixth (trial by jury, right of confrontation, right to present witnesses), and Eighth Amendments (right to heightened scrutiny in capital cases) should lead the Court, legislatures, or prosecutors themselves to eliminate plea agreements in capital cases, particularly those that result in LWOP sentences. Such bargained sentences almost certainly reflect the coercion of the prosecutor in an unequal bargaining dynamic rather than a voluntary acceptance of a proportional punishment for one's crime.

* William W. Berry III is the Associate Dean for Research and Montague Professor of Law at the University of Mississippi. Professor Berry has written over 50 law review articles, primarily in the areas of capital punishment, sentencing, substantive criminal law, and sports & entertainment law. The author thanks Carissa Hessick for the invitation to participate in this symposium on plea bargaining. The author also thanks Madeleine Lamb and Emmy Thrower for excellent research assistance.

INTRODUCTION	215
I. THE PENUMBRA OF CONSTITUTIONAL SENTENCING RIGHTS	216
A. THE FIFTH AMENDMENT	216
B. THE SIXTH AMENDMENT	218
C. THE EIGHTH AMENDMENT	219
II. THE PROBLEM OF CAPITAL PLEAS	220
A. THE COURT'S INEFFECTUAL JURISPRUDENCE	220
B. THE POWER OF THE PROSECUTOR.....	224
C. MANDATORY DEATH-IN-CUSTODY SENTENCES.....	226
III. SOME POSSIBLE BUT UNLIKELY SOLUTIONS	227
A. STRENGTHENING CONSTITUTIONAL JURISPRUDENCE.....	227
B. LEGISLATIVE LIMITS.....	228
C. PROMOTING PROSECUTORIAL ACCOUNTABILITY.....	229
CONCLUSION	229

INTRODUCTION

In *United States v. Jackson*, the Supreme Court recognized the importance of protecting an individual's jury trial rights in capital plea bargaining.¹ *Jackson* rejected a plea under a federal statute where a decision to go to trial risked a death sentence.² With the subsequent *Brady* trilogy, however, the Court's plea bargaining doctrine migrated away from *Jackson* and accepted pleas in capital cases as long as the defendant had counsel.³

At the death penalty's height at the turn of the century, prosecutors had a plausible, good faith argument that charging a defendant with a capital crime was an earnest pursuit of a death sentence, and not merely a tactical maneuver to coerce a guilty plea and a life without parole ("LWOP") sentence.⁴ Over the past twenty years, though, the capital punishment landscape has significantly narrowed, with only an average of twenty new death sentences a year, most coming from the few counties that have the economic resources to pursue the death penalty.⁵ The decreased likelihood of receiving a death sentence could, in theory, convince more capital defendants to go to trial as opposed to entering plea deals, especially as juries, even in Texas, are increasingly disinclined to impose death sentences.⁶ Going to trial would not only enable the defendant to challenge the guilt determination as to the homicide itself, but also which homicide, with a lower degree of murder or manslaughter being a better outcome than first-degree murder.

But, the risk of execution remains too heavy a thumb on the scale. Defendants charged with a capital crime must choose between accepting a long sentence and avoiding the death penalty, or challenging that possible long sentence with the risk of the death penalty as a possible outcome. The effect of this dynamic is that prosecutors essentially have the power to impose mandatory LWOP sentences in homicide cases, simply by threatening to pursue the death penalty.⁷

As such, this essay makes the case that, taken together, the values of the Fifth (right not to plead guilty), Sixth (trial by jury, right of confrontation, right to present witnesses), and Eighth Amendments (right to heightened scrutiny in capital cases)

¹ 390 U.S. 570, 571–72 (1968).

² *Id.* at 582.

³ *Brady v. United States*, 397 U.S. 742, 758 (1970); *Parker v. North Carolina*, 397 U.S. 790, 797–98 (1970); *McMinn v. Richardson*, 397 U.S. 759, 759, 772 (1970).

⁴ See DEATH PENALTY INFO. CTR., *Fact Sheet*, at 1, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf> (last updated October 6, 2022). [<https://perma.cc/T52N-MPB3>].

⁵ *Id.* at 2.

⁶ Only eighteen people were sentenced to death in 2021, including four in Texas. See DEATH PENALTY INFO. CTR., *State-by-State: Texas*, at 3 <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> [<https://perma.cc/8DM2-X9VS>].

⁷ Tina Roseburg, *The Deadliest DA*, N.Y. TIMES (Jul. 16, 1995), [<https://perma.cc/R69G-YRHS>] (Philadelphia prosecutor Lynne Abraham's practice of charging every homicide with the death penalty underscores this point).

should lead the Court, legislatures, or prosecutors themselves to eliminate plea agreements in capital cases, particularly those that result in LWOP sentences. Such bargained sentences almost certainly reflect the coercion of the prosecutor in an unequal bargaining dynamic rather than a voluntary acceptance of a proportional punishment for one's crime.

I. THE PENUMBRA OF CONSTITUTIONAL SENTENCING RIGHTS

What makes the American criminal justice system unique in the world are its aspirations to accord criminal defendants a series of basic rights. These rights emanate from the language of the Constitution, the Bill of Rights and the Supreme Court's jurisprudence interpreting those provisions. These rights are critical to preserve fundamental fairness, protect against incarceration of innocent individuals, and encourage proportionate sentencing.

The plea bargaining process has the consequence of undermining the exercise of these rights. While the efficiency benefits of plea bargaining might arguably justify allowing the voluntary waiver of these rights in certain circumstances, the bar becomes much higher when a death sentence is a possible sentencing outcome.⁸

A. *The Fifth Amendment*

The Fifth Amendment accords individuals accused of crimes the right to avoid self-incrimination by refusing to answer questions prior to trial and refusing to testify at trial.⁹ Courts do not permit criminal juries to make any inferences concerning the guilt of the accused from an accused's failure to testify.¹⁰

This right remains critical to the concept of a fair criminal trial because it keeps the burden on the government to prove all of the elements of the crime beyond a reasonable doubt.¹¹ A criminal defendant does not have to prove his innocence.¹² Requiring a defendant to testify in a way that would incriminate him prior to or

⁸ Even in non-capital cases, there are serious questions as to whether plea bargains ever offer good deals for criminal defendants. *See generally* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2021).

⁹ U.S. CONST. amend. V ("No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."). For purposes of this Article, all references to the Sixth Amendment include both the application of the Amendment to federal crimes and the application of the Amendment, through the Fourteenth Amendment, to state crimes. *See Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (incorporating the right to the privilege against self-incrimination).

¹⁰ *Taylor v. Kentucky*, 436 U.S. 478, 480 n. 5, 481 n. 6 (1978).

¹¹ *In re Winship*, 397 U.S. 358, 362, 368 (1970).

¹² *Coffin v. United States*, 156 U.S. 432, 460 (1895) (tracing the history of the presumption of innocence).

during trial would thus undermine the burden of the state and violate the defendant's constitutional rights.¹³

A plea bargain, though, can have the effect of infringing on the Fifth Amendment right against self-incrimination, particularly in a capital case. The decision to agree to the terms of the plea bargain and plead guilty is, by its very essence, a decision to incriminate oneself. If such a decision is made voluntarily out of guilty conscience or a desire to take responsibility for one's criminal act, then allowing such a waiver of the Fifth Amendment right seems reasonable.¹⁴

If the decision to waive the right against self-incrimination, on the other hand, results from undue pressure by the state, the plea bargain becomes less defensible. In particular, where the state threatens a severe punishment in excess of the defendant's culpability, this pressure compromises the voluntariness of the plea decision.¹⁵ In some cases, perhaps many cases, criminal defendants might choose to plead guilty even though they are innocent to avoid the excessive sentence.¹⁶ Even in cases where the defendant has committed a crime, a pressured plea bargain might convince a defendant to accept a plea to avoid a lengthy sentence even though the state's evidence is weak. Indeed, there should not be a penalty for the defendant choosing to exercise his constitutional right against self-incrimination.

The same is true for other Fifth Amendment rights—the right to present witnesses and the right to confront them. Plea bargaining is a decision to forego the exercise of those trial rights. The defendant trades the value of presenting his own evidence and challenging the evidence of the state in exchange for a reduced sentence. When such a decision is not based on the merits of such a trade, but instead to avoid the risk of a higher punishment, it makes the decision seem less voluntary.

The death penalty further magnifies this problem. If the choice a defendant faces is between the risk of a death sentence and some lesser sentence, many defendants choose the lesser sentence, even in cases where the defendant is innocent or is likely to receive a much lower sentence at trial.¹⁷

The risk of bargaining in the shadow of death is that there will be no real bargaining at all. Instead of a give-and-take negotiation, a plea negotiation involving a risk of death as a consequence for failing to reach an agreement likely gives rise

¹³ *Griffin v. California*, 380 U.S. 609, 615 (1965) (the invocation of the Fifth Amendment right against self-incrimination cannot be used as evidence of guilt).

¹⁴ *Brady v. United States*, 397 U.S. 742, 748 (1970) (noting that guilty pleas must be voluntary).

¹⁵ See generally C.G. Brunk, *Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC. REV. 527, 543–44 (1979).

¹⁶ See, e.g., Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REVIEW OF BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/WJA6-4BLX>].

¹⁷ Of course, going to trial does not ensure a positive outcome either. To date, over 180 innocent people have been exonerated from death row. See DEATH PENALTY INFO. CTR., *Innocence*, <https://deathpenaltyinfo.org/policy-issues/innocence> [<https://perma.cc/F729-YCSD>].

to a Hobson's choice—take it and avoid death, reject it and risk death.¹⁸ For some, this choice is not a meaningful one. Even for those who might be willing to go to trial, it becomes a strong encouragement to plea if not a coercive act.

B. *The Sixth Amendment*

Plea bargains similarly threaten the Sixth Amendment right to a jury trial. Under the Sixth Amendment, criminal defendants have a right to a trial by jury, meaning that the jury makes the determination of whether the defendant is guilty of committing the charged crime.¹⁹ This constitutional right has democratic roots, with the idea being that one's peers, as opposed to elected officials, stand in the best position to decide one's guilt or innocence in an unbiased manner.²⁰

A plea bargain, by definition, extinguishes the right to a jury trial. The parties make the bargain in lieu of a trial, with the defendant forfeiting the right to trial in exchange for a lesser sentence.²¹ As with the Fifth Amendment right, such an exchange can be reasonable in cases where it is voluntary and without coercion.²² The risk of a longer sentence, though, can exert significant pressure on the defendant to forfeit his right to a jury trial.²³

The practical consequence, in many cases, is that there is a sentencing cost placed upon defendants who choose to exercise their right to a jury trial.²⁴ This trial penalty that defendants face—receiving a greater punishment as a consequence for going to trial instead of accepting a plea bargain—is a thumb on the scale that compromises the efficacy of the Sixth Amendment.²⁵

As with the Fifth Amendment, the problem becomes more significant in capital

¹⁸ Joseph L. Hoffman et al., *Plea Bargaining in the Shadow of Death*, 69 *FORDHAM L. REV.* 2313, 2388 (2001).

¹⁹ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .”). For purposes of this Article, all references to the Sixth Amendment include both the application of the Amendment to federal crimes and the application of the Amendment, through the Fourteenth Amendment, to state crimes. *See* *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (incorporating the right to trial by jury); *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (incorporating the right to confrontation).

²⁰ *See generally* ALBERT W. DZUR, *PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY* (2012).

²¹ *See generally* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1914 (1992).

²² *Brady v. United States*, 397 U.S. 742, 748 (1970) (noting that guilty pleas must be voluntary).

²³ *See generally* KETANJI BROWN JACKSON, *THE HAND OF OPPRESSION: PLEA BARGAINING PROCESSES AND THE COERCION OF CRIMINAL DEFENDANTS* (1992).

²⁴ *See, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 *UNIV. PA. L. REV.* 79, 109 (2005) (arguing that federal defendants plead guilty because of large trial penalties).

²⁵ *See, e.g.*, RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 38–62 (2011) (arguing against the trial penalty).

cases. The pressure of a death sentence is simply greater than a term of imprisonment. And it is impossible to receive a death sentence without a jury imposing it.²⁶

C. *The Eighth Amendment*

The Eighth Amendment proscribes the imposition of cruel and unusual punishments.²⁷ Assuming the plea bargain does not involve an unconstitutionally excessive punishment, the Eighth Amendment is, in theory, not implicated in a plea bargain.²⁸ But, the Supreme Court's Eighth Amendment doctrine explains why capital cases magnify the Fifth and Sixth Amendment infringements of plea bargains.

The Supreme Court has long held that “death is different.”²⁹ The death penalty is a punishment unique both in its severity—it is the most severe punishment the state can impose, and its irrevocability—once imposed, it cannot be revoked, as the defendant is dead.³⁰

In the Eighth Amendment context, the idea of the death penalty's differentness has served as the basis for heightened constitutional scrutiny.³¹ In the plea

²⁶ *Hurst v. Florida*, 577 U.S. 92, 102–03 (2016); *see also* Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 451 (2019).

²⁷ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). For purposes of this Article, all references to the Eighth Amendment include both the application of the Amendment to federal crimes and the application of the Amendment, through the Fourteenth Amendment, to state crimes. *See Robinson v. California*, 370 U.S. 660, 675 (1962) (incorporating the cruel and unusual punishment clause).

²⁸ To the extent that punishments permitted by the Supreme Court's interpretation of the Eighth Amendment can be presumed to fall outside the proscription against cruel and unusual punishments, plea agreements do not violate the Eighth Amendment as long as they impose a permissible punishment under the Court's current jurisprudence.

²⁹ *See, e.g.,* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also Furman*, 408 U.S. at 286 (Brennan, J., concurring) (“Death is a unique punishment in the United States.”); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 118 (2004) (discussing the Court's death-is-different jurisprudence and requesting additional procedural safeguards “when humans play at God”).

³⁰ *See, e.g.,* *Ring v. Arizona*, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (explaining as “death is not reversible,” DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Brennan, J., concurring) (noting that death differs from life imprisonment because of its “finality”); *Spaziano v. Florida*, 468 U.S. 447, 460 n.7 (1984) (stating that “[T]he death sentence is unique in its severity and in its irrevocability”); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (noting that “There is no question that death as a punishment is unique in its severity and irrevocability.”).

³¹ Under the Court's evolving standards of decency doctrine, the Eighth Amendment proscribes the imposition of mandatory death sentences (*Woodson v. North Carolina*, 428 U.S. 280 (1976)); death sentences for the crime of rape (*Coker v. Georgia*, 433 U.S. 584 (1977)), the crime of child rape

bargaining context, the same should be true. Because plea bargaining in capital cases implicates the most serious consequence, it should receive different consideration from the Court and receive a higher level of review by the Court. As discussed below, the Court started in this direction but pivoted away from it.

II. THE PROBLEM OF CAPITAL PLEAS

Plea bargains promote efficiency in the criminal justice system, but this efficiency comes at a cost. First, a plea bargain transfers the sentencing power from the judge to the prosecutor.³² This transfer of power enables a prosecutor to coerce a defendant into a plea bargain and undermines the voluntariness of such an agreement.³³ Second, a plea bargain does not accord the defendant the ability to exercise his constitutional trial rights, including the right to proof of guilt beyond a reasonable doubt.³⁴ As a result, the defendant forfeits his right to due process. Third, the defendant does not have access to exculpatory information known by the prosecution prior to trial.³⁵ Finally, if one assumes that a plea bargain is a just sentencing outcome, then the process allows prosecutors to use excessive sentences as a bargaining tool, raising ethical questions.³⁶ This is particularly true in the capital context, where the consequence of the threatened sentence is execution.

A. *The Court's Ineffectual Jurisprudence*

The Supreme Court decided a series of cases in 1968 and 1970 addressing the issue of the sufficiency of plea bargains in capital cases. While initially expressing some sympathy for the unique pressure that the threat of a death sentence places upon a plea bargaining negotiation, the Court ultimately decided to remove restrictions to plea bargaining in such situations.

In *United States v. Jackson*, the Supreme Court considered the constitutionality of a federal statute that allowed for a jury to impose a death sentence as a punishment

(*Kennedy v. Louisiana*, 554 U.S. 407 (2008)) and for certain felony murders (*Tison v. Arizona*, 481 U.S. 137 (1987)); death sentences for juveniles (*Roper v. Simmons*, 543 U.S. 551 (2005)), intellectually disabled (*Atkins v. Virginia*, 536 U.S. 304 (2002)), and insane offenders (*Ford v. Wainwright*, 477 U.S. 399 (1986)); the imposition of mandatory juvenile LWOP sentences (*Miller v. Alabama*, 567 U.S. 460 (2012)); and the imposition of juvenile LWOP sentences for non-homicide crimes (*Graham v. Florida*, 560 U.S. 48 (2010)).

³² Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1987–88 (1992) (highlighting the divergence in the interests of prosecutors and the public at plea bargaining).

³³ See generally Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981).

³⁴ See discussion *infra* Part I.

³⁵ See generally R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011).

³⁶ See, e.g., Richard L. Lippke, *Retributivism and Plea Bargaining*, 25 CRIM. JUST. ETHICS 3 (2006).

for violating the statute but did not authorize a death sentence for pleading guilty to the same statute.³⁷ The kidnapping statute allowed the imposition of the death penalty “if the verdict of the jury so recommend[s].”³⁸

The statute contemplated a jury imposition of a death sentence,³⁹ or some lesser sentence, but appears silent as to the question of whether a guilty plea can result in a death sentence.⁴⁰ The Court read this silence to mean that a court cannot impose a death sentence without a jury.⁴¹

It then explained that, “[i]f 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.”⁴² While the Court found that the provision did have the effect of ameliorating the defendant’s sentence by avoiding the death penalty, it determined that Congress could not pursue its objectives “by means that needlessly chill the exercise of basic constitutional rights.”⁴³

In other words, the question for the Court was whether the chilling effect was necessary—i.e., whether imposing a risk of death for exercising one’s trial rights was needed to prevent some defendants from receiving the death penalty.⁴⁴ As the Court pointed out, this was clearly not the case, as Congress could have left the sentencing determination to the jury independent of the method of achieving guilt, whether by trial or by plea.⁴⁵

The Court further explained that coercion was not necessary to contravene the Constitution: “the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers, but simply that it needlessly encourages them.”⁴⁶ For the *Jackson* Court, the Constitution bars any statutory thumb on the scale in favor of entering a plea bargain and sacrificing constitutional trial rights.⁴⁷

³⁷ 390 U.S. 570 (1968).

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

³⁹ While it appears that the trial court could reject the jury recommendation, the Court noted that that had never happened. *Jackson*, 390 U.S. at 573.

⁴⁰ As the Court explained, “The statute sets forth no procedure for imposing the death penalty upon a defendant who waives the right to jury trial or upon one who pleads guilty.” *Id.* at 571.

⁴¹ The Court also read the statute as not according the judge the final decision as to whether to impose a death sentence, but rather the decision of the jury. *Id.* at 573–81.

⁴² *Id.* at 581.

⁴³ *Id.* at 582. The Court did not strike down the entire statute, just the death penalty clause.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 583 (“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.”). The Court invalidated a similar

Two years later, in *Brady v. United States*⁴⁸ and *Parker v. North Carolina*,⁴⁹ the Court reversed course.⁵⁰ Brady had pled guilty to the federal kidnapping statute just as *Jackson* did. The facts of his case allowed a unanimous Court to distinguish his case.⁵¹ Brady initially chose to go to trial in his case, before pleading guilty at the last minute.⁵² The record was clear and undisputed that the reason Brady pled guilty was because a co-defendant pled guilty, and not because a trial risked death.⁵³

The Court's pivot here moved the focus from the question of whether a statutory trial penalty was necessary to whether the plea was voluntary.⁵⁴ Relying on *Boykin v. Alabama*, the *Brady* Court explicitly limited the holding in *Jackson*.⁵⁵ It stated that "*Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test ... that guilty pleas are valid if both 'voluntary' and 'intelligent.'"⁵⁶

The *Brady* Court went further, undercutting its reasoning in *Jackson*. It emphasized that "even if we assume that Brady would not have pleaded guilty except for the death penalty provision of § 1201(a), this assumption merely identifies the penalty provision as a 'but for' cause of his plea."⁵⁷ That the statute caused the plea in this sense does not necessarily prove that the plea was coerced and invalid as an involuntary act."⁵⁸ The Court also suggested that allowing the possibility of a trial penalty alone to negate a plea bargain would unduly undermine the plea bargaining process and disallow otherwise valid intelligent and voluntary waivers of trial rights.⁵⁹

One additional point to notice in the Court's move away from *Jackson* is its shift from considering pleas in capital cases to focusing on all guilty pleas. The analysis in *Brady* seems to contemplate all pleas and the need for them to be voluntary. The analysis ignores the unique nature of death sentences, which was at

provision in the Federal Bank Robbery Act one year later in a per curiam opinion. *Pope v. United States*, 392 U.S. 651 (1968).

⁴⁸ 397 U.S. 742 (1970).

⁴⁹ 397 U.S. 790 (1970).

⁵⁰ The Court also decided a third plea bargaining case that day. *See McMann v. Richardson*, 397 U.S. 759 (1970) (following the broad theme of deferring to guilty pleas but did not involve the death penalty).

⁵¹ *Brady*, 397 U.S. at 743–45.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

⁵⁶ *Brady*, 397 U.S. at 747.

⁵⁷ *Id.* at 749.

⁵⁸ *Id.* at 750.

⁵⁹ *Id.* at 756–58.

the heart of the decision in *Jackson*.⁶⁰

Justice Brennan's concurring opinion highlighted the Court's doctrinal shift. He first noted the critical point of *Jackson*, that "it is inconceivable that this sort of capital penalty scheme will not have a major impact upon the decision of many defendants to plead guilty. In any particular case, therefore, the influence of this unconstitutional factor must necessarily be given weight in determining the voluntariness of a plea."⁶¹

He then explained, "[t]he Court has elected to deny this latter aspect of *Jackson*, but in doing so it undermines the rationale on which *Jackson* was decided."⁶² Specifically, "the Court appears to distinguish sharply between a guilty plea that has been 'encouraged' by the penalty scheme and one that has been entered 'involuntarily.'"⁶³ Ultimately, "the Court puts a premium on strength of will and invulnerability to pressure at the cost of constitutional rights."⁶⁴

In *Parker*, the Court applied the same reasoning relied on in *Brady* to a North Carolina statute structured similarly to the federal kidnapping statute considered in *Jackson* and *Brady*.⁶⁵ Parker faced a first-degree burglary charge, an offense punishable by death under the state statute.⁶⁶ The consequence for guilty plea by Parker was a mandatory life sentence.⁶⁷

After pleading guilty and receiving a life sentence, Parker challenged his sentence under North Carolina's post-conviction statute in light of the Court's decision in *Jackson*.⁶⁸ Specifically, he argued that his guilty plea was involuntary because North Carolina statutes at that time allowed a defendant to escape the possibility of a death penalty on a capital charge by pleading guilty to that charge.⁶⁹

Citing *Brady*, the Court denied Parker's challenge. It explained that "an otherwise valid plea is not involuntary because induced by the defendant's desire to

⁶⁰ *Id.* at 743–45.

⁶¹ *Id.* at 805 (Brennan, J., concurring in part and dissenting in part).

⁶² *Id.* at 807 (Brennan, J., concurring in part and dissenting in part).

⁶³ *Id.* at 807–08 (Brennan, J., concurring in part and dissenting in part) ("However, if the influence of the penalty scheme can never render a plea involuntary, it is difficult to understand why, in *Jackson*, we took the extraordinary step of invalidating part of that scheme. Apparently in the Court's view, we invalidated the death penalty in *Jackson* because it "encouraged" pleas that are perfectly valid despite the encouragement... Moreover, the Court's present covert rejection of the *Jackson* rationale, together with its acceptance of the result in *Jackson*, leads to a striking anomaly. Since the death penalty provision of the Kidnaping Act remains void, those who resisted the pressures identified in *Jackson* and, after a jury trial, were sentenced to death receive relief, but those who succumbed to the same pressures and were induced to surrender their constitutional rights are left without any remedy at all.").

⁶⁴ *Brady*, 397 U.S. at 808 (Brennan, J., concurring in part and dissenting in part).

⁶⁵ *Parker*, 397 U.S. at 794–95.

⁶⁶ *Id.* at 792.

⁶⁷ *Id.*

⁶⁸ *Id.* at 794.

⁶⁹ *Id.*

limit the possible maximum penalty to less than that authorized if there is a jury trial.”⁷⁰ It assumed that the North Carolina statute posed the same problem that the kidnapping statute posed in *Jackson*, but decided that issue did not foreclose a guilty plea.⁷¹ It further found that Parker’s decision to plead guilty was intelligent and voluntary.⁷²

After *Brady* and *Parker*, a capital punishment consequence for exercising one’s Fifth and Sixth Amendment rights does not constitute unconstitutional coercion in plea bargaining. As long as the plea is intelligent and voluntary, the Court accepts its validity.

Finally, the Court cemented this jurisprudence in an additional case from North Carolina: *North Carolina v. Alford*.⁷³ *Alford* involved the same federal statute, with the key factual difference being that Alford explicitly claimed to be innocent of the crime in question and pleaded guilty only to avoid the death penalty. Citing *Brady*, the Court rejected Alford’s claim that the risk of death made his plea involuntary.⁷⁴

B. *The Power of the Prosecutor*

With the Court making clear that there are no particular limits to plea bargains in capital cases, the power in these cases moves to prosecutors.⁷⁵ While state prosecutors in theory have some level of political accountability, the practical reality is that elected prosecutors are able to hide their plea bargain decision-making from the public.⁷⁶

On one level, this black box of decision making could be necessary in that information from one case might chill the ability to negotiate a plea in a different case. Also, the private nature of such decisions allows prosecutors a level of discretion that might be the subject of undue political pressure if exercised in the public sphere.

On another level, though, the secret nature of plea negotiations can allow prosecutors the opportunity to exercise undue pressure on defendants to enter a plea agreement. The prosecutor can impose a sort of Hobson’s choice—a take it or leave it proposition—that causes the defendant to decide whether to risk a greater sentence.

⁷⁰ *Id.* at 795.

⁷¹ *Id.* at 795–96.

⁷² *Id.* at 793.

⁷³ See *North Carolina v. Alford*, 403 U.S. 25 (1970). The Court decided two additional cases that affirmed these same principles in non-capital cases, generally affirming the validity of plea bargaining in all cases. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Corbett v. New Jersey*, 439 U.S. 212 (1978).

⁷⁴ *Alford*, 403 U.S. at 31.

⁷⁵ See Alschuler, *supra* note 33.

⁷⁶ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

Further, the result of the plea agreement, in essence, is to delegate the sentencing decision from the judge to the prosecutor. By choosing which crime to charge the defendant with, a prosecutor is choosing the range of punishment available. And in some cases, the prosecutor chooses, and the defendant agrees to, the actual punishment imposed.

The trends in the use of the modern death penalty underscore the problematic nature of this kind of prosecutorial power.⁷⁷ First, the broad range of aggravating circumstances in the capital statutes of most states make it easy to charge most homicides as capital crimes.⁷⁸ Such statutes typically contain felony murder provisions, and underlying felonies often accompany homicides. Most states also have an aggravating circumstance that allows for the death penalty in cases that are heinous and/or involve a depraved heart, even though on some level, all homicides are brutal in their own way. The sheer volume of other categories—premeditation, involving a minor, involving multiple deaths, involving a public official, and others—serve to capture most of the homicides.⁷⁹ As such, the prosecutor, in most cases, can charge a homicide as a capital crime.

Further, since the turn of the century, the number of death sentences imposed by capital juries has diminished significantly.⁸⁰ The availability of life without parole (LWOP) sentences has contributed to this trend.⁸¹ The cost of imposing a death sentence, a cost far in excess of a life sentence because of litigation costs and a decade of appeals, also has made prosecutors less willing to take capital cases to trial.⁸² In recent years, a mere twenty people have received a death sentence annually, among the approximately twenty thousand annual homicides.⁸³

The practical consequence is that a death sentence, in most situations, is a highly unlikely outcome at capital trials, particularly when the defendant has competent counsel. The finality of death, though, and the risk one faces in going to trial nonetheless serves as a powerful deterrent for defendants exercising their Fifth and Sixth Amendment rights in many cases. Prosecutors in some jurisdictions decide to charge cases as capital cases to gain this powerful leverage even when they have no intent of pursuing a capital trial.⁸⁴

⁷⁷ See generally Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979).

⁷⁸ See, e.g., Petition for a Writ of Certiorari, *Hidalgo v. Arizona*, No. 17-251 (U.S. Aug. 14, 2017).

⁷⁹ I have made this argument before. See William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012).

⁸⁰ See *supra* note 4.

⁸¹ See Peter Hodgkinson, Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006).

⁸² Costs, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/costs> [https://perma.cc/DCA2-KP3R] (last visited Oct. 24, 2022).

⁸³ See *supra* note 5.

⁸⁴ See Roseburg, *supra* note 7.

What happens, then, in many cases, is that prosecutors can essentially impose a sort of mandatory LWOP sentence. The next subsection explores why this is so troubling.

C. Mandatory Death-in-Custody Sentences

The Supreme Court's Eighth Amendment cases make clear that mandatory death sentences are unconstitutional.⁸⁵ Mandatory juvenile LWOP sentences likewise violate the Eighth Amendment.⁸⁶ To date, however, the Court has not proscribed mandatory LWOP sentences.⁸⁷

The problem with mandatory sentences is that they deny defendants individualized sentencing consideration.⁸⁸ The Court has found this problematic where the consequence is death or, in the case of juveniles, death-in-custody.⁸⁹ If one is imposing the ultimate sentence or something close to it, the sentence should not be an automatic one. Rather, such a sentence should be the product of careful, deliberate consideration.

As the Supreme Court has recognized with respect to juveniles, LWOP sentences are brutal and should not be imposed except in the most extreme circumstances.⁹⁰ The decision to deny someone the ability to ever live outside of custody again—that they deserve such a fate, or are otherwise incorrigible and not capable of rehabilitation—is quite serious and should not be a common sentencing outcome.

And yet, the United States has more individuals—over 60,000—serving this sentence, more than any country in the history of the world.⁹¹ And most LWOP sentences imposed are not the result of careful consideration, but instead the result of mandatory imposition. A few jurisdictions make LWOP the mandatory sentencing alternative for a jury in a capital case. More common, though, is the trend

⁸⁵ See *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down North Carolina's mandatory capital statute); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (striking down Louisiana's mandatory capital statute).

⁸⁶ See *Miller v. Alabama*, 567 U.S. 460, 493 (2012) (barring mandatory JLWOP sentences); *Montgomery v. Louisiana*, 577 U.S. 190, 197 (2016) (applying the Court's decision in *Miller* retroactively); *but see Jones v. Mississippi*, 141 S.Ct. 1307, 1322 (2021) (holding that this proscription does not require a factual finding of permanent incorrigibility).

⁸⁷ See *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991).

⁸⁸ As the Court explained in *Woodson*, mandatory capital sentencing schemes fail “to allow the particularized consideration” of “relevant facets of the character and record of the individual offender or the circumstances of the particular offense.” *Woodson*, 428 U.S. at 303–04.

⁸⁹ See *Woodson*, 428 U.S. 280 (1976); *Miller v. Alabama*, 567 U.S. 460 (2012).

⁹⁰ See *Montgomery*, 577 U.S. 190 (2016).

⁹¹ See, e.g., Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, THE SENTENCING PROJECT (Feb. 17, 2021), <https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/> [<https://perma.cc/YAJ8-PKEA>].

of juries choosing LWOP over life with parole as a sentencing alternative in a capital case.

LWOP sentences also proliferate in non-capital cases, particularly in jurisdictions that have abolished parole, including the federal government. Courts impose life sentences in cases where defendants formerly had the ability to receive consideration for parole after ten or fifteen years; a life sentence now is an LWOP sentence for the same cases.

As the Supreme Court expressed in *Jackson*, such a result should not be permitted. Prosecutors should not be able to invoke death as a consequence in order to coerce LWOP sentences.

III. SOME POSSIBLE BUT UNLIKELY SOLUTIONS

The threat of the death penalty should not serve as a tool to encourage a guilty plea, much less coerce one. The analysis of *Jackson* was correct—the possibility of death clouds the plea bargaining process in such a way as to threaten its legitimacy and constitutionality. Without *Jackson*, though, limits on pleas in capital cases seem unlikely. One result, as mentioned, is the continued imposition of mandatory LWOP sentences.

A. *Strengthening Constitutional Jurisprudence*

The quickest and most effective way for the state to place limits on the use of the death penalty to strong-arm pleas would be by strengthening the constitutional restrictions on such practices. The Court would need to reverse *Brady* and *Parker* and reinstate the holding of *Jackson*.

The Court could also find a middle ground. It would not need to eliminate all plea bargains where the possibility of a death sentence encouraged the outcome. Rather, it could rely on its voluntariness standard as a tool to assess pleas in the capital context. The Court's presumptions, though, would have to change. Under *Brady* and *Parker*, the Court presumes that all pleas are voluntary without explicit evidence of coercion. This shows that the fear of the *Jackson* Court was well-founded.

A better way to ensure voluntariness of pleas in capital cases would be to place the burden on the state to demonstrate the voluntariness. The idea would be that the Court begins from the position that the death penalty is placing an unfair thumb on the scale in such cases, and the state would show why a plea is nonetheless fair in the case at issue.

Such a showing would need to go beyond the ordinary voluntariness colloquy that federal and state courts give to establish voluntariness before accepting a plea deal. The state would need to demonstrate its disclosure of relevant aggravating and mitigating evidence to the defendant. This would help establish that the plea was a reasoned decision—entered into because there is a likelihood of a death sentence, not because the risk provided the pressure. Part of the showing required by the Court

could also involve a likelihood of success on the merits—a demonstration that other similar cases had received the death penalty.

The practical consequence of this kind of constitutional limit, even if not going as far as *Jackson*, would be to discourage prosecutors from charging death unless they genuinely intended to pursue it. Death would then not be a tool to leverage pleas from risk-averse defendants.

Given the fifty years that have passed since *Jackson* and *Brady*, the Court reversing field here seems unlikely.

B. *Legislative Limits*

The legislature could likewise solve the problem of the influence of the death penalty in plea bargaining by altering the statutory pre-requisites for the death penalty.

The simplest approach to addressing this issue would be to bar plea agreements in capital cases and require them to go to trial. Prosecutors would know that charging the death penalty would mean a capital trial would ensue. Such a legislative adjustment would chill the use of the death penalty as a plea bargaining tool.

Two safeguards to such an approach would be necessary. First, prosecutors would need increased flexibility with respect to charging, as charging a crime sometimes occurs before the review of all of the relevant evidence in a case. New statutes should preserve the ability of prosecutors to add a capital charge based on a review of the evidence.

Second, the court should make sure that prosecutors do not use the threat to charge a defendant with a capital crime as a tool to coerce a plea bargain. While the threat to charge does not carry the same weight as an actual indictment for a capital crime, it still provides an opportunity to impose the same kind of pressure. Prior to accepting a plea bargain in a case where a capital charge is possible, the court should require an affidavit or testimony indicating that the state did not make a threat to charge the defendant with a capital crime as an inducement for a plea agreement.

A different statutory solution would be to require a court to make a determination as to the plausibility of a death sentence prior to allowing a capital indictment. This could operate as a mini-trial of sorts, requiring the state to prove the presence of aggravating factors prior to trial in order to pursue a death sentence.

Requiring this kind of procedural hurdle would make it less likely that a prosecutor could use death as a bargaining tool. The advantage of a plea bargain is that it significantly decreases the state's use of resources and is efficient. A demonstration of evidence requirement before the state could proceed in a capital case would mean that the state would only engage in such work if it were serious about pursuing the death penalty; it would be too much work to perform solely for the purpose of plea bargaining. It would likewise signal to the defendant whether the state was likely to actually pursue the death penalty instead of merely threatening it.

A third possible legislative response to the problem of capital pleas would be to create a rebuttable presumption against courts accepting pleas in cases where the

death penalty was a possible sentence. In such cases, courts would require a showing from the state that the plea did not result from the encouragement of avoiding a possible death sentence. Providing a statutory basis for review of plea bargains by courts beyond the constitutional requirements of voluntariness could work to lessen the likelihood that a capital plea deal resulted from the threat of a death sentence.

As indicated above, legislatures are unlikely to pass such laws. The concern with legislatures relates to the capital sentences themselves, not the LWOP sentences that result from prosecutorial coercion in capital cases. The political will to pass rules to reduce LWOP sentences does not appear to be present, as evidenced by their proliferation over the past two decades.

C. Promoting Prosecutorial Accountability

A final tool, equally as unlikely, would be to promote political accountability for prosecutors. A community that demands explanation for plea bargained sentences in capital cases could have the effect of prosecutors electing to use such sentences approaches more sparingly or eliminating them altogether. The hidden nature of the imposition of such sentences, though, makes political backlash unlikely, even in the most liberal of communities.

Public pressure to encourage prosecutors to explain their plea bargaining decisions could help move such decisions from their hidden black box into the public sphere. Prosecutors, though, seem unlikely to want to have the public review decisions that currently are made privately. One could imagine a candidate running for a prosecutor position under the banner of transparency, but the practical reality makes such a shift highly unlikely.

Even if the public paid attention, in many cases the defendants receiving LWOP sentences are not sympathetic and have committed serious crimes. The ability of the public to look beyond the immediate crime to the potential use of the death penalty as a coercive plea bargaining tool seems unlikely.

CONCLUSION

As with many parts of the modern criminal justice system, plea bargains in capital cases carry the appearance of just outcomes, but actually serve to impose excessive, unnecessary sentences. Without the Supreme Court or legislatures imposing limits, however, the use of the death penalty as a tool for leverage in capital cases seems likely, despite the inherent unfairness of such plea bargains.