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SIXTH AMENDMENT—DISPARATE SENTENCING

Corbitt v. New Jersey, 439 U.S. 212 (1978).

Corbitt v. New Jersey[1] is the latest in a line of decisions dividing the Supreme Court on the issue of defendants' constitutional rights under disparate sentencing procedures for guilty pleas and convictions obtained by jury trials.[2] The *Corbitt* Court upheld New Jersey's homicide statute[3] which provided mandatory life sentences for defendants convicted of first-degree murder by a jury trial, while defendants who waived trial by pleading *non vult* or *nolo contendere*[4] received the punishment of "either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."[5] The Court held that the statute did not violate accuseds' fifth amendment right to plead not guilty,[6] sixth amendment right to demand a jury trial,[7] and fourteenth amendment right to equal protection.[8]

I

In May of 1972, fires occurred in a Newark apartment building, killing one person. Corbitt was charged in connection with the fires and indicted on two counts of arson and one count of murder, to which he pleaded not guilty.[9] A jury convicted Corbitt for committing a murder in the course of an arson, a first-degree crime. Pursuant to the New Jersey homicide statute,[10] Corbitt received a mandatory life sentence with a concurrent term of five-to-seven years for the arson conviction.

Corbitt appealed to the Appellate Division of the New Jersey Superior Court which upheld his murder conviction and set aside the conviction for arson under the merger doctrine.[11]

The Supreme Court of New Jersey granted Corbitt's petition of certification for the sole purpose of determining whether a mandatory life sentence upon a jury conviction for murder was valid.[12] As viewed by the New Jersey court, the issue presented in *Corbitt* was whether the United States Supreme Court's decision in *United States v. Jackson*[13] man-

[1] 439 U.S. 212 (1978).

[2] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978) (decided five-to-four); Chaffin v. Stynchombe, 412 U.S. 17 (1973) (decided five-to-four); Brady v. United States, 397 U.S. 742 (1970) (seven joined in majority opinion, two concurred in result); United States v. Jackson, 390 U.S. 570 (1968) (decided six-to-two).

[3] N.J. STAT. ANN. § 2A:113-4 (West 1965), provides in relevant part:

> Every person convicted of murder in the first degree, as aiders, abettors, counselors and procurers, shall suffer death unless the jury by its verdict, and as a part thereof, upon and after the consideration of all the evidence, recommend life imprisonment, in which case this and no greater punishment shall be imposed . . . .

In 1971 the U.S. Supreme Court reversed a decision by the New Jersey Supreme Court to invoke the death penalty provision of § 2A:113-4. Funicello v. New Jersey, 403 U.S. 948 (1971). On remand, the New Jersey Supreme Court amended the section, holding that mandatory life imprisonment is the punishment for all defendants convicted of first-degree murder by a jury. State v. Funicello, 60 N.J. 60, 286 A.2d 55, *cert. denied*, 408 U.S. 942 (1972).

[4] *Non vult* or *nolo contendere* pleas indicate that the defendant does not wish to contest the charge and carry the implications of a guilty plea. Curiously, although *non vult* and guilty pleas are indistinguishable for sentencing purposes, guilty pleas are prohibited under the New Jersey homicide statute. N.J. STAT. ANN. § 2A:113-3 (West 1965).

[5] Section 2A:113-4 of the statute provides that persons convicted of second-degree murder shall receive a sentence of no more than 30 years imprisonment.

[6] U.S. CONST. amend. V provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[7] U.S. CONST. amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with witnesses against him . . . ."

[8] U.S. CONST. amend. XIV, § 1 provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[9] Corbitt, however, confessed to setting two fires. As a result of the second fire, a visitor to the apartments died of smoke inhalation. State v. Corbitt, 74 N.J. 379, 382, 378 A.2d 235, 236 (1977).

[10] As amended by State v. Funicello; *see* note 3 *supra*.

[11] The opinion of the appellate division of the superior court is unreported.

[12] State v. Corbitt, 69 N.J. 447, 354 A.2d 644 (1976).

[13] 390 U.S. 570 (1968). *Jackson* involved a defendant who was convicted and sentenced to death under the Federal Kidnapping Act, which provided a mandatory death penalty upon recommendation of the convicting jury. The maximum sentence obtainable by waiving jury trial or pleading guilty was life imprisonment. On appeal, the Supreme Court held that the death penalty provision of the act placed an impermissible burden on defendants' fifth amendment right to plead not guilty and their sixth

dated an invalidation of New Jersey's dual sentencing scheme for murder convictions.

In *Jackson*, the Court held invalid a federal statute carrying a mandatory death penalty for defendants convicted by a jury, while defendants who waived jury trial or pleaded guilty received a maximum sentence of life imprisonment. The Court reasoned that the kidnapping statute at issue in *Jackson* placed an unconstitutional burden on a defendant's right to plead not guilty to the crimes charged.[14]

The New Jersey court distinguished *Jackson* on the grounds that the Federal Kidnapping Statute therein in question contemplated the death penalty, whereas the statute at issue in *Corbitt* provided the same maximum sentence whether defendants pleaded guilty or not.[15] The New Jersey court also noted that the federal statute in *Jackson* allowed trials to the court.

The New Jersey court reasoned that the statute's homicide sentencing provision created a situation similar to plea bargaining, relying on three recent Supreme Court decisions upholding the allowance of more lenient sentences in return for guilty pleas.[16] Since offers of lenient sentences to induce guilty pleas are inherent in the plea bargaining system, the court reasoned that it could not hold the New Jersey statute invalid without requiring the invalidation of all lenient sentences offered in return for guilty pleas.

Corbitt also argued that the New Jersey statute deprived him of equal protection under the law by providing differential sentencing treatment to defendants who pleaded *non vult* than to those who pleaded not guilty at trial. Under the statute, defendants who waived trial and pleaded *non vult* were entitled to receive a sentence determined according to the discretion of the trial judge,[17] while defendants who pleaded not guilty at trial, if convicted, were sentenced to mandatory life imprisonment. The New Jersey court, however, failed to find that any suspect classification had been created and held that sentencing pursuant to the New Jersey statute bore a "rational relationship" to a proper legislative purpose.[18]

Finding no abrogation of Corbitt's constitutional rights, the New Jersey court concluded that the sentencing provision of the murder statute was valid. Corbitt appealed to the Supreme Court which noted probable jurisdiction in 1978.[19]

The Supreme Court was presented with the issue of whether New Jersey's mandatory life sentence for defendants convicted at trial violated an accused's constitutional rights in light of the possibility of a lesser sentence obtainable by pleading *non vult*. Mr. Justice White, writing for the majority,[20] agreed with the New Jersey court that *Jackson* did not require invalidation of the New Jersey statute, but disagreed with that court's finding that the *Jackson* rationale applied only to cases involving the death penalty.

The Court distinguished *Jackson*, emphasizing that the death penalty in the Federal Kidnapping Act put greater pressure on defendants to plead guilty than did the statute in *Corbitt*. Rather than adopting the same approach as the New Jersey court in limiting *Jackson* to cases involving the death penalty, the *Corbitt* Court reasoned that unlike *Jackson*, the defendant in *Corbitt* could not completely avoid the risk of receiving the maximum sentence by pleading guilty.[21]

The Court stated that decisions since *Jackson* have established the principle that there is no per se rule against encouraging guilty pleas by offering benefits to defendants who forego their trial rights under a *non vult* plea.[22] Drawing on several recent

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amendment right to have a jury trial because it "needlessly" encouraged the making of guilty pleas to avoid the death penalty.

[14] *Id.* at 582.

[15] The majority opinion in *Corbitt* noted the New Jersey statute allows the sentencing judge in a *non vult* plea the discretion to impose any sentence up to life, without determining whether the defendant has committed a first-degree or a second-degree murder. *See* Corbitt v. New Jersey, 439 U.S. at 218 n.7.

[16] The court relied on Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

[17] N.J. STAT. ANN. § 2A:113-3 (West 1965) provides in relevant part: "Nothing herein contained shall prevent the accused from pleading *non vult* or *nolo contendere* to the indictment; the sentence to be imposed, if such plea be accepted, shall be either imprisonment for life or the same as that imposed upon a conviction of murder in the second degree."

See note 5 *supra*. Since the possible sentence for a *non vult* plea ranges downward from the second-degree sentence of 30 years or less, and upward to the life sentence, the trial court appears to have complete discretion in sentencing defendants pleading *non vult*.

[18] 74 N.J. at 402, 378 A.2d at 246.

[19] Corbitt v. New Jersey, 434 U.S. 1060 (1978).

[20] Chief Justice Burger, Justices Powell, Rehnquist, and Blackmun joined in the majority opinion.

[21] *See* notes 15 & 17 *supra*.

[22] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970).

decisions, the *Corbitt* Court declared that a state may constitutionally offer "substantial benefits" to defendants in return for guilty pleas.

In *Brady v. United States*,[23] the Court concluded that as long as guilty pleas are made upon the intelligent advice of competent counsel, such pleas cannot be found to have been coerced and thus invalid, even though motivated by a desire to avoid the death penalty which may be attached to conviction by a jury.[24] The *Brady* Court limited the *Jackson* holding in order to avoid overturning all guilty pleas based on fear of a possible death penalty upon conviction by a jury.[25]

The *Corbitt* Court equated the statutorily imposed choice presented to murder defendants in New Jersey with plea bargaining. Relying on its recent decision in *Bordenkircher v. Hayes*,[26] the Court aligned the facts of *Corbitt* with that case, noting that both cases involved defendants who, if convicted at trial, would be subjected to mandatory life sentences, whereas the possibility of more lenient sentences existed for defendants pleading guilty.[27] The *Bordenkircher* Court held that the State may impose upon the accused the "difficult choice" of whether to plead guilty in return for the possibility of a sentence lighter than the mandatory life imprisonment which the prosecutor would otherwise seek at trial. This choice was upheld even where the Court recognized as "inevitable" the resulting "discouraging effect on the defendant's assertion of his trial rights."[28]

The *Corbitt* Court noted that New Jersey had a valid state interest in maintaining an effective system of plea negotiation which was enhanced by the dual sentencing provision of its homicide statute. Therefore, the Court reasoned, the statute did not "needlessly" burden defendants' assertion of their constitutional right to plead not guilty and demand a jury trial. The Court reasoned that, for constitutional purposes, plea bargaining and New Jersey's statutory dual sentencing provision were equivalent.[29] Hence, the Court applied the same test to the New Jersey statute as it applied in cases involving plea bargained sentences: As long as the sentencing procedure does not coerce or deny voluntary choice of pleas, it may encourage the making of guilty pleas by offering reduced sentences.[30] Applying this test, the Court found no evidence of involuntary pleading in *Corbitt*.[31]

The Court responded to Corbitt's equal protection argument by stating that every person indicted under the statute had the same choice whether to plead *non vult* or to plead not guilty and seek trial. Therefore, similarly situated defendants were treated similarly. Rejecting Corbitt's argument, the Court concluded that the sentencing procedure was not susceptible to equal protection violations.[32]

In a concurring opinion, Justice Stewart agreed with the majority that *Corbitt* could be distinguished from *Jackson*, but objected to the majority's reliance on *Bordenkircher*. Stewart, who authored the majority opinion in *Bordenkircher*, argued that the process of plea negotiations involved in that case differed significantly from the situation created by the statute at issue in *Corbitt*. Stewart noted that there is a "vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case."[33] Characterizing the plea negotiation process as adversarial, Stewart stressed that a state legislature setting penalties for sentences operates in a context different from a prosecutor's plea negotiations. Stewart suggested that if the legislature were to engage in the adver-

[23] 397 U.S. 742 (1970). *Brady* involved the same death penalty provision of the Federal Kidnapping Act at issue in *Jackson*. Brady initially pleaded not guilty but changed his plea to guilty after learning a codefendant planned to plead guilty and testify against him. Brady was convicted and later sought relief on the ground that his guilty plea was involuntarily made as a result of impermissible pressure by fear of the death penalty if he pleaded not guilty and went to trial. Brady relied on *Jackson*, but the Court found that the *Jackson* holding did not make the Federal Kidnapping Act coercive of guilty pleas and affirmed Brady's conviction.

[24] *Id.* at 751.

[25] The *Brady* Court stated: "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." *Id.* at 747.

[26] 434 U.S. 357 (1978). *Bordenkircher* involved a defendant indicted for issuing forged instruments. During plea negotiations, the prosecutor threatened to indict him on an additional charge for recidivism if he refused to plead guilty to the first offense. The defendant refused and was convicted on both charges and sentenced to life imprisonment. On writ of habeas corpus the petitioner alleged that the second conviction and life sentence constituted retaliatory acts in violation of his right to due process. The Court found no violation, reasoning that the defendant was properly indicted under both charges and that the prosecutor's conduct was permissible.

[27] *Corbitt*, however, involved a defendant's statutory choice of pleading *non vult* or not guilty while *Bordenkircher* involved a *prosecutor's* conduct in bringing a second indictment against the defendant. *See* text accompanying notes 67-70 *infra*.

[28] 434 U.S. at 364.

[29] 439 U.S. at 223.

[30] *Id.* at 225.

[31] *Id.*

[32] *Id.* at 226.

[33] *Id.* at 227 (Stewart, J., concurring).

sarial process of plea bargaining by requiring that defendants who pleaded guilty receive half the penalty of defendants convicted for the same crime by a trial, the resulting statute would be held unconstitutional under *Jackson*.[34]

Justice Stevens, in a dissent joined by Justices Brennan and Marshall, opined that the New Jersey sentencing scheme was not the functional equivalent of a plea bargain. Stevens noted that in a plea bargain, the defendant could receive a sentence determined by prosecutor and judge in accordance with factors relevant to the defendant's case. Under the New Jersey statute, however, an accused could be subjected to two different standards of punishment depending on whether he initially pleaded not guilty or *non vult*.[35] The decision to plead not guilty was viewed as triggering a mandatory life sentence if the defendant was convicted, thus precluding consideration of any of the individual factors which influenced a plea bargain.

Steven's dissenting opinion focused on the issue of whether an accused's fifth amendment right against compelled self-incrimination was burdened by the statute. The dissent stressed that a defendant has an "unqualified right" before trial to plead not guilty. As long as this right is constitutionally protected, the dissent reasoned, a statute which is designed to penalize the assertion of this right must be unconstitutional.[36] Stevens characterized the New Jersey statute as penalizing an accused's right against self-incrimination because it fixed a mandatory sentence for the sole purpose of inducing defendants to plead *non vult*. The result, argued Stevens, is that defendants who plead not guilty and are convicted are sentenced not only for the crime of murder but also for having asserted their right against self-incrimination.[37]

The dissenting Justices opined that the majority in *Corbitt* had incorrectly distinguished *Jackson*, noting that while under the New Jersey statute the maximum sentences were technically the same for defendants pleading *non vult* and not guilty, the statute reserved a "significantly more severe standard" of punishment, *i.e.*, the mandatory sentence, for defendants who exercised their constitutional trial rights.[38]

[34] *Id.*

[35] *See* notes 3, 5 & 17 *supra*.

[36] Stevens added: "Just as in *Jackson*, the statute subjects the defendant who stands trial to a substantial risk of greater punishment than the defendant who pleads guilty." 439 U.S. at 230–31 (Stevens, J., dissenting).

[37] *Id.*

[38] *Id.*

II

Corbitt was decided during a period in which the Court has been restricting the protection *Jackson* has offered criminal defendants.[39] The principle of protecting defendants' right to trial was established in 1968 with the *Jackson* Court's pronouncement that "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."[40] The *Jackson* Court reasoned that regardless of a statute's objectives, as long as it "needlessly chilled" the exercise of the fifth amendment right to plead not guilty and the sixth amendment right to a jury trial, it was unconstitutional.[41]

One year later in *Boykin v. Alabama*,[42] the Court held that guilty pleas must be voluntary as evidenced by the trial court's record showing the reasons for accepting a defendant's plea in exchange for his trial rights. The standard announced in *Boykin* for admissibility of guilty pleas was that they be "voluntarily" and "intelligently" made with a full understanding of the consequences.[43]

In 1970, however, the Court in *Brady v. United States*[44] held that all guilty pleas influenced by the fear of a possible death sentence upon conviction at trial were not prohibited by *Jackson*. The *Brady* Court declined to use the *Jackson* standard of determining whether a sentencing procedure "needlessly encourages" guilty pleas in order to invalidate such a procedure. Instead, the Court took a "bargaining" approach, characterizing as "benefits" the more lenient sentences offered to defendants who pleaded guilty, but failing to characterize as "penalties" the lengthier sentences assigned to defendants convicted after exercising trial rights.[45]

Similarly, in *McMann v. Richardson*,[46] decided the same Term as *Brady*, the Court held that the Constitution did not protect defendants' guilty pleas made because of mistaken assessments of fact or bad advice of counsel. The Court stated that in order to prove that a plea is not "voluntary and intelligent," a defendant must show "serious der-

[39] *See* 390 U.S. at 582.

[40] *Id.* at 583.

[41] *Id.* at 582.

[42] 395 U.S. 238 (1969).

[43] *Id.* at 244.

[44] 397 U.S. 742 (1970).

[45] The *Brady* Court stated: "[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 . . . ." *Id.* at 753.

[46] 397 U.S. 759 (1970).

elictions" on the part of his counsel.[47] This holding demonstrated that the Court interpreted the potentially broad standard of voluntariness announced in *Boykin* in a restrictive manner.[48]

The *McMann* Court established that a defendant is required to make difficult choices in the criminal process (*e.g.*, the decision whether to waive the right to plead not guilty) without protection from sentencing influences.[49] The Court stated that a defendant "assumes the risk" of making a faulty decision whenever he decides to forego certain rights. Hence, only by meeting the burden of showing that his counsel was severely remiss can he overturn his plea as involuntary.[50]

In 1975, the Court further restricted the defendant's range of protection in sentencing procedures in *Chaffin v. Stynchcombe*.[51] The *Chaffin* Court held that *Jackson* did not forbid "every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[52] The Court adopted the standard announced in *Crampton v. Ohio*[53] which held that an inducement to plead guilty is permissible unless it "impairs to an appreciable extent any of the policies behind the rights involved."[54] Thus, the *Chaffin* Court permitted the state to force a defendant to choose between foregoing both his trial right and right against self-incrimination in return for a more lenient sentence. Further, the *Chaffin* Court viewed such a choice as an "inevitable attribute" of any plea bargaining system.[55]

[47] *Id.* at 774.

[48] The *Boykin* Court emphasized the importance of examining the totality of the circumstances under which a guilty plea was entered before it could be determined whether it was voluntary. 395 U.S. 238 (1970).

[49] 397 U.S. at 774.

[50] *Id.*

[51] 412 U.S. 17 (1973). *Chaffin* involved a defendant who was convicted by state court on a felony charge and sentenced to 15 years. After serving part of that time he filed a petition for habeas corpus, demanding a retrial, which the Court granted. On retrial, he was reconvicted and sentenced to life imprisonment. Chaffin challenged his second conviction on the basis of the double jeopardy and due process clauses and the chilling of his right to a jury trial under the sixth amendment. The Court held that the second sentence was constitutional, noting the absence of evidence that the jury had any knowledge of his former sentence and concluding that there was no vindictive or retaliatory sentencing.

[52] *Id.* at 30.

[53] Reported *sub nom.* McGautha v. California, 402 U.S. 183 (1971).

[54] *Id.* at 213. Note, however, that the *Chaffin* Court did not investigate whether any of the policies behind the rights were violated. Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

[55] 412 U.S. at 31.

More recently, in *Bordenkircher v. Hayes*,[56] the Court encroached further upon its decision in *Jackson*, emphasizing that it is not only constitutional but necessary that the system of plea bargaining discourage defendants' exercise of their rights to demand a jury trial and to avoid self-incrimination. The *Bordenkircher* Court reasoned that as long as the defendant was free to accept or reject the prosecutor's plea offer, his constitutional rights were not unduly burdened.[57]

The Court's decisions from *Jackson* to *Corbitt* show an increasing willingness to curtail an accused's ability to rely on *Jackson* for protection when making the decision to plead guilty in the face of substantially different sentencing procedures, dependent upon the plea chosen. *Corbitt* furthers this trend by upholding the New Jersey statutory sentencing scheme which allows discretionary sentencing for defendants who enter the *non vult* plea and mandatory life sentences for defendants who are convicted after pleading not guilty.

Since *Jackson*, the Court also has declined to clarify the "needlessly encourages" rationale announced in that decision. Rather, the Court appears to be moving toward a standard that invalidates only those statutes and plea bargaining situations which "coerce" guilty pleas.[58] If this new rationale was applied to the facts of a case similar to *Jackson*, it seems unlikely that the Court would today uphold the decision in *Jackson*.

III

It may be argued that the *Corbitt* Court too severely restricted *Jackson*. In doing so, it has failed to recognize an infringment on accuseds' assertions of trial rights.

The decisions from *Jackson* to *Corbitt* can be read in support of the proposition that defendants are bound to make increasingly "difficult decisions" regarding the waiver of their fifth and sixth amendment rights.[59] Thus the question arises: At what

[56] 434 U.S. 357 (1978).

[57] *Id.* at 363.

[58] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970).

[59] Noting that a defendant cannot be rescued from a wrong decision when he waives constitutional rights as long as his decision is voluntary, the Court in *McMann* stated: "[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments .... In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the state's case." 397 U.S. at 769. *See also Corbitt*, which cites the following passage from *McGautha* approvingly: "The criminal process ... is replete

point do lesser sentences offered by sentencing procedures in return for guilty pleas become an impermissible burden on the defendant's assertion of his constitutional rights?

The Court in *Corbitt* interpreted the New Jersey statute as doing no more than offering "a proper degree of leniency in return for guilty pleas."[60] Although defendants pleading *non vult* were eligible for more lenient sentences than defendants who exercised their trial rights, the Court found no "impermissible punishment" to the latter in denying them the same leniency in sentencing. The Court reasoned that its *Bordenkircher* decision, upholding, *inter alia*, plea bargaining, compelled this outcome.

It appears that the *Corbitt* Court regarded the possibility of lenient sentences available in return for a *non vult* plea as a "benefit" to both the defendant and the state,[61] while it did not view the mandatory sentence reserved for defendants convicted by a jury trial as a penalty for having exercised trial rights. The problem with the New Jersey statute is that it does just that: It penalizes defendants who are convicted at trial by imposing a mandatory life sentence, while rewarding those who forego their trial rights in pursuit of a more lenient sentence.

The *Corbitt* Court did not announce any parameters on the "proper degree of leniency" in sentencing that would be allowed in return for guilty pleas. Under the New Jersey statute, defendants pleading *non vult* may be sentenced from less than a year to life imprisonment.[62] Would the Court thus uphold a sentencing practice that imposed a mandatory life sentence for defendants convicted at trial, but allowed a twenty year sentence in return for a *non vult* plea? Ten year? One year? If the reasoning employed by the *Corbitt* Court is taken to its logical conclusion, it would permit the disparate sentences suggested, absent a showing that defendants were "coerced" into pleading guilty under the sentencing procedure. Such a result is surely prohibited by the *Jackson* Court's holding that "the evil in the . . . statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them."[63]

It may also be argued that the *Corbitt* Court's attempt to distinguish the facts of that case from *Jackson* was without legal significance. The majority reasoned in two parts: the death penalty attached to the Federal Kidnapping Statute provided an impermissible burden on defendants seeking trial and the *Jackson* statute, unlike *Corbitt's*, offered different maximum sentences, reserving the most severe to defendants convicted after exercising their trial rights.

The first of these grounds, by the Court's own admission, is insufficient to distinguish *Jackson*.[64] The second assertion, although supported by the absence of differences in *maximum* penalties available under the New Jersey statute, denies the actual practice and purpose of differential sentences received under *non vult* pleas. As Justice Stevens remarked in his dissenting opinion, "Whether viewed in light of the legislative purpose in enacting the statute or in light of its impact on the defendant's choice of how to plead, this difference in punitive standards has the same 'onerous' effect as if the maximum, as well as the minimum, penalty differed."[65] Hence, it may be assumed that defendants entering *non vult* pleas are likely to be sentenced to terms of less than life imprisonment. If this were not so, there would be no incentive for defendants to plead *non vult*. Thus, only by the formal approach of comparing *maximum* sentences can *Jackson* be distinguished from *Corbitt*, which, as the dissent recognized, is not a meaningful distinction.[66]

Moreover, the thrust of the *Jackson* holding was that a defendant should not be peculiarly penalized for asserting his constitutional rights. The New Jersey statute arguably falls within this prohibition by reserving the penalty of a mandatory maximum to defendants who assert their fifth and sixth amendment rights, while allowing the mere possibility of a maximum to those who plead *non vult*.

The Court analogized the facts of *Corbitt* to the plea bargain at issue in *Bordenkircher*. As pointed out by the author of that opinion, *Bordenkircher* involved the distinguishable issue of the conduct of a prosecutor during plea negotiations; *Corbitt* dealt with statutory trial options confronting an accused. Although the majority in *Corbitt* stated that "there

with situations requiring the 'making of difficult judgments' as to which course to follow." 439 U.S. at 218 n.8 (quoting 402 U.S. at 213).

[60] 439 U.S. at 223.

[61] The Court noted: "We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea." *Id.* at 219.

[62] *See* note 17 *supra*.

[63] 390 U.S. at 583 (emphasis in original).

[64] The Court reasoned: "Although we need not agree with the New Jersey court that the *Jackson* rationale is limited to those cases where a plea avoids any possibility of the death penalty being imposed, it is material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death." 439 U.S. at 217.

[65] *Id.* at 230 (Stevens, J., dissenting).

[66] *See* text accompanying notes 64–65 *supra*.

is no difference of constitutional significance between *Bordenkircher* and this case,"[67] they did not provide reasons supporting that finding, other than the fact that similar life sentences applied to both classes of defendants. The relevant questions addressed by the Court in *Bordenkircher* concerned the voluntariness of the plea decision and the representation of available options provided by the prosecutor and court. The Court found that the prosecutor by increasing the indictments against the defendant was exercising permissible prosecutorial leverage allowed in plea negotiations. *Corbitt*, on the other hand, does not involve conduct in a bargaining context. The state's decision to provide a statutory penalty for defendants who are convicted after exercising their right to trial, while providing a possible benefit to defendants who plead *non vult*, is a different matter. Instead of an ongoing plea bargain, Corbitt faced the fixed choice provided by the homicide statute. The *Jackson* Court addressed such a statutorily imposed choice when it found: "Whatever might be said of Congress' objectives [in the Federal Kidnapping Act], they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[68]

The *Corbitt* Court, in equating the plea bargaining behavior of a prosecutor with the enactment of a sentencing provision by a state legislature, implicitly approved a policy permitting the legislature to exert the same leverage as a prosecutor. However, while a prosecutor may adjust his particular level of indictments to induce a defendant to plead guilty, the legislature must enact a standard for the community. That standard is necessarily inflexible, as compared with the prosecutor's ability to tailor the indictments to individual defendants. Thus, the legislature's attempt to plea bargain by attaching a mandatory sentence to trial convictions creates an inflexible standard for all defendants. The prosecutor, on the other hand, remains free to adjust his indictments according to the particular facts of the defendant's situation.

The *Corbitt* decision also impacts upon the system of criminal justice as a whole. The Court suggests that a state may constitutionally place infringements upon defendants' right to trial in an effort to forward the state interest of conserving prosecutorial and judicial resources.[69] Such a result detracts from the goal of uniformity of punishment for like crimes.[70] This goal involves the social interest, as expressed by the state through its legislature, in determining that first-degree murder is a crime of sufficient gravity to attach a mandatory life sentence. That social interest is compromised when the possibility of a minimal sentence is offered in return for a defendant's plea of *non vult*. Also involved in this goal are fundamental ideas of fairness in distributing justice so that society does not perceive unfair treatment of one defendant when compared to another who is guilty of the same crime.

In addition, there may be serious repercussions as concerns the "deterrent effect of sentencing" where reduced sentences are allowed in return for guilty pleas. If it is assumed that a life sentence deters the act of first-degree murder, the *Corbitt* decision, in upholding a statute allowing discretionary sentencing for the crime of murder, reduces the deterrent impact of a *mandatory* life sentence.

There also exists the likelihood that increasing the incentives to plead *non vult* or guilty will induce a certain number of innocent defendants to plead guilty rather than demand a trial, especially if they believe that the state's case against them is strong. Commentators have noted that accompanying the plea bargaining system is the risk that innocent defendants will be persuaded to plead guilty.[71]

Finally, consider the particular outcome of the New Jersey statutory choice for two hypothetical defendants arrested for murder, where the state possesses enough evidence to make conviction just as likely as not. Defendant A, who decides to take the risk of conviction by contesting his guilt and confronting the witnesses against him, is found guilty and receives the mandatory life sentence under the New Jersey law. Defendant B, on the other hand, pleads *non vult* to the charge. Under the statute authorizing the judge to set a sentence for any term without first determining what degree of murder has been committed,[72] defendant B could conceivably receive a sentence of thirty years in return for his *non vult* plea. As a result, both defendants, having committed the same crime, receive significantly different sentences based on their orig-

[67] 439 U.S. at 221.

[68] 390 U.S. at 582.

[69] By reducing the number of defendants choosing to exercise their right to trial before juries and increasing the number of pleas, the overload of cases tried in criminal courts will be reduced, thereby allowing the cases that go to trial to receive better treatment.

[70] *See* Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 571 (1971).

[71] *See, e.g.*, D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT AND INNOCENCE WITHOUT TRIAL 225-26 (1966); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1977).

[72] *See* note 15 *supra*.

inal ability to predict the outcomes of the trial. Thus, the statute has created a situation that rewards bargaining acumen at the expense of the social goals favoring uniform sentences for the same crime. Individual defendants who plead *non vult* and predict trial outcome are better off, while defendants who are less adept at assessing the probability of acquittal, or who are less apt to gamble their constitutional rights for the possibility of a reduced sentence, are, if convicted, worse off. Hence, the Court has placed the defendant in the position of making probability assessments in order to determine whether it is prudent to exercise his fifth and sixth amendment rights to plead not guilty and to demand a jury trial. In doing so, the Court has retreated from its earlier position of assuring that the defendant cannot, constitutionally, be pressured into such a plea. Such an outcome was found to needlessly burden constitutional rights in *Jackson* and to violate the judicial commitment to maintaining free choice in plea bargains. As expressed in *Boykin v. Alabama*: "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences."[73]

IV.

In *Corbitt*, the Supreme Court approved a statutory sentencing procedure that, in effect, mandated life sentences for defendants convicted after exercising their trial rights while allowing all other defendants the possibility of substantially reduced sentences in return for *non vult* pleas.

This holding continues the Court's trend of upholding increases in sentencing pressure to deter criminal defendants from exercising their rights to plead not guilty and to stand trial.[74] Furthermore, it limits the impact of the *Jackson* rule of protecting defendants from sentencing procedures that "needlessly" encourage guilty pleas and offers protection from only such harsh procedures as are shown to "coerce" pleas.

In addition, by relying on *Bordenkircher*, which approved prosecutorial conduct in plea bargaining situations, to justify its holding that a state legislature can wield similar power in sentencing statutes, the Court has given the legislature the role of prosecutor and allowed it to impose inflexible pressure on *all* defendants to plead guilty regardless of the facts in each individual situation. Such an expansion of the legislative leverage encroaches upon the defendants' zone of trial rights formerly shielded from unnecessary restriction by *Jackson*.[75]

Although the Court did not explicitly reverse the *Jackson* holding, its reasoning represents a reversal of the protective principle expressed in *Jackson*. In pursuing the state's interest of conserving judicial resources by increasing the number of guilty pleas, the *Corbitt* holding indicates that the Court is willing to raise the "price" the defendant must pay to exercise constitutional rights to plead not guilty and to put the state to its proof in a jury trial. As a result, defendants in the future will likely confront more difficult decisions before trial in assessing the case against them with the comparative advantage of foregoing trial. Care must be taken in the future in order to avoid overturning the protective principle in *Jackson* and to ensure that statutory plea options, such as New Jersey's homicide law, do not "price out of reach" a defendant's trial rights under the fifth and sixth amendments.

[73] 395 U.S. 238, 243-44 (1969).

[74] *See* text accompanying notes 39-58 *supra*.

[75] *See* note 68 *supra*.