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COMMENTS

DUPLICATIVE STATUTES, PROSECUTORIAL DISCRETION, AND THE ILLINOIS ARMED VIOLENCE STATUTE

Prosecutorial discretion has achieved overwhelming acceptance in the American criminal justice system.¹ Whether it exists because of the need for individualized treatment of defendants,² the limits in lawmakers' abilities to predict all the conduct they wish to prohibit,³ the inherent limits of statutory language and definition,⁴ or the impossibility of reviewing all the decisions of every prosecutor in the United States, the presence of prosecutorial discretion is no longer an issue. Nevertheless, the question of just how much prosecutorial discretion is needed continues to fuel debate among the commentators.

Supporters of broad prosecutorial discretion argue that the only alternatives to it are never-ending review of decisions,⁵ overly rigid treatment of defendants,⁶ and inability to put limited funds to the best possible use.⁷ In sum, they claim the American system would collapse without vast amounts of prosecutorial discretion. However, those opposing broad grants of prosecutorial discretion fear the dangers of selective enforcement by an unchecked prosecutor.⁸ They refute the claim that prosecutorial discretion is inevitable by pointing to Ger-

many, where prosecutorial discretion is practically nonexistent.⁹ According to this group, prosecutorial discretion makes easy the arbitrary, the discriminatory, and the oppressive.¹⁰

These arguments, both pro and con, apply in full force in the duplicative statute setting. Statutes are duplicative when the same conduct can be prosecuted under more than one statute. If the penalties required by the duplicative statutes differ, the danger is that different people who are equally situated can receive different punishments. While courts have allowed this result to follow from the prosecutor's decision whether to charge,¹¹ it is questionable to allow discretion in the duplicative statute setting: the prosecutor has already made the decision to charge, the prosecutor and police have already allocated their limited funds;¹² in short, a great deal of discretion has already been exercised. Professor Davis states, "Let us not oppose discretionary power, let us oppose unnecessary discretionary power,"¹³ and in the duplicative statute setting, it becomes more probable that the discretion is unnecessary. The prosecutor is given an extra tool which he might use as a lever for plea bargaining¹⁴ or as a means for retaliating against somebody he dislikes. These dangers of unfairness must be balanced against the alleged benefit of the discretionary power: that the prosecutor can tailor

¹ See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); B. GROSSMAN, *THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION* (1969); Bubaney, *Taming the Dragon: An Administrative Law for Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 473 (1976); Cole, *The Decision to Prosecute*, 4 L. & SOC'Y REV. 331 (1970); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12 (1972); Thomas, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507 (1976). See, e.g., Lagoy, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Investigations*, 13 AM. CRIM. L. REV. 435 (1976).

² See Bubaney, *supra* note 1, at 492; Rosett, *supra* note 1, at 17.

³ See Cox, *supra* note 1, at 386.

⁴ See Rosett, *supra* note 1, at 20.

⁵ Cox, *supra* note 1, at 389.

⁶ *Id.* at 390; K. DAVIS, *supra* note 1, at 17, 52.

⁷ Bubaney, *supra* note 1, at 492.

⁸ See K. DAVIS, *supra* note 1, at 224; Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960); Cox, *supra* note 1, at 391; LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 537 (1970); Rosett, *supra* note 1, at 12, 20.

Justice Jackson emphasized the prosecutor's ability to do both good and evil:

The prosecutor has more control over life, liberty and reputation than any other person in America. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst. *The Federal Prosecutor*, 31 J. AM. INSTR. CRIM. L. & C. 3 (1940).

⁹ K. DAVIS, *supra* note 1, at 194; see also Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

¹⁰ Breitel, *supra* note 8, at 429 (1960).

¹¹ See *United States v. Batchelder*, 442 U.S. 114 (1979).

¹² The fact that no prosecutor has enough funds to prosecute all offenders has been used to defend the prosecutor's decision not to prosecute. LaFave, *supra* note 8, at 533.

¹³ K. DAVIS, *supra* note 1, at 25.

¹⁴ LaFave, *supra* note 8, at 541.

the punishment to the crime and the defendant's individual circumstances.

I. THE *BATCHELDER* DECISION

In *United States v. Batchelder*,¹⁵ the United States Supreme Court attempted to address the problem of prosecutorial discretion in the duplicative statute context. Yet it failed to respond adequately to the arguments against that discretion, and did not make it clear that there is more than one type of duplicative statute. This comment will analyze *Batchelder*, set out a three-part scheme classifying duplicative statute situations, and discuss the Illinois Armed Violence Statute,¹⁶ which provides a clear example of the dangers inherent in duplicative statutes which are charged simultaneously.

A. BACKGROUND

*United States v. Batchelder*¹⁷ involved two statutes, each of which prohibited conduct the other did not, but which overlapped to the extent that they prohibited some of the same conduct. *Batchelder* had been convicted under 18 U.S.C. § 922,¹⁸ part of which makes receipt by a felon of a firearm which previously has been transported by interstate commerce punishable¹⁹ by no more than five years in prison or a \$5,000 fine, or both. However, part of 18 U.S.C. App. § 1202(a)²⁰ which describes

exactly the same offense, sets a maximum of only two years in prison, or a \$10,000 fine, or both.²¹ The defendant received five years under § 922(h), and challenged the use of the harsher statute as a violation of his right to equal protection under the law.²²

The Seventh Circuit upheld the defendant's claim two-to-one.²³ Finding the legislative history inconclusive and the two statutory provisions inconsistent, the court used general principles of statutory construction in reaching its decision.²⁴ The court relied on the principles that criminal legislation should be applied in favor of lenity, that later enacted statutes may impliedly repeal earlier ones, and that when a serious doubt of constitutionality arises, the statute, if possible, will be construed so as to avoid the constitutional question.²⁵ Since the court found constitutional problems with inconsistent penalties, it construed the statutes together as limiting imprisonment to two years for receipt of a firearm by a convicted felon.²⁶

The Seventh Circuit emphasized Justice Black's dissenting opinion in *Berra v. United States*.²⁷ *Berra* had been charged with tax fraud, punishable by a fine of not more than \$10,000, or imprisonment of not more than five years, or both.²⁸ He sought to instruct the jury that it could choose to convict under a different statute which covered the same conduct²⁹ but which provided for a lesser penalty.³⁰ The majority opinion, assuming *arguendo* that both

¹⁵ 442 U.S. 114.

¹⁶ ILL. REV. STAT. ch. 38, § 33A-2 (1977 & Supp. 1979).

¹⁷ 442 U.S. 114.

¹⁸ In pertinent part, 18 U.S.C. § 922(h) (1968) provides:

It shall be unlawful for any person—

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant stimulant drug... or narcotic drug... or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution; to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

¹⁹ The applicable statute, 18 U.S.C. § 924(a) (1968), provides in relevant part: "Whoever violates any provision of this chapter... shall be fined not more than \$5,000, or imprisoned not more than five years, or both...."

²⁰ Section 1202(a) states:

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United

States or any political subdivision thereof being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years or both.

²¹ *Id.*

²² *Id.* at 630.

²³ *Id.* Circuit Judges Cummings and Bauer formed the majority; Judge McMillan from the Northern District of Illinois, sitting by designation, dissented.

²⁴ *United States v. Batchelder*, 581 F.2d 626, 630 (7th Cir. 1978).

²⁵ *Id.*

²⁶ *Id.* at 631.

²⁷ 351 U.S.131, 137 (1956) (Black, J., joined by Douglas, J., dissenting).

²⁸ 26 U.S.C. § 145(b) (1939) prohibited the filing of any "false or fraudulent" return.

²⁹ 26 U.S.C. § 3616(a) (1939) forbade delivery of any "false or fraudulent list, return, account, or statement with intent to defeat or evade the valuation..." It set maximum penalties of one year in prison or \$1,000 or both.

³⁰ *Id.*

statutes were applicable to tax returns,³¹ disposed of the case by holding only that the jury's role was limited to deciding issues of fact and did not include making findings of law in choosing under which statute to convict.³² This was specifically said to be the only question before the Court,³³ so the majority failed to reach the duplicative statute question.

Justice Black, in dissent, would have reached the question of the constitutionality of the sentence in light of the overlapping statutes.³⁴ He utterly rejected the concept that the power to punish identical conduct as a felony or a misdemeanor could be left to the prosecutor.³⁵ Justice Black cited *United States v. Beacon Brass Co.*,³⁶ in which the Court had said:

We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. *At least where different proof is required for each offense*, a single act or transaction may violate more than one criminal statute. . . .³⁷ (emphasis supplied).

Justice Black explained that in *Berra*, unlike *Beacon Brass*, identical rather than differing proof was required for each offense, causing three constitutional flaws. First, under due process, statutes must fairly and clearly define the conduct to be made criminal and the possible punishment. This is not done where "either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney."³⁸ Second, the delegation of such vast power to the prosecutor violates the doctrine of separation of powers, because it substitutes "the prosecutor's caprice for the adjudicatory process."³⁹ Third, under the equal protection clause, "no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."⁴⁰ Justice Black would have reversed or, at least,

remanded for sentencing under the more lenient statute.⁴¹

The Seventh Circuit adopted these arguments in *Batchelder*. First, the court found that the two overlapping provisions of the Crime Control Act violated the due process clause because they too vaguely defined the punishment that could be administered.⁴² Second, the broad delegation to the prosecutor violated the separation of powers doctrine.⁴³ Third, the likelihood of different treatment of similarly situated people violated the equal protection clause.⁴⁴ In rejecting the well settled rule that the prosecutor can choose which of two overlapping statutes can be applied to a particular defendant,⁴⁵ the court emphasized that the cases cited for this proposition involved statutes which did not have the same elements of proof.⁴⁶ The case was remanded for sentencing under the more lenient statute.⁴⁷

The dissent disagreed, finding support in the line of cases that the majority distinguished.⁴⁸ Even though in those cases the elements of proof tended to be different rather than identical, as in *Batchelder*, the dissent found them applicable because of the general theories of prosecutorial discretion which those cases endorsed.⁴⁹ The dissent added that "a dissenting opinion, [in *Berra*], even by a respected constitutional scholar such as the late Justice Black, is weak authority. . . ."⁵⁰

The importance of the Seventh Circuit *Batchelder* opinion is that it directly compares the two contradictory lines of cases dealing with duplicative statutes. One line originated in the *Berra* dissent and is followed in several federal⁵¹ and state⁵² courts. It holds that where statutes overlap so that the prosecutor can select the statute offering a harsher or milder penalty for exactly the same conduct, without any other guidelines, the equal protection clause is violated. The second and more recent line of cases holds that a prosecutor's ability to choose

⁴¹ *Id.* The more lenient statute was 26 U.S.C. § 3616(a) (1939).

⁴² 581 F.2d at 631.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 632.

⁴⁶ *Id.* at 633.

⁴⁷ *Id.* at 636.

⁴⁸ 581 F.2d at 637 (dissenting opinion).

⁴⁹ *Id.*

⁵⁰ *Id.* at 639.

⁵¹ *United States v. Coppola*, 425 F.2d 660 (2d Cir. 1969); *United States v. Hairston*, 437 F. Supp. 33 (N.D. Ill. 1977).

⁵² See cases cited in note 136 *infra*.

³¹ The Court later held that there was indeed a difference in the amount of proof required under the two statutes. *Sansone v. United States*, 380 U.S. 343 (1965).

³² 351 U.S. at 134-35.

³³ *Id.*

³⁴ *Berra v. United States*, 351 U.S. at 137 (Black, J., joined by Douglas, J., dissenting).

³⁵ *Id.* at 139.

³⁶ 344 U.S. 43, 45 (1952).

³⁷ *Berra v. United States*, 351 U.S. at 139 (quoting *United States v. Beacon Brass Co.*, 344 U.S. at 45).

³⁸ 351 U.S. at 139.

³⁹ *Id.* at 140.

⁴⁰ *Id.*

one statute over another in the overlapping situation is no different from his ability to choose whether to prosecute or what charge to bring.⁵³ This line of cases finds no violation of the equal protection clause. The Seventh Circuit endorsed the *Berra* dissent and its progeny after directly comparing them with the other authorities. However, the Supreme Court reversed without addressing the comparison in as much detail.⁵⁴

Writing for a unanimous court, Justice Marshall found that the legislative history quite conclusively established Congressional intent to enact two independent gun control statutes, "each enforceable on its own terms."⁵⁵ Therefore, the court of appeals erred in its application of general principles of statutory construction because there was no ambiguity to interpret in favor of lenity, and no repeal was intended.⁵⁶ As for the principle that courts construe statutes to avoid constitutional questions, the Court found no constitutional infirmities.⁵⁷

The Court recognized "the fundamental tenet that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes'" and that the sentencing provisions must clearly state the consequences of violating a criminal statute. Nevertheless, the Court found that the statutes gave adequate notice.⁵⁹ Even though two different penalties were possible, a defendant could know the range of punishment to which he might be subjected, just as he would in the typical statute providing for alternative punishment.⁶⁰ Moreover, the Court rested its judgment on the settled rule that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any one class of defendants."⁶¹

With respect to that series of cases indicating that overlapping statutes with identical elements

of proof give the prosecutor unfettered discretion, the Court held this analysis "factually and legally unsound."⁶² Discretion is limited rather than unfettered in such cases because race, religion, and other suspect differences are constitutionally impermissible reasons for choosing one statute over another, thus placing real limits on the prosecutor.⁶³ Furthermore, these same controls apply when the prosecutor determines he has enough proof to convict under either of two statutes which have different elements of proof.⁶⁴ The prosecutor in this situation may be influenced by the penalties available upon conviction without violating the due process or equal protection clauses. Finally, there is no improper delegation violating the separation of powers doctrine because Congress had expressly set forth the range of penalties available.⁶⁵

B. THE FLAWS OF *BATCHELDER*

The Court in *Batchelder* makes a clear choice between the two prevailing views regarding overlapping statutes with varying penalties by holding such statutes to be constitutional, at least where each statute covers conduct the other does not.⁶⁶ Yet, the decision fails to answer fully the problems raised in the *Berra* dissent and cases like it, and is therefore subject to criticism.⁶⁷ It glosses over delegation and equal protection as applied to duplicative statutes.⁶⁸

⁶² *Id.* at 124.

⁶³ *Id.* at 124-125.

⁶⁴ *Id.* at 125.

⁶⁵ *Id.* at 126.

⁶⁶ Justice Marshall stresses, both in the text and footnote, that the statutes are not identical because each contains a type of person or conduct within its prohibition which the other does not. *United States v. Batchelder*, 442 U.S. at 119 n.5.

⁶⁷ The case completely mirrors the government brief, even to the point of dividing up topics with the same type of headings and organization. Thus, it is not surprising that it fails to raise many issues beneficial to the defendant. See Brief for Respondent *passim*, *United States v. Batchelder*, 442 U.S. 114 (1979).

⁶⁸ The Court does make several findings that are unimpeachable. The Court adequately treats the *Lanzetta v. New Jersey*, 306 U.S. 451, issue of required notice in criminal statutes of what is prohibited and what penalties are possible. *Lanzetta* explains that statutes give adequate notice of the conduct prohibited and its ensuing penalty if any "person of ordinary intelligence" can understand the statute. *Id.* at 453. Under such circumstances, there is no deprivation of due process. *Id. Batchelder* held that the two overlapping statutes were clearly written. Each specifically applied to a felon who receives a gun that has passed through interstate commerce. 442 U.S. at 118. Therefore, a "person of ordinary intelligence" could probably understand that the minimum penalty for being a

⁵³ See cases cited in note 131 *infra*. See also *United States v. Fournier*, 483 F.2d 68 (5th Cir. 1973); *United States v. Chakmakis*, 449 F.2d 315 (5th Cir. 1971); *Hopkins v. United States*, 414 F.2d 464 (9th Cir. 1969); *United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Ehrlich v. United States*, 238 F.2d 481 (5th Cir. 1956); *Bartlett v. United States*, 166 F.2d 920 (10th Cir. 1948); *Clemons v. United States*, 137 F.2d 302 (4th Cir. 1943).

⁵⁴ *United States v. Batchelder*, 442 U.S. 114.

⁵⁵ *Id.* at 119.

⁵⁶ *Id.* at 121.

⁵⁷ *Id.* at 123.

⁵⁸ *Id.* (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

⁵⁹ *Id.* at 123.

⁶⁰ *Id.*

⁶¹ *Id.* at 123-24.

The reason for the Supreme Court's failure to answer the problems raised is that it treats Black's opinion as an enigma. The Court uses a long list of cases to reject the *Berra* dissent⁶⁹ but neglects to cite the many cases that use Black's rationale. Neither *Batchelder*'s nor the government's brief contained a citation to state cases;⁷⁰ this perhaps excuses the Supreme Court's oversight. However, at least five state supreme courts align themselves with the reasoning found in the *Berra* dissent and indirectly have decided against the *Batchelder* holding.⁷¹

Moreover, several of the cases used to bolster support against the *Berra* dissent are themselves highly questionable. For example, the Court cites *United States v. Beacon Brass*⁷² as authority for the proposition that the prosecutor may choose from statutes requiring the same elements of proof but having differing penalties.⁷³ As the *Berra* dissent pointed out, *Beacon Brass* involved different elements of proof,⁷⁴ and therefore is inapplicable. The Supreme Court also points to *SEC v. National Securities, Inc.*,⁷⁵ in which the Court had said "[t]he fact that there may be some overlap [between the Securities Act of 1933 and the Securities Exchange Act of 1934] is neither unusual nor unfortunate."⁷⁶ Yet in *National Securities* there was no allegation that the

felon in possession of a gun which has passed through interstate commerce would be the lesser of the two minimums provided by the overlapping statutes, while the maximum is the greater of the two penalties set out in each of the statutes.

The Supreme Court also read the legislative history better than the Seventh Circuit. Statements from Senate and House debate indicate a clear intention to have both statutes coexist; the later was not meant to preempt the earlier one.

Senator Long, the sponsor of § 1202, explained during floor debate that § 1202 would "take nothing" from, but merely "add to" Title IV. 114 CONG. REC. 14774 (1968). Representative Machen on the House floor stated that § 1202 would complement Title IV. 114 CONG. REC. 16286 (1968). Both statements were cited by the Court. *United States v. Batchelder*, 442 U.S. at 119-21.

⁶⁹ 442 U.S. at 124.

⁷⁰ Brief for Respondent *passim*, *United States v. Batchelder*, 442 U.S. 114.

⁷¹ See cases cited in note 137 *infra*. Nevada, New Mexico, Oregon, Utah, and Washington all reject *Batchelder*. The same is probably true of California, Kansas, and Texas. See note 134 *infra*; 344 U.S. 43 (1962).

⁷² See text accompanying note 37 *supra*. Marshall makes the same mistake by citing *Rosenberg v. United States*, 346 U.S. 273 (1953), which rests on the same language. "At least where different proof is required for each offense . . ." *Id.* at 294.

⁷³ *United States v. Batchelder*, 442 U.S. at 124.

⁷⁴ 344 U.S. 43. See text accompanying notes 36-38 *supra*.

⁷⁵ 393 U.S. 453 (1969).

⁷⁶ *Id.* at 468.

penalties under the two acts would have been substantially different, distinguishing the case from *Batchelder*, where the penalties were indeed different. To cite *Beacon Brass* and *National Securities* for the proposition that overlapping statutes which require different elements of proof and carry different penalties are constitutional is to rewrite them into something they are not.

The crux of the Court's reasoning is that the overlapping statute situation in *Batchelder* resembles other situations in which the prosecutor has broad discretion, and that therefore broad discretion exists in the overlapping statute situation as well. This is a conceptual error, because often the situations are *not* comparable. An example of a situation frequently compared to duplicative statutes is where two statutes exist with differing evidentiary requirements, and the prosecutor has enough evidence to proceed under either.⁷⁷ In such a case, the prosecutor may choose between the two, and even be influenced by the differences in penalties provided.⁷⁸ This situation however, is fundamentally different from *Batchelder* because the state, by making different evidentiary requirements and different penalties, has made a judgment on which conduct is worse. Where the ensuing penalty is greater for one type of conduct than for another, the state specifically has decided that the conduct penalized more heavily poses the greater danger to society. A battery, or willful and unlawful use of force upon another,⁷⁹ is conduct having different proof requirements from an assault, or putting another in fear of receiving a battery,⁸⁰ typically the penalty is greater for battery.⁸¹ A prosecutor might be able to prove either, but would choose battery because the legislature has in effect deemed it a greater danger to society by placing a higher penalty on it. This is not true with overlapping statutes such as those in *Batchelder* because although the penalties are different, the conduct can be the same. Neither statute defines a greater danger to society where the conduct prohibited is identical. Thus the prosecutor in *Batchelder* lacks the guidance

⁷⁷ *United States v. Batchelder*, 442 U.S. at 117.

⁷⁸ *Id.* at 118.

⁷⁹ This is one typical definition. See BLACK'S LAW DICTIONARY 193 (4th ed. 1968). A standard statutory treatment can be found in ILL. REV. STAT. ch. 38, § 12-3 (1962 & Supp. 1979).

⁸⁰ ILL. REV. STAT. ch. 38, § 12-1 (1962 & Supp. 1979); BLACK'S LAW DICTIONARY 147 (4th ed. 1968).

⁸¹ For example, in Illinois both crimes are misdemeanors, but the penalty for battery is Class A, more severe than assault's Class C. See ILL. REV. STAT. ch. 38, § 12-1, 12-3.

he had where the statutes prohibited different conduct.

The Supreme Court similarly errs in comparing discretion in the overlapping statute situation to the prosecutor's decision whether to press charges at all.⁸² The prosecutor has very broad discretion in deciding whether to prosecute, but he is guided in his exercise of discretion by the amount of evidence he can muster. This guidance is wholly lacking in a case like *Batchelder* because the evidence required under either statute is the same.

The *Batchelder* Court addressed the equal protection question by explaining that *Oyler v. Boles*⁸³ and *Yick Wo v. Hopkins*⁸⁴ show the limit the equal protection clause places on prosecutorial discretion. Unlike the *Berra* dissent, the *Batchelder* court found that this limit was not exceeded. To understand the issue, however, it is first necessary to look at the equal protection clause itself.⁸⁵

Briefly, the equal protection clause allows the government to make classifications in the creation and application of laws, but the classification cannot be based on an impermissible standard or be used arbitrarily.⁸⁶ Usually the classification is evaluated under the "rational relation" test: if the classification bears any rational relationship to the governmental purpose for enacting that classification, it will be upheld.⁸⁷ However, if a fundamental right is involved, such as first amendment rights, travel, voting or privacy,⁸⁸ or if a "suspect" classification such as race, national origin, or alienage is used,⁸⁹ the "strict scrutiny" test applies. Under this more exacting test, the government must show a "compelling" interest in the classification which is so important that it warrants overriding fundamental constitutional rights.⁹⁰ In addition, there must be no less drastic alternatives for reaching the governmental objective.⁹¹

Strict scrutiny is not applicable to *Batchelder* because no suspect classification or fundamental

right is involved. The statutes challenged in *Batchelder* made no classifications on their face.⁹² Rather, the danger is that they are arbitrary or capricious as applied. The equal protection clause covers application of statutes by government officials,⁹³ making the rational relation test appropriate.

The equal protection clause involves groups; it focuses on an individual who is treated differently because of the group to which he belongs. The *Batchelder* opinion and the *Berra* dissent each discuss equal protection, but in different ways. The *Berra* dissent assumes equal protection applies, but *Batchelder* discusses equal protection only as it relates to the defense of discriminatory prosecution. Since that defense involves being a member of a group discriminated against, at least some question arises as to whether it applies to Milton Batchelder, the defendant who never made that claim.

*Yick Wo v. Hopkins*⁹⁴ was the first case involving a successful defense of discriminatory prosecution, and the *Batchelder* Court, by invoking *Oyler v. Boles*,⁹⁵ aligns itself with the *Yick Wo* discussion of discriminatory prosecution. In *Yick Wo*, an ordinance concerning private laundries was found to violate the equal protection clause when it was enforced only against Chinese,⁹⁶ but it took *Oyler v. Boles*⁹⁷ to make explicit the two elements of proof necessary in a *Yick Wo*-type case. To show discriminatory prosecution, the defendant must prove that the prosecutor failed to proceed against others whom he knew to be in the same position as the defendant, and that the knowing discrimination was based on an unjustifiable standard.⁹⁸ Cases

⁹² See *Oyler v. Boles*, 368 U.S. 448; *Yick Wo v. Hopkins*, 118 U.S. 356.

⁹³ The statutes are set out in notes 18 and 20 *supra*.

⁹⁴ 118 U.S. 356. See note 96 *infra*.

⁹⁵ 368 U.S. 448. *Oyler* had been convicted under West Virginia's habitual criminal statute, which provided for a mandatory life sentence after three previous convictions of crimes punishable by imprisonment. *Id.* at 449. *Oyler* charged the prosecutor with discriminatory prosecution, and presented evidence that the mandatory life sentence had been invoked in only a minority of cases where it had been applicable. *Id.* at 455. This defense failed because there was no showing that the prosecutor knew he could have proceeded against the others, or that he was using an unjustifiable standard. *Id.* at 456.

⁹⁶ *Id.* at 373-74. The municipal ordinance made it unlawful to operate a private laundry without first obtaining the consent of a board of supervisors. Proof was presented which clearly showed that the ordinance was enforced only against Chinese. The Court found that the statute violated the equal protection clause because, even though it was neutral on its face, it was administered unequally and unfairly. *Id.*

⁹⁷ 368 U.S. 448.

⁹⁸ *Id.* at 456.

⁸² 442 U.S. at 117.

⁸³ 368 U.S. 448 (1962).

⁸⁴ 118 U.S. 356 (1886).

⁸⁵ U.S. CONST. amend. XIV, § 1, states in pertinent part "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

⁸⁶ J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 519 (1977).

⁸⁷ *Id.* at 524. See *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

⁸⁸ J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 86, at 382 n.3.

⁸⁹ See *Graham v. Richardson*, 403 U.S. 365 (1971).

⁹⁰ J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 86, at 524.

⁹¹ L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1001-02 (1978).

have illustrated that it is very difficult to prove an unjustifiable or impermissible standard; those which have been held impermissible have been based on race,⁹⁹ exercise of first amendment rights,¹⁰⁰ political activities,¹⁰¹ and type of business organization.¹⁰²

In limiting the application of the equal protection clause to the reasoning in *Yick Wo* and *Oyler*, the Supreme Court places a very tenuous check on prosecutorial discretion and sets a standard a defendant would find very difficult to meet. Only this very limited set of discriminatory practices has ever been successfully attacked. The fear of arbitrariness, caprice, or whim that was so prevalent in Justice Black's *Berra*¹⁰³ dissent suggests a sort of random discrimination which does not fit into any of these enumerated types. It is hard to tailor a claim of impermissible standard around anything as nebulous as people whom the prosecutor dislikes, or who antagonize him during plea bargaining. If such a claim were made, however, the equal protection clause would have to be applied even under *Batchelder*. The proof problems in showing that the prosecutor acted in this way would, of course, be tremendous. Nonetheless, if the prosecutor pursued the more harsh penalty against those people he did not like, the action would be arbitrary and capricious, thus violating equal protection.¹⁰⁴

It might not even be necessary to define a group for equal protection purposes, since at least one circuit court case dispenses with that requirement. *United States v. Falk*¹⁰⁵ involved a defendant who

⁹⁹ *Yick Wo v. Hopkins*, 118 U.S. 356.

¹⁰⁰ *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (antiwar activities); *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972) (leafletting against the draft); *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968) (claiming unfair police practices).

¹⁰¹ *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974) (union organizing).

¹⁰² *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 225 N.Y.S.2d 128 (1962) (discrimination against discount stores).

¹⁰³ *Berra v. United States*, 351 U.S. at 139 (Black, J., dissenting).

¹⁰⁴ 16A AM. JUR. 2D *Constitutional Law* § 753 (1979).

¹⁰⁵ 479 F.2d 616 (7th Cir. 1973). Even though it was a circuit court case, *Falk* is the "leading case" on discriminatory prosecution. Amsterdam, *The One-Sided Sword: Selective Prosecution in Federal Courts*, 6 RUT.-CAM. L.J. 1, 10 (1974). Even opponents of it who argue its application should be limited concede this point. See Cardinale & Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659 (1978).

The cases citing *Falk* are far too numerous to mention. The most recent affirmation of *Falk* occurred in *United States v. Torquato*, 602 F.2d 564 (3d Cir.), cert. denied, 444 U.S. 941 (1979), where the court held that "relief

was an active draft resister charged with violating a law requiring all people in his age group to carry a draft card.¹⁰⁶ A defense of discriminatory prosecution was successful (the first amendment right to freedom of speech was implicated as well as the equal protection clause). *Falk* could show that many people without draft cards were not prosecuted, but there was no allegation that other similarly situated resisters were prosecuted. *Falk* did not show he was a member of a group being discriminated against, but he still won. From this, it is possible that *Batchelder* could charge unfair treatment by pointing to others prosecuted under the milder gun control statute, but would not have to show similarly situated persons were in the same group and prosecuted under the same harsh statute. It is not enough for the Supreme Court simply to point to *Yick Wo* and *Oyler* when questions like this are left unanswered.

The conclusion that the *Yick Wo* standard, as applied by the Court, does not adequately protect the defendant in an overlapping statute setting gains even more force in light of *Butz v. Economou*.¹⁰⁷ There, the Court approved, by way of dicta, the proposition that because of the prosecutor's position in the judicial process, he must be given absolute immunity from tort liability to perform his function properly.¹⁰⁸

The *Butz* Court explained that the danger of retaliatory suits by angry defendants and the possibility that the prosecutor, facing such suits, would not initiate actions, or be as aggressive in court, warranted absolute immunity for the prosecutor in judicial and quasi-judicial spheres of action.¹⁰⁹ This would seem to include the selection of charges. Thus *Batchelder* and *Butz* together give the prosecutor free rein to be as vindictive and arbitrary as he pleases (short of discriminating against a suspect class), secure in the knowledge that he cannot be sued for damages, and that the defendant will

would be available when intentional or purposeful discrimination was practiced against an individual (even though the discrimination was not class-based)," and that the defendant "could raise his claim of selective prosecution based on individual discrimination." *Id.* at 569 n.9.

¹⁰⁶ 479 F.2d at 617.

¹⁰⁷ 438 U.S. 478 (1978).

¹⁰⁸ *Id.* at 511-12. Though the holding of the Court involved immunity for officials in the Department of Agriculture, some of them were given absolute immunity because their functions were similar to state and federal prosecutors. Prosecutors have absolute immunity because their office requires them to make independent decisions free from outside pressure. *Id.*

¹⁰⁹ *Butz v. Economou*, 438 U.S. at 515 (citing *Imbler v. Pachtman*, 424 U.S. 409 (1976)).

almost certainly be unable to have the charges overturned by claiming discriminatory prosecution.

Even assuming that the prosecutor is scrupulously fair,¹¹⁰ there is still a great danger in the *Batchelder* approach because people may believe the prosecutor is acting unfairly. The canons of legal ethics recognize the danger of the appearance of impropriety even where none actually exists.¹¹¹ Our government may be one of laws rather than of men, but if people feel the laws are unfairly administered, the foundation becomes very shaky. As Justice Brandeis observed, "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."¹¹² The *Batchelder* decision is likely either to treat similarly situated people differently, and therefore unfairly, or else raise the fear that people will be so treated.

An additional reason explaining the Court's action appears in the government's brief,¹¹³ the dissent to the Seventh Circuit *Batchelder* opinion,¹¹⁴ several cases cited by the Court,¹¹⁵ and may be implicit in Justice Marshall's opinion. If the Seventh Circuit opinion had been upheld, numerous overlapping statutes¹¹⁶ would be struck down. This is basically a floodgates argument. Yet the results would be salutary rather than destructive.

All that would be necessary is to take statutes such as the two in *Batchelder* and make them consistent: punish the same conduct with the same penalties and thus eliminate the undue discretion. One method would be to allow sentencing only under the less harsh of the two overlapping statutes.¹¹⁷ This would be a stopgap measure only,

¹¹⁰ One hopes that most prosecutors exercise due care and act in as unbiased a way as they can in the performance of their duties. However, the old political observation that "[a]ll power tends to corrupt, and absolute power corrupts absolutely," see J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 335a n.1 (13th ed. 1955) (1887 letter from John Emerich Edward Dalberg, Lord Acton, to Bishop Mandell Creighton), suggests that the mere presence of the discretion given in overlapping statute situations could be dangerous.

¹¹¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9 (1975).

¹¹² *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

¹¹³ Brief for Petitioner at 33, *United States v. Batchelder*, 442 U.S. 114 (1979).

¹¹⁴ 581 F.2d at 637.

¹¹⁵ See cases cited at 442 U.S. at 121-22.

¹¹⁶ All of the overlapping statutes cited in text accompanying notes 153-59 *infra* might have to be rewritten.

¹¹⁷ Some courts have recommended this. *Berra v.*

because it takes the decision of which penalty to apply to the proscribed conduct out of the legislature's hands. The legislature, if unsatisfied with the results of sentencing under the lesser statute, could repeal it, leaving the harsher one to be applied to all defendants. It could also repeal both and set a new penalty at something in between. Many of the problems caused by overlapping statutes merely result from sloppy legislative drafting.¹¹⁸ Rather than opening floodgates, a Supreme Court decision adopting the arguments made in the *Berra* dissent would force legislators to be more thorough and careful in writing and amending criminal statutes. Such an opportunity should be firmly grasped rather than ignored out of fear of opening floodgates to legislative difficulties.

Though the Supreme Court in *Batchelder* did not cover in depth the necessity for prosecutorial discretion, one can assume that the traditional rationale for discretion is present. The presence of two statutes arguably gives the prosecutor a chance to individualize his treatment of defendants,¹¹⁹ perhaps using the lesser statute for first offenders, or people who assist him to catch other law-breakers. However, those same goals could be achieved with one statute. The prosecutor would still have the option not to press charges, and even a single statute could have some variation in penalties assessed. With only one statute though, the prosecutor could no longer select a single statute by himself. The judge and jury would be brought into the penalty decision, thus shedding light on the entire process. Openness is recognized as one of the best ways to harness discretion;¹²⁰ it could work here to prevent unfairness.

II. A METHOD OF ANALYSIS FOR DUPLICATIVE STATUTES

Despite its shortcoming on both legal and policy grounds, *Batchelder* is the law. Where statutes forbid the same conduct, the prosecutor may choose either

United States, 351 U.S. at 140 (Black, J., dissenting); *Batchelder v. United States*, 581 F.2d at 636; *United States v. Hairston*, 437 F. Supp. at 36; *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146. This technique has the advantage of leaving at least some penalty on the books until the legislature can decide which statutory scheme it prefers.

¹¹⁸ To combat such drafting, courts may use "implied repeal," the later statute acting as an implied repeal of the earlier one, or the more specific statute by implication repealing the less specific one. See Comment, *Prosecutorial Discretion in the Duplicative Statute Setting*, 42 U. COLO. L. REV. 455, 462-63 (1971).

¹¹⁹ K. DAVIS, *supra* note 1, at 17.

¹²⁰ *Id.* at 111.

statute, and may even take advantage of a large variation in penalty provisions.¹²¹ Yet, Justice Marshall emphasized that each statute forbade something the other did not.¹²² This means that the question of constitutionality of statutes that are completely identical except for differing penalties has not been reached. Moreover, in *Batchelder* the prosecutor used only one of the two statutes available. Thus the question of whether the prosecutor could charge under both statutes also remains open.

These three different variations form a conceptual scheme for analyzing duplicative statutes. Courts faced with duplicative statutes can resolve them by resorting to canons of statutory construction¹²³ such as preferring the later statute to the earlier one,¹²⁴ or the more specific statute to the less specific one.¹²⁵ These canons leave the prosecutor with a single statute, thus effectively limiting discretion and promoting equal treatment of similarly situated defendants. These canons, however, are available only in a small number of duplicative statute situations, and the former one may no longer be valid in light of the Supreme Court's refusal in *Batchelder* to apply the later enacted statute so as to repeal the earlier one.¹²⁶

The tripartite framework has the advantage of covering all duplicative statute situations. Marshall's footnote in *Batchelder* adds at least some support to such a division.¹²⁷ This section will discuss all three situations.

A. IDENTICAL STATUTES

In diagram 1, the "A" circle represents conduct that Statute "A" prohibits, while the "B" circle represents conduct that Statute "B" prohibits. The duplicative statute problem occurs when conduct is prohibited by more than one statute. In the

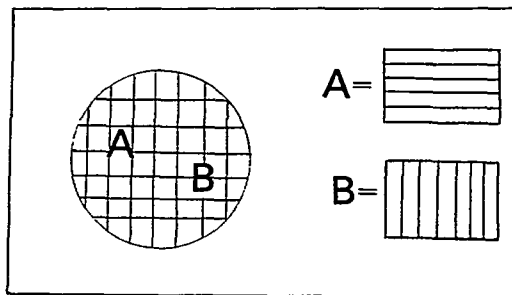


DIAGRAM 1

identical statute situation described above, the two circles completely overlap: all conduct that "A" proscribes, "B" also proscribes, and vice versa. Only the punishments are different. An identical statute situation also exists where a single statute defines the act prohibited, and then gives two alternative sentences either of which the prosecutor can choose at his discretion, with no underlying guidelines. The situation is most dramatic where one alternative is a misdemeanor and the other is a felony.¹²⁸

The Supreme Court has never dealt with statutes identical except for punishment. In *Batchelder*, the United States argued that even these statutes do not violate the equal protection clause,¹²⁹ but only the overlapping statutes previously discussed¹³⁰ were before the Court. However, all the cases the government cited¹³¹ for the proposition that identical statutes are constitutional held only that overlapping statutes with different punishments were not constitutionally infirm, and did not even discuss identical, as opposed to overlapping, statutes.

The government's claim that even identical statutes with differing punishments (see diagram 1) do not violate the equal protection clause is the most extreme of the three duplicative statute situations because it gives the most unfettered discre-

¹²¹ *United States v. Batchelder*, 442 U.S. at 118.

¹²² See note 66 *supra*.

¹²³ See *State v. Chavez*, 77 N.M. 79, 419 P.2d 456 (1966); *State v. Blevins*, 40 N.M. 367, 60 P.2d 208 (1956); *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146; *State v. Twitchell*, 8 Utah 2d 314, 333 P.2d 1075 (1959); *State v. Collins*, 55 Wash. 2d 469, 348 P.2d 214 (1960).

¹²⁴ See *State v. Chavez*, 77 N.M. 79, 419 P.2d 456; *State v. Twitchell*, 8 Utah 2d 314, 333 P.2d 1075; *State v. Collins*, 55 Wash. 2d 469, 348 P.2d 214.

¹²⁵ See *State v. Blevins*, 40 N.M. 367, 60 P.2d 208.

¹²⁶ The Court would use implied repeal only if there were a "positive repugnancy" between the two statutes. *United States v. Batchelder*, 442 U.S. at 122 (citing *United States v. Borden*, 308 U.S. 188 (1939)).

¹²⁷ Footnote 5 stresses that the statutes are not identical, suggesting that identical and overlapping statutes are to be treated differently. 442 U.S. at 119 n.5.

¹²⁸ See *Palmore v. United States*, 290 A.2d 573 (D.C. 1972), *aff'd*, 411 U.S. 389 (1974); *State v. Pirkey*, 203 Or. 697, 281 P.2d 698 (1955); *Olsen v. Delmore*, 48 Wash. 2d 545, 295 P.2d 324 (1956); and Section II *infra*.

¹²⁹ Brief for Petitioner at 34, *United States v. Batchelder*, 442 U.S. 114.

¹³⁰ The statutes are set out in notes 18 and 20 *supra*. See generally Section I *supra*.

¹³¹ *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Jones*, 527 F.2d 817 (D.C. Cir. 1975); *United States v. Smith*, 523 F.2d 771 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975), *cert. denied*, 429 U.S. 939 (1976); *People v. McCulloch*, 57 Ill. 2d 440, 313 N.E.2d 462; *People v. Eboli*, 34 N.Y.2d 281, 313 N.E.2d 746, 357 N.Y.S.2d 449 (1974).

tion to the prosecutor. Several state supreme courts have already decided the issue. In *State v. Pirkey*,¹³² the most widely cited of such cases, the challenged law forbade the writing of a check on an account which is known not to have sufficient funds to cover the check. The law specifically made the crime prosecutable as either a misdemeanor or a felony. The Supreme Court of Oregon held this to be a violation of both the state and federal equal protection clauses, which guarantee like treatment to persons similarly situated. The court would not permit different degrees of punishment to be assessed for the same acts committed under the same circumstances by persons in like situations.¹³³ The Oregon court cited four other state courts that followed this rule.¹³⁴ It further explained that there was no semblance of classification to enable one to ascertain under what circumstances one was guilty of a misdemeanor or of a felony, noting, "This is not legal classification. It is legal chaos."¹³⁵ The court found absolutely no criteria to guide the grand jury or the prosecutor in the exercise of discretion, so the law could not stand.

A large number of state supreme court cases follow *Pirkey*.¹³⁶ Many of them go even further and hold that overlapping statutes are also unconstitutional under the *Pirkey* rationale.¹³⁷ These cases affirm the reasoning in *Pirkey* that where statutes proscribe identical conduct, they cannot prescribe different punishment.

¹³² 203 Or. 697, 281 P.2d 698.

¹³³ *Id.* at 703-704, 281 P.2d at 701.

¹³⁴ *Id.* at 704, 281 P.2d at 702. See *Ex parte Sohnck*, 148 Cal. 262, 82 P. 956 (1905); *State ex rel. White v. Bd. of County Commissioners*, 140 Kan. 744, 39 P.2d 286 (1934); *Ex parte Sizemore*, 110 Tex. Crim. 232, 8 S.W.2d 134 (1928); *State v. Kallas*, 97 Utah 492, 94 P.2d 414 (1939).

¹³⁵ 203 Or. at 705, 281 P.2d at 702.

¹³⁶ The following cases all cite and follow the holding in *Pirkey*. *Palmore v. United States*, 290 A.2d 573 (D.C. 1972); *State v. Chavez*, 77 N.M. 79, 419 P.2d 456; *Rose v. Gladden*, 241 Or. 202, 405 P.2d 543 (1965); *Black v. Gladden*, 237 Or. 631, 393 P.2d 190 (1964); *State v. Powell*, 212 Or. 684, 321 P.2d 333 (1958); *State v. Cory*, 204 Or. 235, 282 P.2d 1054 (1955); *Olsen v. Delmore*, 48 Wash. 2d 545, 295 P.2d 324. The cases cited in note 137 *infra* go even further than *Pirkey*, and wholeheartedly endorse the same reasons cited in *Pirkey*.

¹³⁷ If the conduct penalized under one statute can be identical to the conduct penalized under another statute, equal protection is violated even where the statutes themselves are not identical. *Spillers v. State*, 84 Nev. 23, 436 P.2d 18 (1968); *State v. Chavez*, 77 N.M. 79, 419 P.2d 456; *State v. Corey*, 204 Or. 235, 282 P.2d 1054; *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146; *State v. Twitchell*, 8 Utah 2d 314, 333 P.2d 1075; *State v. Collins*, 55 Wash. 2d 469, 348 P.2d 214; *Olsen v. Delmore*, 48 Wash. 2d 545, 295 P.2d 324.

Pirkey also hints at the notice problem, developed more fully in *State v. Shondel*.¹³⁸ Where two identical statutes offered widely different penalties, the court followed *Lanzetta v. New Jersey*¹³⁹ in finding that penal statutes and their corresponding penalties must be clear and specific enough that a "person of ordinary intelligence" can understand them.¹⁴⁰ The *Shondel* court found that with no criteria in the identical statute situation, nobody can know what the penalty is, making for a deprivation of due process.¹⁴¹

Pirkey alludes to still another constitutional flaw: unauthorized delegation of discretionary power.¹⁴² Though the court rested its decision on equal protection, it suggested that the decision could also rest on the delegation of the legislature's power to the executive branch (prosecution).¹⁴³ While delegation has seldom succeeded as an argument since the days of *Schechter Poultry Corp. v. United States*,¹⁴⁴ Cardozo's cryptic description of the regulatory scheme there as "delegation running riot"¹⁴⁵ seems to apply just as much to statutes identical except for punishment. As in *Schechter*, the legislature has not done its job in drafting the statute, and must be more specific. *Schechter* serves as the outer limit, where delegation becomes impermissible,¹⁴⁶ and identical statutes may reach that limit. In *Schechter*, the President was given the unbridled power to draft his own codes of fair competition, in any manner he wanted. Similarly, the prosecutor has

¹³⁸ 22 Utah 2d 343, 453 P.2d 146.

¹³⁹ *Id.* at 346, 453 P.2d at 148 (citing *Lanzetta v. New Jersey*, 306 U.S. 451).

¹⁴⁰ 306 U.S. at 453.

¹⁴¹ 22 Utah 2d at 346, 453 P.2d at 148.

¹⁴² 203 Or. at 706-07, 281 P.2d at 703.

¹⁴³ *Id.*

¹⁴⁴ 295 U.S. 495 (1935). See also *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (striking down as an unconstitutional delegation § 9(c) of the National Industrial Recovery Act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that Congress' method of letting the industries regulate themselves was an unconstitutional delegation of power). See note 146 *infra*.

¹⁴⁵ 295 U.S. at 553 (Cardozo, J., concurring).

¹⁴⁶ Even though congressional delegations of power have not been struck down for over forty years, "[i]n no instance has the [Supreme] Court itself declared the abandonment of the *Panama-Schechter* principle. It has treated these two cases whenever it has had the occasion to cite them as respected authorities." Merrill, *Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469, 472 (1968). Similarly, Judge Skelly Wright indicated that the reported demise of the delegation doctrine was "a bit premature," and heartily endorsed *Schechter* as an outer limit. Wright, *Book Review*, 81 YALE L.J. 575, 582 (1972). *Contra*, Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1190 n.37 (1973).

the power under identical statutes to charge one person with a misdemeanor and another with a felony when the acts are identical, again with no legislative guidance. Thus, the doctrine of separation of powers is violated.

Before *Batchelder*, these state supreme court cases made it clear that statutes identical except for punishment were unconstitutional. However, *Batchelder* casts at least some doubt on this conclusion, even though it involved overlapping rather than identical statutes. These state cases used the broad equal protection argument found in the *Berra* dissent, but *Batchelder* limited equal protection to the defense of discriminatory prosecution. *Batchelder* also held that overlapping statutes gave adequate notice of the penalty because a person could look at both statutes to determine the range of possible penalties.

Though *Batchelder* undercuts some of the reasoning found in the state cases on identical statutes, they still should be found unconstitutional. The basic difference is one of degree. In overlapping statutes, the focus frequently is on different types of conduct, thus giving the prosecutor at least some idea of which statute he should proceed under. Where statutes are identical except for punishment, the prosecutor finds not the slightest shred of guidance. In this most extreme of duplicative statute situations, the prosecutor's discretion is totally unfettered. The significant danger of harrassment¹⁴⁷ cannot be overlooked.

Operating under the "rational relationship" lower tier of the equal protection clause, statutes identical except for punishment might well be struck down as unconstitutional on their face. The many state supreme court cases striking down such schemes used the sweeping equal protection argument of *Berra*, while *Batchelder*, by citing *Yick Wo* and *Oyler*, limited equal protection to the defense of discriminatory prosecution. Still, *Batchelder* involved overlapping rather than duplicative statutes. In the extreme situation embodied in identical statutes, where there is absolutely no difference in the statutes except for penalty, the Supreme Court might use the more lenient test of *Pirkey* and *Berra*. Under this view, it is arbitrary and capricious¹⁴⁸ to

¹⁴⁷ Harrassment dangers are feared in the articles cited in note 8 *supra*. For examples of actual harrassment practices involving the Illinois Armed Violence Statute, see text accompanying notes 201-04 *infra*.

¹⁴⁸ Numerous cases find that statutes which are arbitrary and capricious violate even the rational relation test. For a listing of cases, see 16A AM. JUR. 2D at §§752-53 (1979).

have widely varying punishments depend on which statutes the prosecutor chooses when he is given absolutely no guidance in distinguishing them. An advantage to this test is that it would not be necessary to go into the difficulties of proving membership in a discriminated-against group, as may be required¹⁴⁹ under a defense of discriminatory prosecution.

The delegation argument also carries great weight in the identical statute situation. The complete absence of legislative standards places the situation within the prohibited outer limits defined by *Schechter*.

Policy as well as questionable constitutionality weigh against the use of statutes identical except for punishment. Harrassment is one factor. In other traditional areas of prosecutorial discretion, such as the decision to charge, the amount of evidence required serves as a guide, and is used in reviewing the case. Similarly, when choosing from different charges, where different types of conduct are more highly penalized, the legislature has decided which is more dangerous, and wishes both to punish and to deter future conduct.¹⁵⁰ Thus the legislature has given at least some guidance. Even in overlapping statutes, the types of conduct which differ between the two statutes can provide clues to the prosecutor. With identical statutes, there is no guidance and little review, so harrassment is easier.

In spite of *Batchelder*, identical statutes are unconstitutional. No case has ever upheld statutes which are totally identical except for punishment.¹⁵¹ With equal protection, delegation, and policy factors all supporting the existing line of state cases beginning with *Pirkey*, the Supreme Court would probably follow this established set of cases and hold the statutory scheme unconstitutional if it were to consider an identical statute case.

B. OVERLAPPING STATUTES

Diagram 2 represents the overlapping statute situation, where each of the two statutes forbids a variety of acts, but where some of the acts are

¹⁴⁹ *But see* United States v. Falk, 479 F.2d 616, and note 105 *supra*.

¹⁵⁰ Certainty of the punishment to be inflicted is probably one of the most important elements to deterrence. The confusion inherent in the identical statute situation might lessen the deterrent effect. For more details on the relationships between sentencing and deterrence, see A. VON HIRSCH, *DOING JUSTICE* (1976).

¹⁵¹ This was not true in *Batchelder*, where there were cases both upholding and striking down overlapping statutes before the decision.

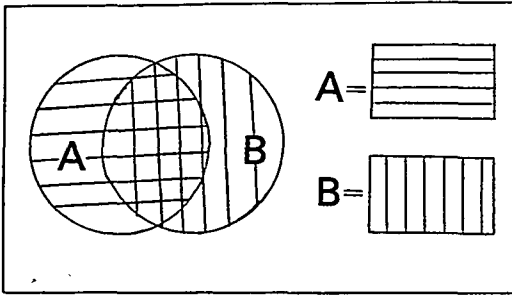


DIAGRAM 2

identical. Again, the duplication problem occurs in the diagram where "A" and "B" overlap, but the difference from diagram 1 (identical statutes) is that both "A" and "B" have elements that are separate from each other. *United States v. Batchelder* involved such a situation. In typical overlapping statute situations, the prosecutor chooses to proceed under only one of the two statutes, but has the option only at the points of intersection. For example, in *Batchelder* the points of intersection included any time a felon is in possession of a gun that has passed through interstate commerce,¹⁵² and the prosecutor exercised his discretion in selecting the statute with the greater penalty.

Overlapping statute situations are far more common than identical statutes. Examples besides *Batchelder* include the overlap between certain provisions in the Atomic Energy Act and the Espionage Act,¹⁵³ between different parts of the Federal Tax Code,¹⁵⁴ between federal drug offenses and those enumerated in the District of Columbia Code,¹⁵⁵ between the Securities Act of 1933 and the Securities Exchange Act of 1934,¹⁵⁶ between different provisions within the Omnibus Crime

Control and Safe Streets Act concerning receipt by a felon of a firearm which has traveled in interstate commerce,¹⁵⁷ and between the Mail Fraud Statute and the Sherman Act.¹⁵⁸ Overlapping statutes have also been frequent at the state level.¹⁵⁹ In fact, it is probable that the very frequency of overlapping statutes was a factor in the Supreme Court's decision to uphold the constitutionality of such statutes.¹⁶⁰

The constitutionality of overlapping statutes was in considerable doubt before *Batchelder*.¹⁶¹ However, after *Batchelder* it is clear that overlapping statutes are constitutional, even if the acts not covered by both statutes (the non-intersecting portion of diagram 2) are miniscule in comparison to the conduct prohibited by both statutes. In *Batchelder*, there was only a small difference in how the two statutes defined a penalty for a previously committed felony,¹⁶² but that difference was crucial for Justice Marshall. In both a footnote and the text, he explained that the holding was meant to apply

¹⁵⁷ See *United States v. Batchelder*, 442 U.S. 114; *United States v. Pruner*, 606 F.2d 871 (9th Cir. 1979); *United States v. Gardner*, 605 F.2d 1076 (8th Cir. 1979); *United States v. Stapleton*, 600 F.2d 780 (9th Cir. 1979); *United States v. Hairston*, 437 F. Supp. 33. The two statutes are set out in notes 18 and 20 *supra*.

¹⁵⁸ The Sherman Act, 15 U.S.C. § 1 (Supp. II 1978), provides in pertinent part: "Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The Mail Fraud Statute, 18 U.S.C. § 1341 (Supp. II 1978), provides in pertinent part: "Whoever, having devised or intending to devise any scheme or artifice to defraud... places in any post office... or knowingly causes to be delivered by mail... any such matter or thing..."

Overlap between these acts occurs in the area of rigging or price fixing, each of which is a per se violation of the Sherman Act. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1939). The Mail Fraud Statute is violated when a scheme to defraud "is carried out by use of the mail," so charges could be brought under either statute whenever bid rigging or price fixing includes mailings. Since 1972 the United States Attorney for the Northern District of Illinois has made it a practice in Sherman Act cases to charge mail fraud violation. The Seventh Circuit has upheld the practice in *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101 (7th Cir.), *cert denied*, 444 U.S. 840 (1979), and *United States v. Azzarelli Construction Co.*, 612 F.2d 292 (7th Cir. 1979).

¹⁵⁹ See cases cited in note 136 *supra*.

¹⁶⁰ See text accompanying notes 113-18 *supra*.

¹⁶¹ One line of cases held them constitutional, see cases cited in notes 53 and 131 *supra*, while another line held them unconstitutional, see notes 51, 136 & 137 *supra*. See generally Section I *supra*.

¹⁶² 434 U.S. at 119 n.5.

¹⁵² Punishable under both 18 U.S.C. § 922(h), and 18 U.S.C. § 1202(a). For the full text of these statutes, see notes 18 and 20 *supra*.

¹⁵³ See *Rosenberg v. United States*, 346 U.S. 273 (discussing the Atomic Energy Act of 1946, 42 U.S.C. §§ 1810(b), 1816, and the Espionage Act of 1917, 50 U.S.C. §§ 32(a), 34).

¹⁵⁴ See *Sansone v. United States*, 380 U.S. 343 (1965); *Berra v. United States*, 351 U.S. 131; *United States v. Coppola*, 425 F.2d 660. The discussion of the two overlapping statutes in *Berra* can be found in text and notes accompanying notes 27-40 *supra*.

¹⁵⁵ See *Hutcherson v. United States*, 345 F.2d 965 (D.C. Cir.), *cert denied*, 382 U.S. 894 (1965); *Lloyd v. United States*, 343 F.2d 242 (D.C. Cir. 1964), *cert denied*, 381 U.S. 952 (1965) (discussing D.C. CODE ANN. § 33-402 (1961), 26 U.S.C. § 4704(a) and 21 U.S.C. § 174, the latter two repealed in 1970).

¹⁵⁶ See *United States v. Naftalin*, 441 U.S. 768 (1979); *SEC v. National Securities, Inc.*, 393 U.S. 453.

only to duplicative statutes that have at least some difference in the conduct described.¹⁶³

Marshall's opinion does leave open the possibility that a legislature wishing to pass identical statutes might vary the conduct proscribed by a tiny amount in order to bring the statutes within the *Batchelder* opinion. This would escape the likely fate of identical statutes: to be overturned as unconstitutional.¹⁶⁴ Given the presumption that legislative motives will not be too closely examined by a reviewing court unless a suspect classification or fundamental right is involved,¹⁶⁵ such a legislative strategy might well succeed.

C. OPTIONAL INCLUDED DUPLICATIVE STATUTES

Optional included duplicative statutes are those in which the prosecutor has the option to charge along with a single crime an extra offense augmenting the penalty if the crime is committed in a certain way. If the prosecutor can prove the simple crime, the extra penalty attaches automatically, without any additional proof. He retains the option not to invoke the extra penalty.

The fact that little or no extra proof is required to trigger the optional included statute distinguishes the situation from greater and lesser included statutes in their traditional sense.¹⁶⁶ In the latter situation a certain amount of proof is required to convict under the lesser statute, while that amount and an incremental amount of proof is needed to convict under the greater statute. The lesser included offense invariably carries a lesser penalty than the greater offense, but the difference in proof required places a check on the prosecutor. For example, simple assault, or placing another in fear of receiving a battery, is a lesser included offense of aggravated assault, which is typically defined as simple assault using a deadly weapon.¹⁶⁷ A potential duplication problem is raised where the prosecutor has enough evidence to convict under the greater statute because he still has the option to proceed under either. The amount of

proof, however, gives the prosecutor an indication of how to use his discretion. If he can prove up the more severe statute, he is justified in proceeding under it because the state has declared the conduct to be more dangerous to society by penalizing it more heavily.

Undoubtedly, the above statutory scheme is constitutional, as *Batchelder* pointed out.¹⁶⁸ However, the question of optional included duplicative statutes is far less certain. The concept itself is so elusive that the best way to discuss it is with a concrete example.

The Illinois Armed Violence Statute defines armed violence as any felony committed with a dangerous weapon.¹⁶⁹ Depending on the felony involved, the armed violence charge can take several forms. With respect to crimes such as homicide or kidnapping, armed violence is not always an option for the prosecutor because these crimes can be committed with or without a dangerous weapon. Where using a dangerous weapon is actually included in the definition of the crime, such as in the case of armed robbery, the armed violence statute would always be available to the prosecutor. Unlike a lesser included offense, proof elements provide no guide to the prosecutor. Moreover, whenever the prosecutor decides to bring charges both for armed violence and for the felony on which armed violence rests, the danger is that the multiple charges, which simply define the same conduct, can be unduly prejudicial to the defendant.

The Illinois Armed Violence Statute, until recently, existed in a different form. Under the previous version, the dangerous weapon requirement was similar, but armed violence could be used only where an enumerated group of crimes was involved, rather than all felonies.¹⁷⁰ Most of the litigation under this version involved aggravated assault, because even though the conduct required for conviction necessarily included armed violence, the former was a misdemeanor while the latter was

¹⁶³ *Id.*

¹⁶⁴ See Section IIA *supra*.

¹⁶⁵ J. NOWAK, R. ROTUNDA, J. YOUNG, *supra* note 86, at 524.

¹⁶⁶ For a typical statutory definition of "included offense," see ILL. REV. STAT. ch. 38, § 2-9 (1977 & Supp. 1979).

¹⁶⁷ For a typical assault and aggravated assault pairing, see ILL. REV. STAT. ch. 38, §§ 12-1, 12-2 (1977 & Supp. 1979). Section 12-2 includes other aggravating circumstances as well as the use of a deadly weapon, including assaulting a person known to be a policeman, fireman or teacher.

¹⁶⁸ 434 U.S. at 121.

¹⁶⁹ ILL. REV. STAT. ch. 38, § 33A-2 (1977 & Supp. 1979).

¹⁷⁰ ILL. REV. STAT. ch. 38, § 33A-2 (1967) (repealed in 1978), could be applied whenever the following crimes from ILL. REV. STAT. ch. 38 (1977) were charged: kidnapping, § 10-1; aggravated kidnapping, § 10-2; rape, § 11-1; deviate sexual assault, § 11-3; aggravated assault, § 12-2; aggravated battery, § 12-4; intimidation, § 12-6; compelling confessions by force, § 12-7; theft of over \$150 in value, § 16-1; burglary, § 19-1; resisting a peace officer, § 31-1; escape from jail, § 31-6(a); or aiding an escape, § 31-7(b).

a felony. Armed violence in both forms is a useful springboard for discussion of optional included duplicative statutes. In either form it differs from the statutes previously discussed because it is charged in addition to, rather than instead of, the other statutes upon which it rests.

As courts have interpreted it, the legislative intent with respect to the armed violence statute was simply to "counteract the much publicized increase in crime rate," and describe certain offenses as more serious if committed by persons who are armed.¹⁷¹ The Illinois Supreme Court has never reached the question of whether the duplicative aspects of the statute are constitutional. The closest it came was in *People v. McCollough*,¹⁷² where the court held that a prosecutor had the option of charging an automobile driver who ran over a pedestrian with either reckless homicide or involuntary manslaughter, the latter having the harsher penalty. It reversed the appellate court, which had found a deprivation of both due process and equal protection because of the unguided discretion to impose different charges of punishment for identical acts under identical circumstances.¹⁷³ The supreme court ignored the lower court's reliance on the *Berra* dissent,¹⁷⁴ holding that the discretion exercised was like the kind of discretion exercised every day by the prosecutor in his charging decisions.¹⁷⁵

Following this opinion, every Illinois appellate court considering the constitutionality of the armed violence statute relied on *McCollough's* discussion of reckless homicide and involuntary manslaughter to uphold it.¹⁷⁶ Although state courts usually follow their own supreme court, this reliance is troublesome in view of the fact that *McCollough* was decided 4-3, with the dissent¹⁷⁷ vigorously citing to *Berra*, and to four different state supreme court

cases,¹⁷⁸ all of which refused to allow an equivalent broad breadth of discretion where exactly the same conduct is forbidden.¹⁷⁹

The state legislature's response cast additional doubt on the appellate court's reliance on *McCollough*. The legislature effectively overruled the Illinois Supreme Court by redefining reckless homicide and involuntary manslaughter so that they no longer required the same elements.¹⁸⁰ Even after this change, however, the appellate courts continued to uphold the armed violence statute, relying instead on earlier appellate cases, which in turn had relied on *McCollough*.¹⁸¹

Again, the legislature took action, this time changing the armed violence statute to its present form. This did not solve all the possible problems with the statute,¹⁸² but did eliminate the largest grant of discretion by removing the misdemeanor of aggravated assault as a base upon which armed violence could rest. This was sound action on the legislature's part. Although the situation might be seen as a constitutionally permissible overlap under *Batchelder* because armed violence applies to crimes other than aggravated assault, aggravated assault covers no ground that armed violence does not also cover. Therefore, the situation looks more like identical statutes (diagram 1), the most extreme situation, in which case the widely varying penalty provisions would violate the constitutional rights of the defendant. The Illinois legislature, whether intentionally or not, followed the tenets outlined in *Pirkey*.¹⁸³ Even if a *Batchelder* overlap situation does exist, the legislature is still entitled to limit the prosecutor's discretion. After all, the Supreme

¹⁷⁸ *Id.* at 447-50, 313 N.E.2d at 466-67.

¹⁷⁹ *Id.*

¹⁸⁰ For an examination of these events, see *People v. Hollister*, 39 Ill. App. 3d 514, 350 N.E.2d 373. Unfortunately, Illinois does not have legislative history on record, so often the best that can be done is to trust a court's interpretation of the legislature's intent.

¹⁸¹ *People v. Hollister*, 39 Ill. App. 3d 514, 350 N.E.2d 373, recognizing that *McCollough* was a doubtful authority, instead relied on *People v. Graham*, 25 Ill. App. 3d 853, 323 N.E.2d 441, to uphold the statute. *Graham* itself had relied on *McCollough*. For other cases stressing *Graham* in reaching the same result, see *People v. Gross*, 52 Ill. App. 3d 765, 367 N.E.2d 1028; *People v. Anthony*, 38 Ill. App. 3d 190, 347 N.E.2d 179.

¹⁸² The problem of duplication and the option to file armed violence charges where a felony had been committed with a dangerous weapon remained. Moreover, a new problem was added by increasing the penalty for armed violence so much that it is now far greater than the penalty for the underlying felony on which it rests. See text accompanying note 199 *infra*.

¹⁸³ 203 Or. 697, 281 P.2d 698.

¹⁷¹ *People v. Hardaway*, 108 Ill. App. 2d 325, 332, 247 N.E.2d 626, 630 (1969). See also *People v. Graham*, 25 Ill. App. 3d 853, 859, 323 N.E.2d 441, 444 (1975).

¹⁷² *People v. McCollough*, 57 Ill. 2d 440, 313 N.E.2d 462 (1974).

¹⁷³ *People v. McCollough*, 8 Ill. App. 3d 963, 971, 291 N.E.2d 505, 511 (1972).

¹⁷⁴ *Id.* at 970, 291 N.E.2d at 510.

¹⁷⁵ 57 Ill. 2d at 444, 313 N.E.2d at 464.

¹⁷⁶ See *People v. Cannes*, 61 Ill. App. 3d 865, 378 N.E.2d 552 (1978), *cert. denied*, 440 U.S. 917 (1979); *People v. Gross*, 52 Ill. App. 3d 765, 367 N.E.2d 1028 (1977); *People v. Hollister*, 39 Ill. App. 3d 514, 350 N.E.2d 373 (1976); *People v. Anthony*, 38 Ill. App. 3d 190, 347 N.E.2d 179 (1976); *People v. Graham*, 25 Ill. App. 3d 853, 323 N.E.2d 441.

¹⁷⁷ 57 Ill. 2d at 446, 313 N.E.2d at 465 (Ryan, J., dissenting).

Court has said only that the overlapping situation is not constitutionally infirm. It has not given the concept a blanket affirmation. Thus the Illinois legislature's actions show one way to avoid (or circumvent) the *Batchelder* holding: rewrite the statutes so the overlap no longer exists.

One problem the state legislature did not cure in its revision of the armed violence statute is the undue weight a jury might attach to the presence of multiple counts, even though they are based on identical conduct. Neither *Batchelder* nor the cases involving identical statutes with varying penalties addressed this problem because in both situations the main question was whether the prosecutor had the option to charge under either statute. He was not trying to charge both statutes at once. Therefore, *Batchelder* is not controlling.

Both the United States Congress and Illinois courts have recognized that juries have a strong tendency to compromise on verdicts. Under the Federal Rules of Civil Procedure, quotient verdicts in cases involving damages are expressly forbidden.¹⁸⁴ Furthermore, in federal and most state courts, compromising on the lesser crime is not expressly allowed in criminal cases.¹⁸⁵ An Illinois jury looking at charges of armed violence and some other crime on which it rests, if unsure about the guilt or innocence of the defendant, might want to compromise similarly by convicting on one count while acquitting on the other. However, the Illinois courts have prevented this from being a problem. Where a defendant is found guilty of either armed violence or the statutory crime on which it rests, but innocent of the other charge, the verdicts are held to be legally inconsistent because the elements of the crimes are the same.¹⁸⁶ The defendant is found innocent because the reviewing court assumes that the jury had reasonable doubt based on its finding of innocence on one of the two charges.¹⁸⁷

¹⁸⁴ F.R.C.P. 49(b) provides that when a jury gives inconsistent answers in a special verdict, the judge must either send them back for more deliberation or order a new trial.

¹⁸⁵ Comment, *Compromise Verdicts in Criminal Cases*, 37 NEB. L. REV. 802 (1958).

¹⁸⁶ See *People v. Pearson*, 16 Ill. App. 3d 543, 306 N.E.2d 539 (1973), in which the jury found the defendant guilty of aggravated assault and not guilty of armed violence. Since the two charges required exactly the same acts to convict, the not guilty verdict was held to embody enough reasonable doubt to warrant dismissing all charges. *Id.* at 548, 306 N.E.2d at 543. The court added that under the doctrine of collateral estoppel, the case could not be tried again. *Id.* at 549, 306 N.E.2d at 543 (citing *Ashe v. Swenson*, 397 U.S. 436 (1969)).

¹⁸⁷ *Id.*

Unfortunately this solves only one of the problems occurring when juries face multiple charges. Even if they are not allowed to compromise by convicting on only one of the two charged crimes, they still may give undue weight to the fact that there are so many charges in the first place. A jury might not realize that even though it looks as if the defendant has been involved in several possibly criminal actions, in truth he has only been involved in one.

The ideal way to test this hypothesis would be to divide defendants into two groups and compare their conviction rates. One group would consist of those charged only with the crime on which the armed violence charge is based, but who used a dangerous weapon. The other group would consist of defendants charged with both the other crime and armed violence. If the conviction rate for the latter group were higher, it would mean that the multiple counts were unduly prejudicing the defendants. Unfortunately, no such research has been done on this topic.

Other studies, comparing conviction rates for multiple charges and single charges of the same magnitude, would be nearly as useful. Surprisingly, no such study of this type has been made either.¹⁸⁸ However, an analysis of the studies on jury behavior which do exist indicates that the multiple charges probably are given too much weight. According to Kalven and Zeisel, fully 43% of the jury cases are rated by the judge as "close."¹⁸⁹ Therefore, any untoward circumstances could tip the balance against the defendant in a large number of cases. The credibility of the defendant could be that ultimate determinant tipping the balance because it is a crucial factor in how the defendant fares at the hands of the jury.¹⁹⁰ Since the first thing the jury learns about the defendant is what he is charged with,¹⁹¹ the multiple counts could have immediate effect, damaging credibility and caus-

¹⁸⁸ Part of the problem may be that recent Supreme Court decisions permitting the use of six member juries, *Williams v. Florida*, 399 U.S. 78 (1970), and less than unanimous verdicts, *Apodaca v. Oregon*, 406 U.S. 404 (1972), have caused researchers to turn much of their efforts in these directions, causing other areas to be neglected. A survey of jury research indicates that nearly every article is on one of these two topics.

¹⁸⁹ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 135 (1966).

¹⁹⁰ *Id.* at 168-69.

¹⁹¹ See M. SAKS & R. HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 87-90 (1978), for the importance of the jurors' initial decision made before any evidence is admitted.

ing him to lose a case he might otherwise have won.

At least one study strongly indicates that there is a sound basis for fearing multiple counts and confused juries. After hearing a Florida jury instruction that when the defendant pleads not guilty, the state must prove each material allegation of the information or indictment beyond a reasonable doubt, 6% of the jurors thought the state need prove only a "majority" of the charges.¹⁹² Five percent of the jurors were so confused that they thought the defendant was required to carry the burden of proving his own innocence, 3% thought the judge was to decide innocence, and 9% were simply uncertain.¹⁹³ If juries became this confused over the burden of proof to prove a single charge, then filing multiple charges can only compound the confusion.

The armed violence statute can inflame the jury as well as confuse it. If the jury is presented with two charges rather than one, it may believe that more than one type of criminal conduct is involved, even though both statutes actually define the same conduct. The confusion may be great enough to cause the jury to believe that the defendant has been involved in several criminal acts, and that he therefore has a criminal character. From this, it is an easy step to assume that somebody with a criminal character has committed the act he is accused of.

This danger has been recognized in other situations. Congress prevents the prosecution from presenting evidence of the defendant's past crimes or wrongs to show that he acted in conformity with them by committing the crime charged.¹⁹⁴ The danger is that the past crimes will cause the jury to believe the defendant is a criminal and therefore convict him. Multiple charges based on the same conduct have a similar effect. The extra charges magnify the act out of all proportion, making the defendant look worse than he really is.

The comparison to evidence of past criminal acts is particularly apt because jury research has shown that such evidence has the very effect that legisla-

tors and judges¹⁹⁵ alike have feared. Broeder's study of the impact of past crimes on the jury shows that the jury badly wants to know about them, and will discuss and use such evidence to infer guilt even if it is not admitted into evidence.¹⁹⁶ Other studies have obtained similar findings.¹⁹⁷

Congress's fear of the use of the criminal reputation to infer guilt¹⁹⁸ is justified in light of the findings of the various jury research studies. The same jury behavior almost certainly takes place when the armed violence statute is charged. Defendants charged with armed violence are at a great disadvantage because of the undue prejudice that charge will cause.

Thus the problem which was not ruled on in *Batchelder* becomes clear. The prosecutor's discretion to bring multiple charges or a single charge for the same act permits him to choose which defendants will get a confused and inflamed jury. Note that though the prosecutor has similar discretion to bring greater and lesser included charges, that situation is different because the two involve different conduct, and the jury knows it must choose between the two on the basis of proof adduced at trial. When, however, the multiple charges are armed violence and the offense on which it rests, the jury must take both statutes or none; variations of proof do not let it choose the statute under which to convict.

In the armed violence setting, erratic jury behavior suggests that the defendant charged under both statutes is more likely to be convicted than one charged only with the single underlying non-armed violence statute. Thus the situation provides a twist from *Batchelder*. There, the penalties were different, but the jury was no more likely to convict under one than under the other. Under the Illinois Armed Violence Statute, not only are the penalties more disparate than those in *Batchelder*,¹⁹⁹ but also the

¹⁹⁵ See *United States v. Ostrowsky*, 501 F.2d 318 (7th Cir. 1974); *People v. Stadtman*, 59 Ill. 2d 229, 319 N.E.2d 813 (1974); FED. R. EVID. 404(b), Advisory Committee's Note.

¹⁹⁶ D. Broeder, A Series of Cross-Case Essays on Jury Behavior, § 10 (November, 1957) (unpublished work from University of Chicago Jury Project, available at Northwestern University Law Library).

¹⁹⁷ See generally Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535 (1974). To the extent that past crimes affect the defendant's credibility, which is of crucial importance at trial, see H. KALVEN & H. ZEISEL, *supra* note 189, at 168-69; Sonaike, *The Influence of Jury Deliberation on Juror Perception of Trial, Credibility, and Damage Awards*, 1978 B.Y.U.L. REV. 889.

¹⁹⁸ See note 195 *supra*.

¹⁹⁹ In *Batchelder* the difference in penalties was three

¹⁹² Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976).

¹⁹³ *Id.*

¹⁹⁴ FED. R. EVID. 404(b) states:

Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

actual probability of conviction appears to increase when armed violence is charged.

The equal protection argument against the Illinois Armed Violence Statute is therefore stronger than the equal protection argument in *Batchelder*. This is especially interesting in light of the *McCullough* dissent, which stressed equal protection rather than due process or delegation:

[T]he decision to prosecute for one offense rather than the other is in no way dictated by the available evidence or the elements of the crime. I believe that this type of scheme, which allows such a great disparity in the punishment of precisely the same conduct according to the caprice of the prosecutor. . .violates the equal protection of the laws. (emphasis added)²⁰⁰

The actual day-to-day use of the armed violence statute suggests that such caprice indeed exists, and that it is dangerous to give prosecutors the discre-

years because the less harsh penalty was set at two years and the harsher at five years. However, armed violence is a Class X felony, therefore punishable by 6 to 30 years, ILL. REV. STAT. ch. 38, § 33A-2, while the most minor felony (Class 4) with which armed violence can be charged is punishable by one to three years, ILL. REV. STAT. ch. 38, § 1005-8-1 (1977 & Supp. 1979). Therefore, the difference in possible maximum penalties is a staggering 27 years.

An example of a current attack on the Class X provision for armed violence involves its pairing with voluntary or involuntary manslaughter. Since the legislature addressed itself specifically to homicides in ILL. REV. STAT. ch. 38, § 9 (1977 & Supp. 1979), it fixed the penalties for murder, voluntary, and involuntary manslaughter by the seriousness of the crimes. To let the prosecutor add armed violence would undermine this careful scheme and replace the legislature's judgment with the prosecutor's. Since the legislature must have known that most homicides occur with a dangerous weapon, it has presumably already taken the probability of being armed into account. In addition, the use of a gun, as opposed to pushing somebody out a window, cannot be seen as the greater harm to society. The legislature did not intend to make this distinction or to give the prosecutor such an option. See Motion of Defendant at 2, 6, *State v. Rollins*, Circuit Court of Cook County, Information No. 79-I-2620 (January 3, 1980).

²⁰⁰ *People v. McCollough*, 57 Ill. 2d at 448, 313 N.E.2d at 466. A suggestion that the Illinois Supreme Court may soon strike down the statute came in *People v. Vriner*, 74 Ill. 2d 329, 385 N.E.2d 671 (1978), where the defendant was charged under the old aggravated assault armed violence provision. Although the court had been asked to overrule *McCullough*, the court explained that it would not reach consideration of it because it could find for the defendant on other grounds. *Id.* at 344-45, 385 N.E.2d at 678. The court easily could have said in dicta that *McCullough* remains good law; its failure to do so indicates it might be waiting for the proper case in which to strike down both *McCullough* and the armed violence statute.

tion to charge the duplicative statute in addition to the statute upon which it rests. Illinois prosecutors are using the statute in plea bargaining to coerce the defendant into pleading guilty,²⁰¹ especially under the new version of armed violence, which makes it a Class X felony punishable by six to thirty years.²⁰² According to many public defenders, instead of using the statute where the crime has been particularly heinous, the prosecutors have been using it when their case is borderline, to bolster its strength.²⁰³ Even several state's attorneys have conceded that at least some of this goes on, although they think the occurrences are very rare.²⁰⁴

Written guidelines would alleviate some of these problems,²⁰⁵ although guidelines alone are not likely to make an unconstitutional statute constitutional. When placed in the perspective of the *Batchelder* and the *Berra* dissent cases, actions in Illinois appear to justify Justice Black's fears of caprice and unfair differential treatment. Even if the armed violence statute avoids *Batchelder* on its facts (because the overlap between the statutes emphasized in *Batchelder* is not strictly present), it

²⁰¹ This is the opinion of five Cook County public defenders, who have asked not to be identified. Prosecutors from Cook, Dupage, and McHenry counties also admit that such activities take place, but find nothing unconstitutional about them. They are essentially correct. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the prosecutor threatened the accused with the state habitual criminal statute if he refused to plead guilty to forgery, and then used it, as promised, to obtain a life sentence. The Court found no abuse of discretion. It was not retaliation because the accused was free to accept or reject the offer. *Id.* at 363. Thus, the use of the armed violence statute in this fashion is constitutional. Most of the comment on the *Bordenkircher* decision, however, has been unfavorable, stressing the unfairness to the defendant in an unequal bargaining position, and the possibility of prosecutorial vindictiveness. See Note, 6 AM. J. CRIM. L. 201 (1978); Note, 33 ARK. L. REV. 211 (1979); Note, 27 BUFFALO L. REV. 563 (1978); Note, 66 CALIF. L. REV. 875 (1978); Note, 6 HASTINGS CONST. L.Q. 269 (1978); Note, 26 KAN. L. REV. 651 (1978); Note, 19 SANTA CLARA L. REV. 249 (1979); Note, 24 VILL. L. REV. 142 (1978). The armed violence statute should not be used for the same reasons.

²⁰² ILL. REV. STAT. ch. 38, § 1005-8-1 (1977 & Supp. 1979).

²⁰³ The same five public defenders as in note 201 *supra* gave this opinion.

²⁰⁴ This opinion is held by the prosecutors cited in note 201 *supra*.

²⁰⁵ Chief Judge Bazelon found that the fact that certain guidelines were set out in the U.S. Attorney's Manual indicated that the discretion exercised was not unbridled. *Hutcherson v. United States*, 345 F.2d at 975 (Bazelon, C. J., concurring in part and dissenting in part).

still shows the folly of the *Batchelder* rationale. Whether an Illinois court uses equal protection (possibly under the state rather than federal constitution to get around *Batchelder*),²⁰⁶ or distinguishes it, the armed violence statute illustrates some of the dangerous and prejudicial results which can occur in the optional included duplicative statute setting. It should be struck down as unconstitutional.

III. CONCLUSIONS

The Supreme Court's holding in *United States v. Batchelder* establishes that where two statutes prohibit some of the same conduct, but where each also prohibits conduct the other does not, the prosecutor may proceed under either statute if the

defendant's conduct falls within the common proscription. *Batchelder* can be attacked on both legal and policy grounds, but it was a unanimous opinion, and therefore unlikely to be reversed. The *Batchelder* opinion, however, covers only one of the three separate categories in which duplicative statutes may fall. Overlapping statutes are constitutional, but an unbroken line of state cases indicates that statutes identical except for penalty are unconstitutional. The case is not as clear for optional included duplicative statutes, but the dangers of prejudice indicate that they too should not be used. Legislatures have the option to prevent all three situations by careful drafting. The inherent unfairness in treating similarly situated defendants differently outweighs the advantages in individualizing system response to defendants to such an extent that this area of prosecutorial discretion should be removed. Legislatures should draft statutes so that no two statutes (except greater and lesser included statutes) can be interpreted to prohibit the same conduct, thus taking the choice out of the prosecutor's hands.

MARTIN H. TISH

²⁰⁶ Indeed, many of the state cases finding duplicative statutes to be unconstitutional rest on both federal and state grounds. See *Spillers v. State*, 84 Nev. 23, 436 P.2d 18; *Rose v. Gladden*, 241 Or. 202, 405 P.2d 543; *State v. Cory*, 204 Or. 235, 282 P.2d 1054; *State v. Pirkey*, 203 Or. 697, 281 P.2d 698; *State v. Shondel*, 22 Utah 2d 343, 453 P.2d 146; *State v. Twitchell*, 8 Utah 2d 314, 333 P.2d 1075; *Olsen v. Delmore*, 48 Wash. 2d 545, 295 P.2d 324.