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SYSTEMIC COERCION: UNCONSTITUTIONAL CONDITIONS IN THE CRIMINAL LAW

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I. INTRODUCTION

The United States Supreme Court three terms ago decided *Bordenkircher v. Hayes*,[1] another of the Court's plea bargaining cases.[2] The decision purported to concern itself with no more than "the course of conduct engaged in by the prosecutor in [the] case,"[3] and the majority would have us believe it merely rejected a due process challenge to plea bargaining.[4] It stands, I fear, for much more. Plea bargaining cases often present complex questions allowing no easy answers. *Hayes*, though, is different. By refusing to recognize that an extreme difference in degree can result in a difference in kind, the Court, by intellectual abstinence, declined to extend the doctrine of unconstitutional conditions[5] to criminal procedure, its most natural setting.

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1 434 U.S. 357 (1978). Discussions of the decision can be found in Nemerson, *Coercive Sentencing*, 64 MINN. L. REV. 669 (1980); Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in Bordenkircher v. Hayes*, 6 HASTINGS CONST. L.Q. 269 (1978); Note, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165 (1979).

2 The others are: Corbitt v. New Jersey, 439 U.S. 212 (1978); Blackledge v. Allison, 431 U.S. 63 (1977); Blackledge v. Perry, 417 U.S. 21 (1974); Tollett v. Henderson, 411 U.S. 258 (1973); Santobello v. New York, 404 U.S. 257 (1971); North Carolina v. Alford, 400 U.S. 25 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970); United States v. Jackson, 390 U.S. 570 (1968).

3 434 U.S. at 365.

4 *Id.* at 360, 361, 365. Apparently, they were believed. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 57-326 (1978) (by omission).

5 The doctrine of unconstitutional conditions was first espoused in Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935), and has come to stand for the proposition that "government may not condition the receipt of its benefits upon the non-assertion of constitutional rights." Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 891-92 (1979). *See generally* Van Alstyne, *The Demise of the*

Hayes, a twice-convicted felon, had been indicted for uttering a forged instrument in violation of Kentucky law.[6] Hayes retained counsel, who tried to plea bargain with the prosecutor. The prosecutor offered to recommend a sentence of five years imprisonment in exchange for a guilty plea. But, if Hayes refused to "save the Court the inconvenience and necessity of a trial,"[7] the prosecutor threatened to return to the grand jury and seek an indictment under an habitual criminal statute.[8] The maximum penalty for uttering a forged instrument was ten years in prison; conviction under the habitual criminal statute would have subjected Hayes to a mandatory life sentence.[9]

Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439 (1968); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968) [hereinafter *Another Look*]. *See also* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) [hereinafter *Unconstitutionality*].

The genesis of the doctrine of unconstitutional conditions can be traced to McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159 (1819). In that case, Chief Justice Marshall invalidated a state tax which discriminated against the federally chartered Bank of the United States. Correctly perceiving that the effect of the tax would be to destroy the Bank, Chief Justice Marshall enforced the supremacy clause and protected the Bank. He did not, however, base his decision on the discriminatory nature of the tax, *see* Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664 (1899), but instead held that property of the federal government is immune from state taxation. 17 U.S. (4 Wheat.) at 210; *see* First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968).

Chief Justice Marshall's extreme position was hardly essential. The short answer to a claim that the power to tax is the power to destroy is: "[N]ot . . . while [the Supreme] Court sits," it isn't! Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), *quoted with approval*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 490 (1939) (Frankfurter, J., concurring); *accord*, Railroad Comm'n Cases, 116 U.S. 307, 331 (1886) ("The power to tax is not the power to destroy . . . ."). His overbroad opinion can perhaps be explained by his appreciation of the difficulty in drawing the line between a state's reasonable use of its taxing power, and an abusive, unreasonable use. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 209-10. That is in essence the line in the field of unconstitutional conditions that the courts have as yet been unable to trace. *See also* Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926); Pullman Co. v. Adams, 189 U.S. 420 (1903).

6 KY. REV. STAT. § 434.130 (1973) (repealed 1977), now *id.* §§ 514.040, 516.060 (Supp. 1977).

7 434 U.S. at 358 n.1.

8 KY. REV. STAT. § 431.190 (1973) (repealed 1977, current version *id.* § 532.080 (Supp. 1977)), providing a maximum penalty of 20 years imprisonment. The habitual criminal statute under which Hayes was sentenced was unusually harsh. *Cf.*, *e.g.*, MASS. GEN. LAWS ANN. ch. 279, § 25 (West 1972) (mandatory maximum term for offense then at issue); N.Y. PENAL LAW §§ 70.02-.10 (McKinney Supp. 1978) (maximum penalty graded by nature of offense).

The prosecutor's timing in *Hayes* causes problems of its own. In Blackledge v. Perry, 417 U.S. 21, the Court held that a prosecutor cannot reindict on a felony charge a convicted misdemeanant who exercises a statutory right to obtain a trial *de novo*. There seems to be little difference between demanding such a new trial and Hayes' demand for a first trial. *See* Bordenkircher v. Hayes, 434 U.S. at 366-68 (Blackmun, J., dissenting).

9 434 U.S. at 358-59. Hayes' two prior felonies were: (1) detaining a female, committed at age 17 and for which Hayes was placed in a state reformatory for five years, and (2) robbery, for which he was sentenced to five years imprisonment though placed on parole

Hayes rejected the "bargain," was convicted of both charges, and sentenced to life in prison. His convictions were sustained by the Kentucky Court of Appeals,[10] and a collateral attack was summarily rejected by the federal district court.[11] The Sixth Circuit reversed, ordering that Hayes be discharged "except for his confinement under a lawful sentence imposed solely for the crime of uttering a forged instrument."[12] The court reasoned that since the prosecutor originally did not ask for an indictment under the habitual criminal statute, he had determined that the state had no interest to so charge. Thus, the prosecutor returned to the grand jury solely to punish Hayes for rejecting the offered plea agreement. To repudiate such prosecutorial vindictiveness, the Sixth Circuit reversed.[13]

The Supreme Court overruled the circuit court and sustained both convictions. Both the majority and dissenting opinions framed their arguments in terms of prosecutorial vindictiveness—the dissenters[14] found it, while the majority thought it lacking. The Court's language, however, is misleading. Neither the majority nor the dissenters suggested that the prosecutor was motivated by personal animosity for Hayes. Rather, the Court divided over whether a prosecutor violates due process when his charging decision is intended to discourage a defendant from exercising his constitutional right to trial.[15] Prosecutorial vindictiveness in this sense describes a series of actions taken by the prosecutor *qua* prosecutor to strengthen his plea bargaining position.

All of the states and the federal government have either passively accepted or actively encouraged plea bargaining,[16] knowing that prosecutors are under extreme pressure to produce high conviction rates. Legislative acceptance of plea bargaining is thus tantamount to mandating the practice.[17] Though the majority opinion purported to deal

immediately. *Id.* at 359 n.3. The "forged instrument" was a bad check in the amount of $88.30. *Id.* at 358.

[10] The opinion of the Kentucky Court of Appeals is unpublished. *See id.* at 359.

[11] *See* Hayes v. Cowan, 547 F.2d 42, 43 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

[12] *Id.* at 45.

[13] *Id.* at 44-45.

[14] Justice Blackmun was joined in dissent by Justices Brennan and Marshall. Justice Powell wrote his own dissenting opinion.

[15] *Compare* 434 U.S. at 362-65 *with id.* at 367 (Blackmun, J., dissenting) *and id.* at 373 (Powell, J., dissenting) ("Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion.").

[16] *See, e.g.*, FED. R. CRIM. P. 11; ARK. STAT. ANN. §§ 24.5-26.1 (1977); CAL. PENAL CODE § 119.25 (West Supp. 1975).

[17] In addition, a prosecutor may feel compelled to plea bargain because he perceives injustice in the laws—he sees that legislatures have overcriminalized much conduct, and so he "comes to believe that it is his professional responsibility to develop standards that distinguish among defendants and lead to equitable dispositions." M. HEUMANN, PLEA BARGAINING 109

only with "the course of conduct engaged in by the prosecutor in [the] case,"[18] it in fact involved a legislative decision to encourage the waiver of constitutional rights.[19]

At least since 1926, the Supreme Court has been wary of state attempts to frustrate federal statutory or constitutional protections by conditioning receipt of a privilege upon the waiver of a statutory or constitutional right.[20] One state, antagonistic to the federal courts, conditioned a foreign corporation's privilege to do business within the state upon a waiver of its right to remove state actions to the federal courts.[21] Similarly, New York has attempted to circumvent the fourth amendment by conditioning the receipt of welfare benefits upon the "voluntary" waiver of one's right to be free from government searches.[22]

The Supreme Court has attempted to resolve these cases by determining whether the condition unduly burdens the constitutional right, or whether it is reasonable, and therefore constitutional. In the two situ-

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(1978). *See also* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 131-96 (1966).

The consequence of any substantial increase in the cost of the criminal justice system is to place more pressure on police officers and prosecutors to curtail the flow of persons into the formal criminal justice system. Although the extent to which institutional pressure influences plea bargaining is unclear, *compare* M. HEUMANN, *supra*, at 119, *with id.* at 27-33, interviews with prosecutors show that their perceived potential backlog is the paramount justification for maintained plea bargaining. *Id.* at 114-17. A consequence is a resort to more informal techniques to achieve what is now accomplished by the adjudicatory process. These informal techniques—the police officer's occasional stern warning instead of an arrest, the prosecutor's unexplained decision not to prosecute—are unconstrained by procedural protections and judicial review, *see* Linda R. S. v. Richard D., 410 U.S. 614 (1973). The result is less accountability and more selective enforcement of the laws. "Where law ends, discretion begins," K. DAVIS, DISCRETIONARY JUSTICE 3 (1976), discretion which undercuts our conception of the rule of law as justice defined by and enforced through general and impartial laws. *Id.*; Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651; Wyzanski, *Constitutionalism: Limitation and Affirmation*, in GOVERNMENT UNDER LAW 473, 482-83 (A. Sutherland ed. 1956). However, procedural justice often means slow motion justice, and slow motion justice is no justice at all. *See* W. SEYMOUR, JR., WHY JUSTICE FAILS 78-81, 87-88 (1973).

18 434 U.S. at 365.

19 Much of the following will apply *mutatis mutandis* to a larger class of rights, which may conveniently be labeled "protected" rights. They comprise all rights beyond the control of the sovereignty under discussion. In a federal context, protected rights are no more than those rights "implicit or explicit" in the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). In a state context, protected rights include not only constitutional rights (both national and the state), but also those created by federal legislation. U.S. CONST. art. VI, ¶ 2; *see, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971); Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967); Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967). The seminal case is McCulloch v. Maryland, 17 U.S. (4 Wheat) 159.

20 Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583; Terral v. Burke Constr. Co., 257 U.S. 529 (1922).

21 ARK. STAT. ANN. ch. xxxi, art. 1, § 824 (Castle 1911).

22 N.Y. SOC. SERV. LAW § 134 (McKinney 1976); 18 N.Y. CODE RULES & REGS. § 351.21 (1979).

ations above the Court invalidated the former,[23] yet sustained the latter.[24] To date, the Court has not formulated or consistently applied a coherent theory of unconstitutional conditions analysis.[25] This inability to articulate the boundaries of a reasonable condition—sometimes claiming that no condition may ever be reasonable[26]—has left the lower courts to reconcile inconsistent holdings and produced myriad rationales and resolutions.

The rights of felons charged with serious crimes provide an apt setting in which to formulate a theory of unconstitutional conditions. The courts have been especially solicitous in observing these rights, recognizing that deprivation of liberty and imposition of a criminal stigma is unjustified unless a defendant receives every opportunity to avoid an improper conviction.[27] Any attempt to elicit a waiver of these fundamental rights by punishing those who assert them is antithetical to the premises of our criminal justice system.[28]

On the other hand, recent decisions have constitutionalized and ex-

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23 Terral v. Burke Constr. Co., 257 U.S. 529.

24 Wyman v. James, 400 U.S. 309 (1971).

25 *Compare* Zablocki v. Redhail, 434 U.S. 374 (1978), *with* Califano v. Jobst, 434 U.S. 47 (1977); *compare* United States v. Jackson, 390 U.S. 570 (1968), *with* Brady v. United States, 397 U.S. 742.

26 *E.g.*, Garrity v. New Jersey, 385 U.S. 493, 500 (1967); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. at 598; Terral v. Burke Constr. Co., 257 U.S. at 532-33; Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 36-37 (1910).

27 *See In re* Winship, 397 U.S. 358, 363-64 (1970); Silver v. New York Stock Exch., 373 U.S. 341, 366 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

28 *See* Brady v. United States, 397 U.S. at 758; McNabb v. United States, 318 U.S. 332, 347 (1943).

A defendant's waiver of his constitutional protections also undermines the normative aspect of the criminal sanction, *see* H.L.A. HART, THE CONCEPT OF LAW 55-56, 84-87 (1961), by refuting our shared belief that the criminal stigma may not be applied until the state proves its case by the most stringent level of proof to the satisfaction of twelve randomly chosen and impartial jurors. As the Court in *Winship* explained:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is . . . important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

397 U.S. at 364. *Cf.* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7-20 ("[O]ur adjudicative process requires an informed, impartial tribunal capable of administering justice . . . according to procedures . . . that command public confidence and respect."). Moreover, the formal adjudicatory criminal process helps legitimize verdicts by insulating them from public criticism. *See* Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194-99 (1979).

Although there have been calls to treat a criminal defendant's rights as unwaivable, Griffiths, *Ideology in Criminal Procedure or A Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 397 & n.134 (1970), and numerous authors have observed that the absence of formal processes results in an absence of accountability, *see, e.g.*, K. DAVIS, *supra* note 17; Vorenberg, *supra* note 17, the courts will nevertheless honor a defendant's voluntary and intelligent waiver. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258 (1973).

panded the rights of criminal defendants to the point where if one in five defendants demanded all such rights, our criminal justice resources would be exhausted.[29] Our formal, elaborate criminal adjudicatory process is perceived as inadequate for use by more than a small percentage of those charged with crimes.[30] Most defendants must be persuaded to waive their rights, and the only way to elicit a waiver from a rational defendant is make it in his interest not to assert his rights.

Both one's natural predisposition against imposing conditions upon the exercise of constitutional rights as well as the need for those rights are highlighted in the context of criminal rights, and plea bargaining is the paradigmatic problem. *Hayes* was a student's delight, displaying the issues with microscopic clarity. However, the majority opinion was founded on improper analysis and couched in ill-chosen terms, leaving the legitimate scope of plea bargaining essentially uncharted.

Justice Stewart's opinion for the Court in *Hayes* acknowledged that "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' "[31] This view appears incompatible with plea bargaining, which the Court had recognized has a "discouraging effect on [a] defendant's assertion of his trial rights."[32] Nevertheless, the two can be reconciled if either (i) plea bargaining does not have the objective of discouraging the assertion of constitutional rights, but merely produces that result, or (ii) it does not penalize the defendant who asserts his right to trial, but rewards the defendant who waives it.

In *Hayes*, the Court explicitly focused on the latter explanation, finding that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[33] *Hayes*, the Court suggested, merely reaffirmed that "the advantages [accruing to a criminal defendant] of pleading guilty and limiting the probable penalty are obvious

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29 Plea bargaining rates are estimated at over 90%. *See* M. HEUMANN, *supra* note 17, at 1 n.2; Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975). The Supreme Court has characterized plea bargaining as "essential," Santobello v. New York, 404 U.S. at 260, although the empirical studies do not support that conclusion. *See, e.g.*, Rubinstein & White, *Alaska's Ban On Plea Bargaining*, 13 LAW & SOC'Y REV. 367 (1979); Note, *The Elimination of Plea Bargaining in Black Hawk County: A Case Study*, 60 IOWA L. REV. 1053 (1975).

30 *See* M. HEUMANN, *supra* note 17, at 114-17; F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 191-92 (1969); D. NEWMAN, *supra* note 17, at 3-4; Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 566-67 & nn.18-23 (1977).

31 434 U.S. at 363; *accord*, United States v. Jackson, 390 U.S. 570, 581 (1968).

32 Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973).

33 434 U.S. at 363.

. . . ."[34] The defendant was offered a benefit in exchange for his plea; he was not penalized when he demanded trial.

The Supreme Court's fixation on Hayes' freedom to accept or reject the prosecutor's proposal was misguided. Of course Hayes could have limited his sentence by pleading guilty. He had a choice: either exercise his right to a jury trial, or guarantee the lesser sentence. The crux of the case was whether Hayes could be put to such a choice.[35] Hayes' dilemma was entirely state created—there is no reason why length of sentence and insistence on constitutional protections must be interdependent. Kentucky chose to make them so, and the Supreme Court failed to face the question of whether it had the power to do so.

"Systemic coercion" refers to a legislature conditioning the assertion of a criminal defendant's guaranteed rights upon the waiver of some state-created privilege. In *Hayes*, the reduced sentence was only available if Hayes forfeited his right to trial. Similarly, New Jersey law once denied the privilege of state employment to anyone who refused to waive his fifth amendment right not to incriminate himself when officially questioned about his employment.[36]

The effect of systemic coercion is to force its victim to choose between two desirable options. Neither option is denied, but each is burdened, since the selection of one forecloses the other. If a defendant chooses to waive the constitutional right, he may claim that he was denied a constitutional guarantee. That is, he will argue that his waiver should be deemed invalid because it was made to avoid assertedly impermissible punishment.[37]

To be valid, a waiver of a constitutional right must be both intelligently and voluntarily made.[38] One necessary condition for a voluntary waiver is that it be the product of a reasoned, rational mind.[39] Thus, waivers induced by torture have easily been invalidated.[40] Courts will

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34 Brady v. United States, 397 U.S. at 752.

35 "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." Union Pac. R.R. Co. v. Public Serv. Comm'n, 248 U.S. 67, 70 (1918) (Holmes, J.); *see Unconstitutionality, supra* note 5, at 1396.

36 N.J. REV. STAT. § 2A:81-17.1 (Supp. 1965) (repealed 1970).

37 *See, e.g.*, Jurisdictional Statement at 10-11, Garrity v. New Jersey, 385 U.S. 493 (1967).

38 Boykin v. Alabama, 395 U.S. 238, 242 (1969); Brookhart v. Janis, 384 U.S. 1 (1966); *see* Walker v. Johnston, 312 U.S. 275, 286 (1941). A waiver is made intelligently if the defendant is aware of his options and their consequences. For example, a defendant cannot validly consent to interrogation unless informed of his right to counsel and his privilege against self-incrimination. *See* Miranda v. Arizona, 384 U.S. 436 (1966). Similarly, a guilty plea cannot intelligently be tendered unless the charge and maximum penalty are known. *See, e.g.*, Robinson v. United States, 474 F.2d 1085 (10th Cir. 1973).

39 Brady v. United States, 397 U.S. at 748.

40 *See* Brown v. Mississippi, 297 U.S. 278 (1936).

examine the totality of circumstances to determine voluntariness in this sense,[41] and have ruled waivers involuntary when induced in part by sickness[42] or extensive questioning.[43]

That a defendant rationally chose between available alternatives does not establish voluntariness. The Court has long recognized that a choice is not voluntary merely because the actor was free from "the more obvious and oppressive forms of physical coercion."[44] Whenever a defendant waives a constitutional right to avoid an unpleasant result, a court must determine whether that waiver was "induced by promises or threats which deprive it of the character of a voluntary act."[45]

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41 *See* Haynes v. Washington, 373 U.S. 503, 513 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961) (plurality opinion); State v. Hoyt, 21 Wis. 2d 284, 128 N.W.2d 645 (1964).

42 Jackson v. Denno, 378 U.S. 368 (1964).

43 Turner v. Pennsylvania, 338 U.S. 62 (1949) (plurality opinion, eight-to-one decision).

44 Parker v. North Carolina, 397 U.S. at 803 (Brennan, J., concurring and dissenting); *cf.* 14 C.J.S. *Coercion*, at 1307 (1939) ("[C]oercion exists where one is, by the unlawful conduct of another, induced to do or perform some act under circumstances which deprive him of the exercise of his free will."); WEBSTER'S NEW COLLEGIATE DICTIONARY 217 (1973) (coerce: "to restrain or dominate by nullifying individual will."). *See generally* Dix, *Waiver in Criminal Procedure: Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

Professor Fletcher's discussion of involuntary choices is illuminating, see G. FLETCHER, RETHINKING CRIMINAL LAW § 10.3.1 (1978), and compare J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 111-13 (2d ed. 1960). *See also* Queen v. Dudley, [1884] 14 Q.B. 273.

The Supreme Court has gone so far as to say that a defendant's decision not to appeal his life sentence when faced with fear of death following reconviction is not an "intentional relinquishment or abandonment" of his right to appeal. *See* Fay v. Noia, 372 U.S. 391 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938). Does that mean such fear "coerced" the defendant into not appealing? Apparently not. North Carolina v. Alford, 400 U.S. 25 (1970). *See generally* Comment, 47 DEN. L.J. 540 (1970).

It has been held that fear of impeachment by prior conviction impermissibly coerces defendants into waiving their right to testify in their own behalf. State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971); *see* Shepard v. United States, 290 U.S. 96, 104 (1933); Nash v. United States, 54 F.2d 1006 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932) (L. Hand, J.). To date, the federal courts have gone only part way. *See* Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965); FED. R. EVID. 609(a); McGowan, *Impeachment of Criminal Defendants by Prior Conviction*, 1970 LAW & SOC. ORD. 1.

45 Machibroda v. United States, 368 U.S. 487, 493 (1962); *accord*, Parker v. North Carolina, 397 U.S. at 802 (Brennan, J., concurring and dissenting); Shelton v. United States, 246 F.2d 571, 575 (5th Cir. 1957) (en banc), *rev'd on confession of error by solicitor general*, 356 U.S. 26 (per curiam) (a plea of guilty may not stand if "induced by threats . . . or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business . . . ."), *quoted with approval*, Brady v. United States, 397 U.S. at 755; *see, e.g.*, Fay v. Noia, 372 U.S. 391; Waley v. Johnston, 316 U.S. 101 (1942) (per curiam); Bram v. United States, 168 U.S. 532 (1897). *Cf.* Simmons v. United States, 390 U.S. 377 (1968) (testimony of defendant needed to establish standing to invoke fourth amendment protection may not be used by prosecution at trial); State v. Evans, 77 Wis. 2d 225, 252 N.W.2d 664 (1977) (answers given to probation officer may not be used at trial).

Justice Harlan (the younger) apparently believed that there is a distinction between waivers "involuntary as a matter of fact" and involuntary ("inadmissible") as a matter of law. Garrity v. New Jersey, 385 U.S. 493, 501 (1967) (Harlan, J., dissenting). The distinction urged is this: a waiver involuntary "in fact" is the product of an irrational mind, or an

On the other hand, if a defendant asserts his constitutional rights, the question arises whether a state may "punish" him by denying him some benefit otherwise available. These questions are complementary in that they represent the two horns of a single systemic coercion dilemma. Surely, a state may inform a defendant of the consequences of his decision, and any choice predicated upon such information cannot be involuntary.[46] On the other hand, a waiver induced by fear of an impermissible penalty—consequences threatened but which cannot lawfully be imposed—just as clearly cannot be sustained. In short: *If a defendant is forced to choose between the assertion of right* A *and receipt of benefit* B, *then an intelligent and rational waiver of* A *is voluntary and hence valid if and only if* B *legitimately may be denied to one who refuses to waive* A.

It is important to appreciate what this assertion does *not* signify. It provides no program for distinguishing permissible systemic coercion from the impermissible, nor for separating invalid waivers from valid ones. It *does* provide that the creation of a systemically coercive situation is what must be judged—the dilemma is or is not permissible. The forced choosing, and not any particular choice, must command our attention.

Systemic coercion cases should most naturally focus on the equal protection clause. However, current equal protection doctrine is too coarse to resolve the systemic coercion issues, and so the inquiry shifts to the motivation behind any challenged practice. Although a motivational test has some applicability, it too is insufficiently sensitive to resolve most systemic coercion cases. The answer I propose is to employ a normative theory of analysis which both accords with the language used by the Supreme Court in its systemic coercion cases and is capable of eliminating most improper systemic coercion. While a normative theory fails to resolve a few types of cases, it is quite capable of resolving the issues posed by most instances of systemic coercion.

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irrational fear; a waiver induced by the threat of an unconstitutional burden is involuntary merely "as a matter of law."

His distinction seems illusory (the two types of waivers are not "two unruly horses"). The bank president who calmly opens the vault to a masked gunman in fact is acting involuntarily. *See* G. FLETCHER, *supra* note 44, § 10.3.2; note 44 *supra*.

Some help may be gleaned from the invalidation of confessions as being involuntary. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436; Comment, *Developments in the Law: Confessions*, 79 HARV. L. REV. 935 (1966). Since a guilty plea is tantamount to a conviction and "is an admission of all the elements of a formal criminal charge," McCarthy v. United States, 394 U.S. 459, 466 (1969), it is more serious than a confession. *See* Kercheval v. United States, 274 U.S. 220, 223 (1927). Accordingly, the standards relating to guilty pleas should be as least as strenuous as those for confessions. Arguably, the standards concerning the waiver of any constitutional right should be the same. *See* Parker v. North Carolina, 397 U.S. at 801 (Brennan, J., concurring and dissenting).

[46] Garrity v. New Jersey, 385 U.S. at 506-07 (Harlan, J., dissenting).

II. EQUAL PROTECTION ANALYSIS

The equal protection clause of the fourteenth amendment requires that persons similarly situated be similarly treated.[47] Systemic coercion by its very nature classifies, and to the class of those who exercise a specified right, denies a certain benefit. Two defendants identical in every respect save that one demands his constitutional due are thus treated differently. Equal protection under the laws demands that the government justify the disparity.[48]

In most circumstances, the quantum of justification demanded by the courts is almost insignificant,[49] which is only proper. Classification is the stuff of legislation,[50] whether it is used for distributing benefits or burdens. Moreover, classifications are usually predicated upon imperfect generalizations—we rely on them not because they are ideal, but because they work tolerably well, and life would be impossible without them.[51] So long as the classification can be defended by rational argument, the courts will honor a legislature's decision.[52]

This deference is owed to a legislature only when there is no reason to suspect that it is acting improperly.[53] If a classification is drawn on racial or ethnic lines and forms the basis for disadvantaging a group traditionally subject to prejudice, a court will sustain it only if a compelling justification exists.[54] Strict scrutiny is also appropriate whenever a court suspects that a classification was drawn to further an unconstitutional goal.[55]

Where does systemic coercion fit into this scheme? Justice Holmes advocated subjecting systemic coercion to only the minimum rationality level of scrutiny. First articulated in 1892 in a systemic coercion setting,[56] his view surfaced in a variety of contexts,[57] and now is known as

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47 U.S. CONST. amend. XIV, § 2.

48 *See generally* Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

49 *See, e.g*, Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, 348 U.S. 483 (1955).

50 Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 658 (1974) (Rehnquist, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 462 (1973) (Burger, C.J., dissenting).

51 *Id.*

52 J. ELY, DEMOCRACY AND DISTRUST 30-31 (1980); note 49 *supra*.

53 *See generally id.* at 136-47; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

54 *See, e.g.*, Maher v. Roe, 432 U.S. 464, 469-70 (1977); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. at 17.

55 *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

56 McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

57 *See, e.g.*, Ferry v. Ramsey, 277 U.S. 88 (1928); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409-13 (1911) (Holmes, J., dissenting); Pullman Co. v. Adams, 189 U.S. 420 (1903); Commonwealth v. Davis, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd sub nom.* Massachusetts v. Davis, 167 U.S. 43 (1897). *Cf.* State v. Dreyer, 265 So. 2d 367 (Fla. 1972)

the "Greater Includes the Lesser" theory. Typically Holmesian, it is pithy and seemingly persuasive. Although it has not been followed by the courts nor favored by the commentators, it has never been soundly refuted.

A. MINIMUM RATIONALITY AND THE "GREATER INCLUDES THE LESSER" THEORY OF JUSTICE HOLMES

In *McAuliffe v. Mayor of New Bedford*,[58] the Massachusetts Supreme Judicial Court rejected a challenge to a New Bedford regulation forbidding police officers to solicit funds for political purposes.[59] Officer McAuliffe breached this regulation and was fired. He protested and took his appeal to the highest court of the commonwealth. Justice Holmes wrote for the court:

> The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as idleness by the implied terms of the contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here.[60]

Justice Holmes argued that the greater power to withhold a benefit entirely necessarily included the lesser power to withhold it unless specified conditions are satisfied. In particular, a victim of systemic coercion forced to choose between a benefit and a constitutional right is in a better position than if he was denied the benefit in all events, so what is the cause for complaint?[61]

Though commentators have almost unanimously rejected Justice Holmes' theory, they attack it not so much on its logic as in its application. Tacitly admitting the validity of the syllogism, they attempt to recharacterize the benefit as a constitutional right. Then, since the Constitution's rights are guaranteed in the conjunctive, they avoid Justice

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(statute giving public employees different criminal statute of limitations constitutional because reasonable); Rankin v. Shanker, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968) (jury may be denied to public employees and their labor unions in criminal contempt proceedings).

58 155 Mass. 216, 29 N.E. 517.

59 The Supreme Judicial Court recognized that such conduct is protected by the first amendment. *Id.* at 220, 29 N.E. at 517 (by implication).

60 *Id.*, 29 N.E. at 517-18; *accord*, Powell v. Pennsylvania, 127 U.S. 678 (1888).

61 We are not prepared to say that it can be coercion to inform a defendant that someone close to him who is guilty of a crime will be brought to book if he does not plead [guilty]. If a defendant elects to sacrifice himself for such motives, that is his choice . . . .

Kent v. United States, 272 F.2d 795, 798 (1st Cir. 1959); *see* Shelton v. United States, 246 F.2d 571. *But see* Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966).

Holmes' analysis by denying that the greater power actually existed.[62]

Justice Holmes' argument should be squarely faced. As Professor Ely has observed, the Constitution identifies few substantive values, instead specifying the processes by which values are to be chosen.[63] And he so powerfully argues, the linchpin of our procedure-oriented fundamental law is the guarantee of equal protection.

By demanding that benefits and burdens given to the politically powerful also be given to all others, the equal protection clause ties together the citizenry's divergent interests. The Constitution does not allocate resources, nor inform the political branches how to do so. It does require that any allocation agreed upon be fair to all, not merely to select groups.[64] The equal protection requirement, accordingly, is fundamentally irreconcilable with the Greater Includes the Lesser theory: the right to withhold from all does not *a fortiori* include the power to withhold from some.

Yet, while the Constitution requires like treatment for similar people, it does not forbid different treatment for dissimilar people. So long as a legislature is pursuing reasonable goals in a reasonable manner, the courts may enforce the distinctions among persons which the enacted statutes inevitably draw. The presumption of legislative regularity and the minimum rationality level of scrutiny are nothing more than the children of this observation.[65]

However, when there is reason to suspect that a legislature has pursued illegitimate goals, the courts must make further inquiry. While statutes which disadvantage groups traditionally subject to prejudice are obvious candidates for additional scrutiny, they are not the only candidates. Classifications which form the basis for denying or severely restricting the exercise of constitutional rights must be suspect, simply because the rights *are* constitutional, and any such classification on its face appears to overlook that fact.[66] Laws in conflict with the Constitution are invalid and laws seemingly repugnant to it must be, if not automatically invalidated, at least denied the presumption of regularity. It may be that such a law was not motivated by animosity to the constitu-

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[62] *See, e.g.*, Van Alstyne, *supra* note 5.

On the other hand, some commentators have accepted the "Greater Includes the Lesser" theory without reservation. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1345-46 (1979).

[63] *See* J. ELY, *supra* note 52, at 90-101; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 471-85 (1978).

[64] J. ELY, *supra* note 52, at 74, 79-83.

[65] *See* note 49 *supra*.

[66] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

tional right, but a court is obliged to discover, rather than to assume, that there is some other plausible explanation.

How plausible must that explanation seem, or how compelling must the classification be? Those questions occupy the rest of this article. The requirement of a plausible explanation for facially invalid discriminatory treatment teaches that systemic coercion, because it appears to represent an attempt by a legislature to achieve indirectly what it is constitutionally forbidden to do directly, must be treated as constitutionally suspect. While we yet have no reason to conclude that systemic coercion is necessarily illegitimate, the Greater Includes the Lesser theory does not provide its justification.

B. STRICT SCRUTINY AND EQUAL PROTECTION

Dual standards have evolved from equal protection theory. A challenged classification either benefits from the presumption of legislative regularity and is subject to the minimum rationality level of scrutiny, or it is suspect and subject to strict scrutiny. In the former case, the classification inevitably survives, and in the latter, it just as inevitably falls.[67] When a court strictly scrutinizes a classification, it must decide two independent issues: (1) whether the classification furthers a compelling governmental interest, and (2) whether the classification is narrow enough to avoid over and underinclusion.[68] Only if a statute survives both of these tests will it be upheld, and as a statistical matter, any statute's chance of survival is nil.

Because systemic coercion merits more than minimal scrutiny, courts have applied strict scrutiny.[69] No cases better reflect this intense examination than *Gardner v. Broderick*[70] and *Garrity v. New Jersey*,[71] which together implicitly overrule *McAuliffe*.

Police officer Gardner was subpoenaed by a grand jury investigating bribery and corruption among police officers. Before his scheduled appearance, he was advised of his privilege against self-incrimination and was requested to sign a "waiver of immunity," effectively a waiver

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[67] *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[68] *See* Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 813-68 (1978); Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101-02 (1969).

[69] *See, e.g.*, Von Stauffenberg v. Dist. Unemployment Compensation Bd., 459 F.2d 1128, 1132 (D.C. Cir. 1972) (per curiam). At least one commentator has applied equal protection theory to unconstitutional conditions issues. *See* Note, *supra* note 1, at 177-82. Unlike this article, however, the Note does not address the motivational aspects of equal protection theory.

[70] 392 U.S. 273 (1968).

[71] 385 U.S. 493.

of his fifth amendment rights. He was informed that if he did not sign, he would be automatically discharged pursuant to New York City law.[72] He refused to sign and was fired for that refusal.[73]

Justice Fortas had little difficulty with the case, writing: "[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt . . . to coerce a waiver of the immunity it confers on penalty of the loss of employment."[74] His authority for so broad a statement was a "[p]roper regard for the history and meaning of the privilege against self-incrimination"[75] and *Garrity v. New Jersey*.

Garrity involved the same choice at issue in *Gardner*. Garrity was asked to testify before an agency investigating police misconduct. He too was informed of his privilege against self-incrimination and was warned that failure to testify would result in automatic dismissal. Garrity chose to testify. He subsequently was prosecuted for conspiracy to obstruct the administration of New Jersey's traffic laws, and his statements were admitted into evidence over his objection.[76]

Garrity explicitly rejected the *McAuliffe* perspective, stating that "[t]he question . . . is not cognizable in those terms."[77] Rather, the question "is whether a State . . . can use the threat of discharge to secure incriminatory evidence against an employee."[78] In holding that a state could not, the Court used conclusory, absolutist language: "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price."[79] As Garrity could not constitutionally be forced to choose between retaining his job and asserting his fifth amendment right, his election was involuntary, and the statements were inadmissible.[80]

Neither *Garrity* nor *Gardner* appear to concern the equal protection clause: neither decision cited it, and neither defendant based his claim upon it. That is arguable, however, since *Garrity* reached the Supreme Court first, and in that case, the defendant arguably waived his fifth amendment right, the gravamen of his claim was that his waiver was coerced, and so therefore invalid. Coerced testimony is excluded from

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72 *See* 392 U.S. at 275 n.2.

73 *Id.* at 275.

74 *Id.* at 279.

75 *Id.*

76 385 U.S. at 495. *See generally* State v. Holroyd, 44 N.J. 259, 208 A.2d 146 (1965); State v. Naglee, 44 N.J. 209, 207 A.2d 689 (1965), *rev'd sub nom.* Garrity v. New Jersey, 385 U.S. 493.

77 385 U.S. at 499.

78 *Id.; accord*, Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 392 U.S. 280 (1968); Spevack v. Klein, 385 U.S. 511 (1967) (plurality opinion).

79 385 U.S. at 500.

80 *But see* Nelson v. Los Angeles, 362 U.S. 1 (1960).

trial by the due process clause, so the parties and the Court addressed the issues within that framework. Because systemic coercion dilemmas must stand or fall as a whole, when the *Garrity* Court invalidated one of the horns of the *McAuliffe* dilemma, the other was doomed to invalidation.[81] The defendant in *Gardner* could thus rely on *Garrity* without canvassing the issues anew.

Although these two cases did not purport to rely upon the equal protection clause, the doctrine they developed accords with modern equal protection theory. Moreover, if an equal protection issue was merely latent in the *Garrity* decision, it managed to surface in *Gardner*.

The defendant in *Gardner* did not assert that a police officer can never be discharged for refusing to answer his superior's questions. He argued that the case be decided on a narrower point.

> It has been suggested that a public officer has a duty to account to the state for the conduct of his office, and the failure to do so is insubordination and misconduct. . . . The advance relinquishment of constitutional guarantees is not an *essential* prerequisite to such duty as may exist.[82]

This compelling state interest exception was presaged by Justice Fortas in an earlier opinion,[83] and was adopted by the Court in *Gardner*. Forced testimony cannot be introduced at trial regardless of any compelling state interest,[84] but that was not the real issue in *Garrity* or *Gardner*. The Court was asked only to decide when a state may deny employment to one who insists upon exercising a constitutional right. Whenever the legitimacy of a denial of benefits to a class of persons is questioned, the equal protection clause arguably commands the Court to look to the government's motivation.[85] To survive equal protection strict scrutiny, the state must provide a compelling interest necessitating the classification. Although the opinions contained nebulous due process language, Justice Fortas spoke to equal protection strict scrutiny analysis: "If appellant . . . had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties . . . the privilege against self-incrimination would not have been a bar to his dismissal."[86]

Strict scrutiny protects the integrity of the Constitution's guarantees; at times it protects them too well. Minimum rationality is unsatis-

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81 *See* text accompanying note 46 *supra*.

82 Brief for Appellant at 9, Gardner v. Broderick, 392 U.S. 273 (emphasis added).

83 Spevack v. Klein, 385 U.S. at 519 (Fortas, J., concurring).

84 *See* Townsend v. Sain, 372 U.S. 293 (1963).

85 *See* J. ELY, *supra* note 52, at 145-48. Professor Ely notes that "special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation." *Id.* at 146 (footnote omitted).

86 392 U.S. at 278. *See also* Note, *supra* note 1, at 187-98 (applying strict scrutiny to *Bordenkircher v. Hayes*).

factory as the validating test of systemic coercion because it is premised on an assumption of legislative regularity, an assumption challenged by the statute itself. Systemic coercion presents a clear opportunity for legislative abuse,[87] so a court should convince itself that animosity to a constitutional right was not the sole animating force behind any statutory coercion. A court, that is, must be persuaded that some legitimate goal underlay the statute, but it is a long leap from there to conclude that the court must find a *compelling* goal. Refusal to presume legislative regularity hardly suggests that a state should have to establish anything more than that regularity was actually present. Current equal protection theory, however, either presumes legislative regularity or irregularity. Whomever the burden of persuasion falls upon faces an almost impossible task. Strict scrutiny invalidates not only the indefensible, but the merely rational as well.

Imposing the onerous strict scrutiny burden upon the government sometimes may be appropriate. For example, if a classification disadvantages blacks for no apparent reason, the conclusion is almost inescapable that the legislature was pursuing an unconstitutional goal. So too, when a legislature gerrymanders electoral districts into multifaceted polygons, apparently to ensure the party in power remains in power.[88] But systemic coercion is rarely so evident. The next section analyzes how a court should ascertain a decisionmaker's motivation and suggests in part that most systemic coercion represents rational attempts to achieve worthy goals. Even so, systemic coercion does force defendants to waive their constitutional rights. Section IV faces the difficult question posed when a state can defend systemic coercion by a legitimate but uncompelling reason.

III. SYSTEMIC COERCION AND THE SEARCH FOR MOTIVATION

A. SUBJECTIVE INTENT

"Intent" denotes two distinct concepts. In its first sense ("subjective" intent), it encompasses human desires and goals, and refers to the mental state of a human being. For example, a baseball batter may in this sense intend to hit a home run, although the external manifestation of that intent, the muscular movements in his arms and body, do not constitute the act of hitting a home run but of swinging a bat. His goal is not to move a piece of wood through the air in such a fashion as to contact a thrown baseball—that action is more properly viewed as the means by which he attempts to achieve his goal. Subjective intent is

[87] *See* C. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 114 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-10 (1978).

[88] Gomillion v. Lightfoot, 364 U.S. 339 (1960). *See generally* Ely, *supra* note 53.

independent of all external reality, except insofar as one attempts to effectuate one's desires.

Any systemic coercion subjectively intended to discourage the assertion of a constitutional right is invalid since dissuading the exercise of constitutional rights is not a permissible goal of legislation.[89] Yet while the Court periodically reiterates that legislation "necessarily calculated to curtail the free exercise" of one or another constitutional right is void,[90] it has rarely invalidated legislation on a finding of improper motivation.[91] The reason the Court's practice has not followed its rhetoric is easy to find; the classic statement is by Chief Justice Warren:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.[92]

The concerns articulated by Chief Justice Warren are not compromised when a court examines the motivation of individual decisionmakers exercising delegated authority. When a defendant alleges that executive, administrative, or judicial action has penalized him for asserting a constitutional right, a court can simply engage in a traditional factfinding inquiry designed to ascertain the decisionmaker's intent.[93] Conceptually, this approach is obvious. As a matter of practice, it is unsatisfactory.

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[89] One possible exception is a legislative act premised upon a constitutional grant of power, and not a grant limited to the attainment of specific ends. The federal commerce power has been viewed in this light. *See* Perez v. United States, 402 U.S. 146 (1971) (commerce power used to regulate crime); Katzenbach v. McClung, 379 U.S. 294 (1964) (commerce power used to prohibit racial discrimination); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (same). For a slightly different perspective, *see* L. TRIBE, *supra* note 87, § 12-5, at 593-94.

[90] *See, e.g.*, United States v. Jackson, 390 U.S. at 578 (1968); Terral v. Burke Constr. Co., 257 U.S. at 532.

[91] For rare examples, *see* Epperson v. Arkansas, 393 U.S. 97, 103, 107 (1968); Gomillion v. Lightfoot, 364 U.S. 339. *See generally* Ely, *supra* note 53.

[92] United States v. O'Brien, 391 U.S. 367, 383-84 (1968) (footnote omitted); *accord*, Palmer v. Thompson, 403 U.S. 217, 224-25 (1971); Fleming v. Nestor, 363 U.S. 603, 617 (1960).

[93] *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Griffin v. County School Bd., 377 U.S. 218 (1964); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

Determining someone's state of mind is no easy task, so the placement of the burden of persuasion may be decisive. One might reasonably shift the inquiry from determining motivation on a case-by-case basis, instead attempt to isolate situations in which improper motivation is a significant possibility, and then impose a blanket prophylactic protection.

In *North Carolina v. Pearce*,[94] the Supreme Court adapted this prophylactic approach to the problem of harsher sentences imposed upon defendants who successfully appeal their convictions and then are reconvicted at retrial. It held that

> whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.[95]

Pearce gives to each defendant the ability to limit any subsequent resentencing by controlling his behavior after the first sentencing.[96] Although it was initially understood as speaking to concerns broader than impermissible motivation,[97] the Court now reads *Pearce* as a prophylactically overbroad ruling justifiable only because there is a significant possibility that a harsher resentence will be the result of judicial vindictiveness. Consistent with this interpretation of *Pearce*, the Court has declined to extend it to harsher sentences following trials *de novo* available as of right[98] or sentences imposed by juries,[99] believing that in such cases the possibility of an impermissible motivation is either "not inherent"[100] or "de minimis."[101]

Both the case-by-case and prophylactic approaches are conceptually sound: each represents an attempt to guarantee that systemic coercion that cannot rationally be justified will be avoided. Unfortunately, both lack much significance as they are inapplicable to legislative systemic coercion. In the following subsection, I show how a

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94 395 U.S. 711 (1969).

95 *Id.* at 726.

96 *See* Note, *"Upping the Ante" Against the Defendant Who Successfully Attacks His Guilty Plea: Double Jeopardy and Due Process Implications*, 50 NOTRE DAME LAW. 867 (1975).

97 *See* Levine v. Peyton, 444 F.2d 525 (4th Cir.), *cert. denied sub nom.* Slayton v. Levine, 404 U.S. 995 (1971); Aplin, *Sentence Increases on Retrial After North Carolina v. Pearce*, 39 U. CIN. L. REV. 427 (1970). *See also* Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 390 U.S. 905 (1968). *But cf.* United States v. Allsup, 573 F.2d 1141 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978) (state may use initially unbrought charges as a bargaining tool).

98 Ludwig v. Massachusetts, 427 U.S. 618 (1976); Colten v. Kentucky, 407 U.S. 104 (1972).

99 Chaffin v. Stynchcombe, 412 U.S. 17 (1973).

100 Colten v. Kentucky, 407 U.S. at 116.

101 Chaffin v. Stynchcombe, 412 U.S. at 26.

different notion of intent allows the courts to apply to legislative decisionmaking an analysis analogous to the one presented above. The flaw inherent in motivational analysis is present there too: improper motivation is a sufficient but not a necessary condition for invalidating legislation.

Invalidating subjectively improper systemic coercion is no more controversial—and no more interesting—than validating that necessitated by a compelling governmental interest. Most systemic coercion, like plea bargaining, is the product of attempts to achieve laudable ends in reasonable ways. It therefore will satisfy a motivational inquiry. It is not by that token alone necessarily legitimate, however, for "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect."[102]

B. OBJECTIVE INTENT

"Intent" also embraces a second, objective concept. Objective intent refers to the obvious and inevitable consequences of any human action. In determining whether one ought to be held civilly liable for one's conduct, the requirement of intent has come to embody both meanings. For example, Perkins offers the following formula: "Intent includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire)."[103]

Perkins' example, based on the definition of intent found in the law of torts,[104] is typical of many codifications in the older state criminal codes.[105] The Model Penal Code eschews the word "intent," but nevertheless incorporates both forms into its scheme of mental states which determine culpability. It defines a person to be acting *purposely* when pursuing his subjective intentions, and acting *knowingly* when accomplishing his objective intentions.[106]

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102 Wright v. Council of Emporia, 407 U.S. 451, 462 (1972); *accord*, Meyer v. Nebraska, 262 U.S. 390 (1923).

103 R. PERKINS, CRIMINAL LAW 658 (1957).

104 RESTATEMENT (SECOND) OF TORTS § 8A (1965).

105 ARIZ. REV. STAT. ANN. § 13-203(B)(2) (1978); KAN. STAT. ANN. § 21-3201 (1974); LA. REV. STAT. ANN. §§ 14-10, 14-11 (West 1974); H. SILVING, CONSTITUENT ELEMENTS OF CRIME 207 (1967); *see* GA. CODE § 26-604 (1978); WIS. STAT. § 939.23 (1975).

106 MODEL PENAL CODE § 2.02(2)(a), (b) (proposed official draft 1962); *accord*, ALA. CODE tit. 13A, § 2-2 (1978); ARK. STAT. ANN. § 41-203 (1977); CAL. PENAL CODE § 7 (Deering 1971); COLO. REV. STAT. § 18-1-501 (1973); CONN. GEN. STAT. § 53a-3 (1979); DEL. CODE ANN. tit. 11, § 231 (1979); HAWAII REV. STAT. § 702-206 (1976); IDAHO CODE § 18-101 (1979); ILL. REV. STAT. ch. 38, §§ 4-4, 4-5 (1980); IND. CODE § 35-41-2-2 (1979); KY. REV. STAT. § 501.020 (1975); LA. REV. STAT. ANN. §§ 14-10, 14-11 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 10 (Supp. 1980); MINN. STAT. § 609.02 (1976); MO. ANN. STAT. § 562.016 (Vernon 1979); MONT. REV. CODES ANN. tit. 94, § 2-101 (Supp. 1974); N.Y. PENAL LAW

The concept of objective intent can be traced to Austin, who believed that "[t]o expect any of [an act's] consequences, is to intend those consequences . . . ."[107] Although objective intent can be thought of as a purely mental state (the state of expectation), a litigant will have difficulty convincing a jury that he did not expect the obvious and inevitable consequences of his actions.

It is convenient to distinguish between two situations, "class (1)" and "class (2)." Suppose that a legislature passes a statute which has two consequences, X and Y. If achieving X was the subjective intent of all the legislators, X may rightly be treated as the goal of the statute. Then, either of two possibilities is true: (1) there is a way to accomplish X without also achieving Y; or (2) there is no way to accomplish X without Y. We can define class (1) by stating that Y is unnecessary to X, and class (2) by stating that Y is necessary to X. Our baseball batter example falls within the second class because swinging a bat is necessary to hitting a home run. However, if the batter's desire had been merely to play some sport, swinging a bat would fall into the first category.[108]

Class (1): Unnecessary Systemic Coercion

When Y is unnecessary to X (class (1)), one should treat both X and Y as goals of the legislation. By hypothesis, X could have been obtained without Y. That the state chose to achieve X in a manner also producing Y should be treated as a deliberate decision to achieve Y. Consequently, whenever systemic coercion is defended as a reasonable attempt to achieve a permissible goal, the defense must fail if the asserted goal could be achieved without the systemic coercion. Moreover, legislative intent is primarily determined by the plain meaning of the words of the statute,[109] so an exhaustive set of possible candidates for X should be available from the face of the statute.

In *United States v. Jackson*,[110] the Court faced what it perceived to be a class (1) case. Jackson challenged the sentencing provision of the Federal Kidnapping Act, which provided that a convicted defendant could be sentenced to no more than life imprisonment unless the jury recom-

§ 15.05 (McKinney 1975); N.D. CENT. CODE § 12.1-02-02 (1976); OHIO REV. CODE ANN. § 2901.22 (Page 1979); OR. REV. STAT. § 161.085 (1972); 18 PA. CONS. STAT. ANN. § 302 (Purdon 1973); S.D. COMPILED LAWS ANN. § 22-1-2 (1978); TEX. PENAL CODE ANN. tit. 2, § 6.03 (Vernon 1974); UTAH CODE ANN. § 76-2-103 (1978).

107 1 J. AUSTIN, LECTURES ON JURISPRUDENCE 433-34 (4th ed. 1879). *See generally*, J. HALL, *supra* note 44, at 108-17.

108 *But see* Hart, *Acts of Will and Responsibility*, in PUNISHMENT AND RESPONSIBILITY 101-04 (1968).

109 *See* Flora v. United States, 357 U.S. 63, 65 (1958); Richmond Welfare Rights Organization v. Snodgrass, 525 F.2d 197, 202 (9th Cir. 1975).

110 390 U.S. 570 (1968).

mended death.[111] The statute allowed a defendant to limit his maximum penalty either by pleading guilty, or, with the court's permission, by pleading not guilty and waiving a jury. As the Court noted: "The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[112] The government argued that the object of the penalty provision was to "ameliorat[e] the severity of the more extreme punishment that Congress might have wished to provide."[113] Congress might have felt that kidnapping merits a death sentence, yet was reluctant to impose so drastic a judgment absent a concurrence by a sample of the community. From this perspective, the effect of "inducing defendants not to contest in full measure" was merely incidental.[114]

The Supreme Court's reply was succinct. Assuming *arguendo* the state's benign motivation, the Court nevertheless wrote: "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . . The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[115] Noting that uniformly empaneling a sentencing jury would eliminate the statute's failings,[116] the Court had no difficulty voiding the sentencing scheme.

Although the *Jackson* result seems correct, the Court's rationale is problematic. If by "unnecessary" the Court meant that there was another way to further the state's goal as efficiently as the challenged scheme, then it was incorrect. The Court's proposed alternative was considerably more expensive than the voided alternative. More plausibly, the Court might have meant that administrative efficiency and cost effectiveness should play no role in determining what is necessary to further state aims and that cost considerations are not sufficiently important to justify interference with the exercise of constitutional rights.[117]

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111 18 U.S.C. § 1201(a) (1966), *later amended by* Pub. L. No. 92-539, 86 Stat. 1070 (1972), provided:

> Whoever knowingly transports . . . any person who has been unlawfully seized . . . and held for ransom . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

112 390 U.S. at 581 (footnote omitted).

113 *Id.* at 582.

114 *Id.*

115 *Id.*

116 *See, e.g.*, TENN. CODE ANN. § 40-2310 (1975) (jury empaneled to fix penalty following plea of guilty).

117 Stanley v. Illinois, 405 U.S. 645, 656 (1972); *accord*, Bruton v. United States, 391 U.S. 123, 134-35 (1968); *see* Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

However, if cost is of no concern, then the Court is on a slippery slope indeed. Few aspects of any criminal justice system cannot be made more favorable to defendants and their constitutional rights if cost were irrelevant. Free counsel, sufficient courts to ensure speedy trials, and prison child care centers spring to mind—the possibilities are endless. One interpretation of "necessary" has no effect, and the other has too much.[118] The Court did not suggest—nor is it apparent—where to draw the line.

Additionally, if the state had argued that the purpose of the statute was to facilitate plea bargaining, the sentencing provision would have been essential to the purpose of the Act. Such a defense would have shifted the statute from class (1) into class (2), rendering it immune to a motivational attack.[119]

As characterized by the Court, *Jackson* represents a rare case indeed: one in which the systemic coercion was purely incidental and unrelated to the legitimate goals of the legislature. If improperly motivated systemic coercion, whether subjective or objective, were not uncommon, the subject would lack interest. However, most systemic coercion is neither improperly subjectively motivated nor merely incidental to another legitimate goal, but rather the coercion itself forms the only reasonable attempt to effectuate the state's desires. That case forms the crux of the issue, and is treated below.

Class (2): Necessary Systemic Coercion

Class (2) systemic coercion encompasses reasonable attempts by legislators to achieve legitimate goals which cannot be attained without discouraging the assertion of constitutional rights. It suffers from the same disability as does systemic coercion enforced by an individual (e.g., a judge), which is properly motivated. There is no easy way to validate it or to strike it down. Both forms of systemic coercion can be rationally defended and current constitutional doctrine does not specify whether that level of defense is enough.

The Supreme Court has identified two modes of analysis for dissecting class (2) cases, and has hinted at a third. The remainder of this section argues against the two theories, and then suggests that the Court's hint, if properly developed, can assist in rationalizing the systemic coercion field.

A Balancing Approach. One way for the Court to respond to a sys-

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[118] *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-90 & n.29 (1975).

[119] Corbitt v. New Jersey, 439 U.S. 212, was just such a case.

temic coercion challenge is to balance the incremental costs to individuals against the potential state benefits. This approach appears reasonable: it represents in a poorly defined way an attempt to determine whether the benefits flowing from any particular instance of systemic coercion are worth the concomitant costs.[120] The problem is that it *is* poorly defined, and places the judiciary in the uncomfortable position of deciding difficult cases without the guidance of meaningful standards.

Balancing may be appropriate when applying broadly worded constitutional clauses. Beyond the interpretive stage, though, it has no place.[121] To deny an individual an unencumbered opportunity to assert his constitutional rights because of some diffuse governmental interest is judicial abdication, not constitutional interpretation. As Justice Black so long maintained[122] and as the commentators are beginning to agree,[123] case-by-case balancing legitimizes majoritarian tyranny since a collective interest always seems to outweigh individual needs.[124]

Criticism of *ad hoc* judicial balancing is common, and often reflects a belief that balancing is incompatible with the proper judicial role. Class (2) systemic coercion presents hard cases, but that does not justify allowing judges to decide them as they please, as condoned by qualitative balancing. To the extent that one perceives the judicial role as applying general legal rules to sets of particular facts, *ad hoc* balancing as a judicial methodology refutes that perception.

In the context of systemic coercion, *ad hoc* balancing is particularly unsatisfactory. The Bill of Rights was added to the Constitution to protect individual liberties from an overzealous government. The rights to trial by jury, to confront one's accusers, and to refuse to testify against

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120 *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961). *See also* Dix, *supra* note 44, at 249; Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFAIRS 204, 222 (1972) *Another Look*, *supra* note 5, at 181.

121 *See* Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 942 (1968).

122 *See* Konigsberg v. State Bar, 366 U.S. at 61 (Black, J., dissenting); H. BLACK, A CONSTITUTIONAL FAITH (1969); Decker, *Justice Hugo L. Black: The Balancer of Absolutes*, 59 CALIF. L. REV. 1335 (1971); Freund, *Mr. Justice Black and the Judicial Function*, 14 U.C.L.A. L. REV. 467 (1967); *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).

123 *See, e.g.*, Nimmer, *supra* note 121.

124 Barenblatt v. United States, 360 U.S. 109, 144 (1959) (Black, J., dissenting); *see* Nimmer, *supra* note 121, at 939-42. *See generally* C. DUCAT, *supra* note 87, at 95-100, 116-92.

Almost forty years ago, Dean Pound observed:

> When it comes to weighing or valuing claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest, we may decide the question in advance in our very way of putting it.

R. POUND, A SURVEY OF SOCIAL INTERESTS 2 (1943), *reprinted in* 3 JURISPRUDENCE 329 (1959), *quoted in* C. DUCAT, *supra* note 87, at 181.

oneself were not enshrined as the supreme law of the land because of a fear that a legislature would abolish them on a whimsy, or out of raw tyranny. They were adopted because they were thought to be so important that they should not be denied even if a legislature thinks there is a good reason for doing so. They represent checks upon government benefiting each individual who elects to exercise them. Thus it is particularly inappropriate to diminish their availability in the name of the public weal.

An Historical Approach. Another possibility is to look to long-standing practices or Anglo-American traditions to set the relevant standards. Surprisingly, such an approach need not be static. That state after state abolishes a once prevalent form of systemic coercion may justify abolition of the practice in those few anachronistic jurisdictions standing fast. Similar methods have long been advocated as the proper way to interpret the eighth amendment's prohibition of "cruel and unusual punishments."[125]

Nevertheless, this historical approach is as unsatisfactory as the *ad hoc* balancing approach discussed above. The inconclusive debate on whether the fourteenth amendment's due process clause was intended to incorporate the Bill of Rights shows how ambiguous history may be on even the simplest of issues.[126] Justice Harlan's opinions defining fundamental fairness in terms of an historical understanding and overwhelming community sentiment show that these standards change not so much with the times, but with each appointment to the bench.[127]

In addition, using contemporary legislative practice as evidence of reasonableness is letting the fox guard the hens; after all, class (2) systemic coercion is predicated upon a legislative decision to discourage the assertion of a constitutional right. Perhaps more important, systemic coercion does not lend itself to an historical or community sentiment approach as does the eighth amendment. What constitutes a cruel punishment does seem to turn on a community's values, and rightly it could vary between peoples or across time. Whether a legislature may do indirectly that which it is prohibited from doing directly is not as ephemeral a question. It should be attacked from a more reasoned and less pragmatic vantage.

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125 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Weems v. United States, 217 U.S. 349, 378 (1910); *see* Rummel v. Estelle, 100 S. Ct. 1133, 1144 (1980).

126 *Compare* Adamson v. California, 332 U.S. 46, 92-123 (1947) (Black, J., dissenting) *with* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

127 *See* McGautha v. California, 402 U.S. 183, 209-220 (1971); Miranda v. Arizona, 384 U.S. at 506-26 (Harlan, J., dissenting); Malloy v. Hogan, 378 U.S. 1, 14-33 (1964) (Harlan, J., dissenting).

A Normative Approach. In *Griffin v. California*,[128] the Supreme Court invalidated the California "comment rule" which provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or jury."[129]

Justice Douglas' brief opinion condemned the rule for creating "a penalty . . . for exercising a constitutional privilege."[130] His stark conclusion was juxtaposed between the observations that (i) the inference of guilt drawn from a refusal to testify "is not always so natural or irresistible,"[131] and (ii) the practice was a "remnant of the 'inquisitorial system of criminal justice.' "[132]

In painful contrast to the opinion of Justice Traynor of the California Supreme Court, which it overruled,[133] *Griffin* contained scant analysis. No equal protection or motivational analysis was attempted. The Court merely held that the comment rule violated the fifth amendment's guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[134]

Yet, California's comment rule compelled nothing.[135] The only strength in the opinion lies in its characterization of the rule as a penalty. However, the Court gave no clue suggesting how it made that characterization. In fact, the Court routinely refers to impermissible systemic coercion as imposing penalties upon the assertion of constitutional rights,[136] in apparent accordance with the notion that one may only be penalized for doing something wrong, not for demanding one's constitutional rights.

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128 380 U.S. 609 (1965). For a similar criticism of *Griffin, see* Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841, 853-55 (1980).

129 CAL. CONST. art. I, § 13, ¶ 7 (1934) (repealed 1974).

130 380 U.S. at 614. The full quotation is: "It is a penalty *imposed by courts* for exercising a constitutional privilege." (emphasis added). The italicized portion makes no sense at all, since the California comment rule was a part of the state's constitution, inserted as a senate amendment. Barr, *Privileges Against Self-Incrimination in California*, 30 CALIF. L. REV. 547, 549 & n.16 (1942).

131 380 U.S. at 615.

132 *Id.* at 614.

133 People v. Modesto, 62 Cal. 2d 436, 398 P.2d 753, 42 Cal. Rptr. 417 (1965).

134 380 U.S. at 609.

135 *See id.* at 617-23 (Stewart, J., dissenting). *See also* Turner v. United States, 396 U.S. 398 (1970); Yee Hem v. United States, 268 U.S. 178 (1925); Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC. REV. 527 (1979). *But see* Nesson, *supra* note 28, at 1203-13.

136 *See, e.g.*, Blackledge v. Perry, 417 U.S. 21; Chaffin v. Stynchcombe, 412 U.S. at 24; Colten v. Kentucky, 407 U.S. at 116; Brady v. United States, 397 U.S. 742; United States v. Jackson, 390 U.S. at 582-83.

"Penalty" need not function merely as a conclusory label. It embodies a normative concept.[137] If it can be tied to an independently defined referent, it can provide the basis for distinguishing legitimate systemic coercion from the illegitimate. One ought not be penalized for asserting one's rights, but one surely may be rewarded for helping the state. So long as there is an independent referent, these terms can be meaningfully defined, and the absence of one will not necessarily imply the existence of the other.

Systemic coercion fits nicely within a penalty and reward framework. A defendant has a choice: either assert or waive some constitutional right. Each option corresponds to a separate outcome, and waiver results in a more pleasant consequence than assertion. The defendant naturally enough alleges that the dilemma penalizes the exercise of his constitutional right, to which the government responds that the defendant may not benefit from both his waiver and assertion of his constitutional rights. That is, the government argues that the scheme merely rewards waivers. In the abstract, it is impossible to tell which of the parties is correct. Given the facts of a particular case, that is just the inquiry which a court should make.

While the Supreme Court invariably resorts to normative language in systemic coercion cases, it fails to pursue the proper inquiry. In *Griffin*, Justice Douglas cited the appropriate constitutional provision, quoted the challenged statute, and then announced that the two did not square, so the statute was struck down. Such result-oriented opinions may accord with the practice of common law adjudication over the last several centuries, but they are inappropriate for constitutional adjudication.[138]

More than any other tribunal, the Supreme Court must be, and must appear to be, guided by principle. It must be principled because it writes the fundamental law of our government. It weaves the fabric of our society. As the design in a piece of cloth can only change by imperceptible increments, so too must constitutional doctrine only slowly and carefully change directions. The common law "random-walk to truth" methodology would wreak chaos if followed by a court of last resort. As the bedrock of our legal infrastructure, the Court's vibrations reverberate throughout society. It must therefore be "a voice of reason charged with the creative function of discerning afresh and of *articulating* and developing *impersonal* and *durable* principles."[139]

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[137] *See generally* Nozick, *Coercion*, in PHILOSOPHY, SCIENCE AND METHOD 440 (S. Morgenbesser, P. Suppes & M. White eds. 1969).

[138] *See* J. ELY, *supra* note 52, at 67-68.

[139] Hart, *The Supreme Court, 1958 Term—Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 97 (1959) (emphasis in original). *See* A. BICKEL, THE LEAST DANGEROUS BRANCH

The Court must also *appear* to be principled. The judiciary serves not only to check the legislatures by invalidating acts repugnant to the Constitution, but to legitimize those acts it upholds. Through principled decisionmaking removed from the hue and cry of legislative halls, political logrolling, and public outcry, the courts perform their "mystic" function of assuring us that our society remains on its charted constitutional course.[140] But this mysticism will not survive unless the courts, especially the Supreme Court, appear to reflect the "sober second thought" of our collective conscience. The Court must justify its decisions not with transient theories or timely rationalizations, but with values of "more general and permanent interest."[141]

The *Griffin* approach is unsatisfactory because it is purely conclusory. It hides the Court's decisionmaking process, creating instability and uncertainty in the legal community, and undercutting the moral force necessary to sustain its legitimizing function. By rendering opinions unsupported by neutral principles, the Supreme Court loses its ability to claim that right reason, rather than force or will, is the source of its strength and the justification for its power.[142] Hiding analysis behind the facade of interpretation makes analogies harder to draw and forces similar cases to appear foreign. Faint lines, particularly the ones distinguishing permissible burdens from impermissible ones, are not illuminated by a Court which tells us on which side of the line a case falls, but refuses to tell us why.[143]

The Court has recently reiterated that "not every burden on the exercise of a constitutional right . . . is invalid."[144] Its justification must be the belief that "[t]he distinction between [giving] benefits [to one] and burdens [to another] is more than one of semantics."[145] Yet, unless that distinction is securely tied to a normative theory, it *is* purely semantic. When faced with systemic coercion, the defendant who waives, gets more, while the defendant who demands, gets less, each in relation to the other. There is no way one can meaningfully label one treatment as punishment or the other as reward absent an independently defined referent.[146] Until the Court articulates some normative theory or drops

247-51 (1962); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

140 C. BLACK, THE PEOPLE AND THE COURT 56-86 (1960).

141 A. BICKEL, *supra* note 139, at 24; Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

142 A. BICKEL, *supra* note 139, at 235-43; THE FEDERALIST NO. 78 (A. Hamilton).

143 This concern is, of course, far broader than systemic coercion. *See, e.g.*, Tushnet, *Constitutional Limitation of Substantive Criminal Laws: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775, 802 (1975).

144 Corbitt v. New Jersey, 439 U.S. at 218.

145 Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).

146 The courts have tried to define "punishment" in other contexts, notably in respect to

the penalty and reward distinction, its systemic coercion opinions are doomed to inconsistency and irrationality. This can only undercut the Court's legitimizing function in general, and one's faith in the rule of law, and not of men, in particular.

IV. A NORMATIVE THEORY OF SYSTEMIC COERCION

While systemic coercion may not validly penalize those who insist upon exercising their constitutional rights, it *may* induce waivers favorable to the state by rewarding those who forego their entitlements. The courts must give that distinction content by fleshing out the concept of an independent referent, the definitional linchpin of any normative theory.[147] For some cases, a sufficiently omnipresent norm will provide an easy answer. For others, there will be no easily identifiable referent, forcing the courts to either define one themselves or look to another political branch to do so. Following the lead of Professor Ely, I propose that the courts not define these bottom-line standards themselves, but use a separation of powers doctrine to ensure that the duty to make these definitions is properly distributed among the other branches of the government.[148]

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challenges based upon the ex post facto and bills of attainder clauses. *See generally* Flemming v. Nestor, 363 U.S. 603, 613-17 (1960). However, in these contexts the distinction drawn is not between reward and penalty, but between civil and criminal. The discussion presupposes that someone is being punished, and the question is whether it is *criminal* (and thus impermissible) punishment. *Cf.* Commissioner v. Tellier, 383 U.S. 687, 691 (1966) (income tax levied on illegally obtained funds not punishment).

147 Professor Nozick has constructed a similar normative theory, not *of coercion*, but *of being coerced*. *See* Nozick, *supra* note 137. His shift in emphasis allows him to define punishment more objectively, but at the cost of overlooking (in what Professor Nozick refers to as a "preliminary" work, *id.* at 440) the inequity forced upon one who refuses to be coerced and is therefore doomed to suffer the punishment.

148 Since this theory is not tied to any specific constitutional clause or amendment, one might argue it lacks a constitutional foundation. Such a criticism misses the mark. The supremacy clause, coupled with an appreciation of the overall structure of the Constitution and the federalism which it imposes, imply that a state may not do indirectly that which it constitutionally is forbidden to do directly.

Professor Charles Black makes this point exceptionally well in his brilliant book, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969). He observes that American constitutional jurisprudence has come to rely almost exclusively on particularized interpretation as its method of analysis, and argues

> that our preference for the particular-text style has been a decided one, leading not only to the failure to develop a full-bodied case-law of inference from constitutional structure and relation but even to a preference, among texts, for those which are in form directive of official conduct, rather than for those that declare or create a relationship out of the existence of which inference could be drawn.

Id. at 8.

A. OMNIPRESENT NORMS—GOVERNMENT AS A MEMBER OF SOCIETY

In 1850, in *State v. Wright*,[149] the Missouri Supreme Court upheld a jury fee of three dollars taxed against every criminal defendant who demanded a jury and was subsequently convicted. Wright claimed the tax was repugnant to the Constitution's guarantee "that the right of trial by jury, shall remain inviolate."[150] The court, though acknowledging "that right and justice ought to be administered without sale, denial, or delay,"[151] nevertheless wrote: "[W]e do not deem that any of the great guarantees alluded to have been invaded or violated by the legislation in question."[152]

The conventional justification offered in support of taxes such as those found in *Wright* is that the state incurs additional costs as a result of the defendant's demand, hence in fairness the defendant ought to bear them. The state is not burdening the defendant's right, so the argument goes, because the costs are inherent in the assertion. Empaneling a jury is expensive and the defendant has brought this cost upon himself.[153]

This argument confuses an inherent cost *occurrence* with an inherent cost *allocation*. The state, which pays the salaries and related expenses of the judge, prosecutor, bailiff, and court reporter, is obligated to provide a jury, and, at least initially, to pay any expenses necessary to achieve

149 13 Mo. 243 (1850); *see, e.g.*, United States v. Wilson, 193 F. 1007 (S.D.N.Y. 1911); Conner v. Municipal Court, 145 Colo. 177, 358 P.2d 24 (1960); Saunders v. People, 63 Colo. 241, 165 P. 781 (1917); Adams v. Corriston, 7 Minn. 365 (1862); Shaw v. State, 17 Neb. 334, 22 N.W. 772 (1885); Arnold v. State, 76 Wyo. 445, 306 P.2d 368 (1957); 28 U.S.C. §§ 1918, 1920, 1923 (1966); IDAHO CODE § 19-4703, *repealed*, 1969 Idaho Sess. Laws ch. 139, § 3; MICH. STAT. ANN. § 27A.2537 (1962). *See generally* Note, *Charging Costs of Prosecution to the Defendant*, 59 GEO. L.J. 991 (1971); Annot., 65 A.L.R.2d 854 (1959); Annot., 32 A.L.R. 865 (1924).

150 13 Mo. at 244.

151 *Id.*

152 *Id.*

153 *See* Schilb v. Kuebel, 404 U.S. 357, 371 (1971). *Cf.* Gleckman v. United States, 80 F.2d 394, 403 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936) (costs do not include "the general expense of maintaining the system of courts and the administration of justice"); United States v. Murphy, 59 F.2d 734, 735 (S.D. Ala. 1932) (costs include expenses incurred obtaining prosecution witness not called but which "under certain phases of the case could have become very material"); State v. Hanson, 92 Idaho 665, 668, 448 P.2d 758, 761 (1968) (costs do not include general expenses of court administration); Commonwealth v. Giacco, 202 Pa. Super. Ct. 294, 196 A.2d 189, *aff'd*, 415 Pa. 139, 202 A.2d 55 (1964), *rev'd on other grounds*, 382 U.S. 399 (1966) (costs may be imposed on acquitted defendants). *See also* Cox v. New Hampshire, 312 U.S. 569, 577 (1941); Maguire, *Taxing the Exercise of Natural Rights*, in HARVARD LEGAL ESSAYS WRITTEN IN HONOR OF AND PRESENTED TO JOSEPH HENRY BEALE AND SAMUEL WILLISTON 289 (1934). *But see* Krutz v. State, 4 Ind. 647 (1853) (incurred expenses may be multiplied by number of counts to produce chargeable costs); State v. Smith, 184 N.C. 728, 114 S.E. 625 (1922) (statutory jury tax must be assessed even if defendant pleads guilty and no jury impaneled).

that end. That being done, the jury tax is an attempt to recoup some of the expenses by charging the defendant. To call it a jury tax is not to say that it pays for a jury, but that it is levied only upon those who demand a jury.[154] Whatever the defendant pays goes into the state's coffers, to be spent as the legislature sees fit. Insofar as the legislature predicates its budget upon receipt of these funds, only decisions whether to fund other activities might be affected. Regardless of the state's revenues, it is constitutionally obligated to provide a jury.

The jury tax in *Wright* should have been struck down. At a minimum, an entitlement should be free from government surcharge. One pays for the unusual, the extra, the exceptional—a constitutional right is none of these. To be sure, one obtains the right to cross the Golden Gate Bridge only by paying the toll, but that is because the state is under no obligation to let anyone use the bridge at all. Since no constitutional right is involved, the requirement of equal protection requires no more of California than that it provide equal access, upon whatever terms it chooses, to all who wish to cross.

Contrast *Wright* with an hypothetical *State v. Rong* in which a defendant challenges the constitutionality of a statute which provides for a three-dollar payment to every criminal defendant who waives his right to a jury. In *Rong*, as in *Wright*, the defendant benefits financially by waiving a jury. Yet in *Rong* the statute should be upheld. The challenge is based upon a claim to money to which the defendant is neither entitled, nor would ever expect, as the government does not distribute money for no reason.[155]

The very act of paying someone not to exercise his constitutional right makes the waiver exceptional. We expect to pay for services received and to be paid for services rendered. By providing a jury, the state is merely doing what it must. By waiving a jury, a defendant is doing what he need not, and what the government desires. If a state believes that the benefits of a jury do not justify its expense, it should try to save that expense by sharing the gain with those who will forego the benefits, not by taxing those who demand them.

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154 *See* Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943). *But see* State v. Smith, 184 N.C. 728, 114 S.E. 625.

155 One commentator has suggested that "it is at least arguable that state spending power cannot be exercised to buy up rights guaranteed by the Constitution." Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599 (1960). His justification is two-fold: (1) since no societal interest is endangered by the exercise of a defendant's rights, their exercise may not be regulated; and (2) withholding a benefit from those who exercise a constitutional right "in effect penalizes that exercise," *id.* As to his first point, a defendant's exercise of constitutional rights consumes valuable state resources, and so this "buying up" program is a rational attempt to save money. The thrust of this article responds to his second point.

B. LEGISLATIVE REFERENTS—SEPARATION OF POWERS AS A PROCEDURAL PROTECTION

In *United States v. Jackson*,[156] the Supreme Court invalidated the sentencing provision of the Federal Kidnapping Act because it excluded from its capital punishment provision only those defendants who waived their right to a jury trial. The Court held that the provision unnecessarily chilled a defendant's constitutional rights. As discussed above, that rationalization would not have sufficed had the government argued that the particular sentencing provision was enacted to encourage plea bargaining and waivers of jury trials. Such a defense was offered in the substantially similar case of *Corbitt v. New Jersey*.[157]

New Jersey law imposes a mandatory life sentence upon a defendant convicted of first degree murder while second degree murder is punished by not more than thirty years imprisonment. A defendant is never charged with a specific degree of murder—if the jury convicts, its verdict must include a finding of first or second degree murder. If a defendant foregoes trial, the sentencing judge leaves unspecified the degree, and imposes imprisonment for up to thirty years, or life.[158] Corbitt was charged with murder, pled not guilty, and was sentenced to mandatory life imprisonment after a jury returned a finding of guilty in the first degree.[159]

Corbitt argued that by demanding trial, he was forced to give up the possibility of a sentence less than life because the circumstances underlying the government's case could have sustained a murder conviction only in the first degree.[160] The effect of New Jersey's statutory scheme was to give him either an opportunity to contest guilt or a chance to benefit from the sentencing judge's mercy. *Jackson* condemned a statute that provided that one might get a harsher sentence by going to trial; Corbitt was challenging a statute which offered the possibility of a reduced sentence only to one who did not contest his guilt. Corbitt argued that *Jackson* was controlling; a majority of the Court disagreed. At this point, a schematic comparison of the *Jackson* and *Corbitt* sentencing schemes will be helpful.

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156 390 U.S. 570.

157 439 U.S. 212.

158 N.J. STAT. ANN. §§ 2A:113-1, -2, -4 (West 1969), *repealed*, 1978 N.J. Laws ch. 95, § 2C:98-2 (current version at N.J. STAT. ANN. §§ 2C:11-2, -3 (West Supp. 1979)).

159 439 U.S. at 216.

160 Corbitt was indicted for both arson and murder. The state presented its case on a felony murder theory and murder committed in perpetrating arson is defined to be in the first degree. N.J. STAT. ANN. § 2A:113-1 (West 1969), *repealed*, 1978 N.J. Laws ch. 95, § 2C:98-2 (current version at N.J. STAT. ANN. § 2C:11-3 (West Supp. 1979)). *See* 439 U.S. at 216 n.4.

	AFTER PLEA	AFTER TRIAL
Corbitt	30 to Life	Life
Jackson	Life	Life or Death

The similarity between *Jackson* and *Corbitt* is apparent. In each case, a defendant is better off if he relinquishes his right to trial. At first glance, *Jackson* lends strong support for the defendant's position in *Corbitt*.

The facts in *Corbitt* were indistinguishable from those in *Jackson*. The government's litigating posture, however, was completely different. While the Court in *Corbitt* correctly sensed the inadequacy of the *Jackson* rationale, it was plainly at a loss how to distinguish them. Moreover, the Court could not distinguish the challenged practice from plea bargaining generally, and it was unwilling to condemn the latter wholesale.[161]

The *Jackson-Corbitt* sentencing scheme is not "punishment" any more than it is "reward." There is no *a priori* correct punishment befitting any crime or criminal. In the first instance and within broad limits, setting the appropriate punishment for each crime is left to the various legislatures.[162] If the lesser sentence were the correct one in *Jackson* or *Corbitt*, the sentencing scheme would induce guilty pleas by punishing those who demand trial. If the greater sentence were correct, then the scheme would merely reward those who voluntarily forego trial. Because there is no correct sentence, there is no referent, and without that, normative concepts cannot be defined.

The statutes in *Jackson* and *Corbitt* should have been condemned not because the legislatures chose wrong sentences, but because they refused to choose any. In *Corbitt*, any term of years from thirty to life would have been constitutionally permissible. Had the New Jersey legislature specified forty-five years imprisonment, or life, or almost any other penalty, it would have been unassailable. Instead, the legislature conditioned a killer's just dessert on whether he demands a trial, and that cannot be correct. The legislature or its delegate must sentence a convicted defendant justly. While many individual factors may affect that justice, the assertion or waiver of a constitutional right is not one of them.[163]

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161 439 U.S. at 218-20.

162 Rummel v. Estelle, 100 S. Ct. 1133.

163 I am proposing that the only significant limitation upon a criminal sentence is a requirement of pure procedural justice.

> [T]here is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed. This situation is illustrated by gambling. If a number of persons engage in a series of fair bets, the distribution of cash after the last bet

Plea bargaining by anyone other than the body or individual responsible for setting sentence[164] was not at issue. The duty of the legislature or the judge is to select the right sentence for each defendant depending upon what he has done, and perhaps who he is.[165] A prosecutor, in the interest of expediency rather than justice, may be willing to "buy" a guilty plea for leniency. So long as the sentence is or will be set by an independent body, the prosecutor has no power to punish, but can only reward. The statute in *Corbitt* was not unconstitutional because it encouraged plea bargaining, but because it represented *legislative* plea bargaining.

Separating the power to create a referent from the power to bargain with it offers several benefits. First and foremost, it legitimizes the substantive choice reflected in the referent. From taxes to traffic laws, from quality of education to quality of beef, legislatures, executives, and their delegates define our relationships, rights, and remedies. Courts review the validity of the various political decisions not so much by imposing their notions of correctness, but by ensuring that the processes by which these decisions are made accord with our conception of representative democratic decisionmaking. One does not successfully challenge a sale of state mineral rights as unwise, but as being the result of corruption. A court will much more likely enjoin a zoning variance if the challenge is based on conflict of interest rather than on arbitrariness.

> is fair, or at least not unfair, whatever this distribution is. I assume . . . [t]he betting procedure is fair and freely entered into under conditions that are fair. Thus the background circumstances define a fair procedure. Now any distribution of cash summing to the initial stock held by all individuals could result from a series of fair bets. In this sense all of these particular distributions are equally fair. A distinctive feature of pure procedural justice is that the procedure for determining the just result must actually be carried out; for in these cases there is no independent criterion by reference to which a definite outcome can be known to be just. Clearly we cannot say that a particular state of affairs is just because it could have been reached by following a fair procedure. . . . What makes the final outcome of betting fair, or not unfair, is that it is the one which has arisen after a series of fair gambles. A fair procedure translates its fairness to the outcome only when it is actually carried out.

J. RAWLS, A THEORY OF JUSTICE § 14, at 86 (1971); *see* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 511 (1974). *But see* W. SEAGLE, LAW: THE SCIENCE OF INEFFICIENCY 13-14 (1952).

164 There have been direct attacks upon all plea bargaining. *See, e.g., Unconstitutionality, supra* note 5. Most are based on the same misconception, namely that "[p]lea bargaining is inherently destructive of the values of the trial process, for it is designed to prevent trials." *Id.* at 1397-98. A defendant's probability of nonconviction is simply a reflection of the procedural protections available to all defendants as mirrored by the particular facts of a specific case. Since a defendant's probability of nonconviction plays a substantial role in his plea negotiations, *see* S. BUCKLE & L. BUCKLE, BARGAINING FOR JUSTICE 121-26 (1977); M. HEUMANN, *supra* note 17, at 106-07, the procedural protections filter down to the negotiating table and are reflected in the eventual bargain struck by the parties.

165 *See, e.g.*, Williams v. New York, 337 U.S. 241, 247-49 & nn.8-15 (1949); People v. Johnson, 252 N.Y. 387, 169 N.E. 619, 621 (1930).

Plea bargaining is defensible so long as it can be placed within a normative framework. That framework requires a referent, and it is up to the legislature to define it or require judges to do so. A range of sentences is arguably appropriate for any particular crime, and any choice within that range should be upheld so long as there is no indication that the selection was influenced by improper factors. The correct sentence is that which accords with the sentencer's sense of justice.[166] If, however, the sentencer is not disinterested, the sentence is suspect. When the sentence is statutorily tied to a waiver of a constitutional right, it cannot be correct even by this procedural definition. While the executive may be willing to trade expediency for leniency, justice may not.

To be sure, a legislator may vote for a sentence harsher than he believes befits a certain crime, assuming that those eventually sentenced for that crime will have committed a more serious offense which was successfully negotiated down. Yet, such disingenuousness is unlikely. One may not plea bargain because the prosecutor is unwilling, or because one is innocent. A defendant may be forced to go to trial because the judge feels that a plea bargain is unfair to the state,[167] or to the defendant.[168] Or, if a defendant has bargained down, one cannot determine how high he began, or whether he drove a hard or an easy bargain. In short, the innumerable factors causing a defendant to be sentenced under a particular statute are beyond the ken of any legislator. A legislator knows too little to accurately step-up a criminal punishment.

Moreover, regardless of a legislator's or judge's expectations and assumptions, his public sentencing record will reveal actual crimes and sentences. To the extent that he inflates criminal sentences, he may face constituency pressure. Of course, acceptance by the voters of inflated sentences would indicate that the legislator or judge had misconceived the correct sentence in the first place.

In addition, legislative plea bargaining is done wholesale. A lesser sentence is tied to a single characteristic (whether the defendant pleads guilty), and is offered to all. Prosecutorial plea bargaining is done retail, and can be tailored to each defendant. To a defendant whose guilt appears clear and whose trial will be short, little need or should be offered for a plea of guilty. In an especially complicated case, a guilty plea offers the state greater benefits, and so the state should be willing to offer

166 *See* note 163 *supra*.

167 *See* Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241 (1974).

168 United States v. Biscoe, 518 F.2d 95 (1st Cir. 1975); United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971); Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966); McCoy v. United States, 363 F.2d 306 (D.C. Cir. 1966).

more. The less individualized the plea bargaining, the more arbitrary it becomes. Validating only prosecutorial plea bargaining helps ensure that waivers of the right to trial are induced in a refined and rational manner.

This examination of plea bargaining illustrates a broader point. Systemic coercion is amenable to a normative analysis, and as long as one decisionmaker creates the referent while another bargains with it, systemic coercion is legitimate. If, however, there is no independent referent, systemic coercion cannot be defended in normative terms. So far, the courts have not articulated an alternate justification.

C. EVERYDAY PRACTICE AS A TEST OF INVALIDITY

A standard can have critical content only for those whom it constrains. Anyone who can modify a standard is certainly unconstrained by it. We cannot hope to prevent prosecutorial abuse by defining what a prosecutor ought to do as what he currently does, for today's abuse would become tomorrow's norm. It is the independent quality of the referent which both legitimizes its correctness and reduces the likelihood of improper motivation by eliminating the obvious conflict of interest.

There is no reason, however, why a decisionmaker's past practices should not form a basis for invalidating systemic coercion. In *North Carolina v. Pearce*,[169] the Court held that a defendant who successfully appealed his conviction and then was reconvicted could not be given an increased sentence unless the reason for doing so appeared in the record and was based upon facts occurring after the time of the original sentencing proceeding. Justice White concurred in part and dissented in part, writing: "I join the Court's opinion except that in my view Part II-C should authorize an increased sentence on retrial based on any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding."[170]

When sentencing is left to the discretion of the trial judge, the correct sentence is by definition that which he believes is reasonable given the facts as he knows them. A defendant is entitled to no more than the judge's unbiased decision. Since the state has created the process by which a defendant's proper sentence is determined, in the absence of evidence that the process has broken down, the state should be bound by that determination. Justice White's opinion embodies this theory: the first sentence cannot be enhanced unless the process by which it was chosen was faulty, the fault being an absence of relevant information. When that information was developed is immaterial. If it was unknown

169 395 U.S. 711.

170 *Id.* at 751.

to the original sentencing judge, the original sentence is tainted and the process must begin again. If all the relevant data were known at the first proceeding, the process cannot be challenged and its result is binding.

Even the majority opinion in *Pearce* can be read as embracing this normative approach. The government should be estopped from presenting facts at the resentencing which existed at the time of the original proceeding but were not then brought to light, because an adversary is generally bound by his mistakes. The majority opinion is consistent with a normative approach because it binds the government to the original sentence when the process which determined it was not faulty and when the government is estopped to assert its faults. All this is not to say that the Court consciously decided *Pearce* in these terms, but only that as the Court's systemic coercion opinions are often clothed in normative rhetoric, so too their decisions are animated by normative concepts.

This brings us back to *Bordenkircher v. Hayes*.[171] *Hayes* involved prosecutorial plea bargaining. The defendant was threatened with no more than indictment for a crime for which he plainly was guilty and he was sentenced to life as the Kentucky legislature statutorily had fixed. It appears to be the paradigmatic permissible systemic coercion. Nevertheless, the Court's decision brought widespread criticism, and in fact was wrong.

What causes such a violent reaction to *Hayes* is that the defendant was sentenced to life imprisonment for committing three petty offenses. The visceral unacceptability of the *Hayes* situation is not that the prosecutor drove such a hard bargain, but that he had power to drive such an extreme bargain at all. Nevertheless, the Supreme Court has ruled that if a legislature wants to send a petty recidivist to prison for life, neither the eighth amendment's prohibition of cruel and unusual punishment nor any other part of the Constitution stands in the way.[172]

The problem in *Hayes* was that the Kentucky legislature did not make that decision. To be sure, the legislature validly enacted a statute which authorizes life sentences for third-time offenders. But it did not intend that statute to be rigorously, or even commonly, applied. Despite the almost total absence of marginal cost, the enforcement of habitual criminal statutes is rare.[173] These statutes are characterized by indefen-

171 434 U.S. 357.

172 Rummel v. Estelle, 100 S. Ct. 1133.

173 Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640, 659 (1945); *see* Oyler v. Boles, 368 U.S. 448, 454-56 (1962). *See generally* Note, 16 AM. CRIM. L. REV. 275, 277 n.4 (1979).

Because serious crimes carry their own severe penalties, the harsh sentences meted out by

sible harshness and infrequent application.[174] If they were taken seriously by prosecutors and judges, they might vanish. But they are not. Legislators enact these extreme statutes knowing that they will be enforced only sporadically, thereby shifting sentencing decisions from high visibility legislative debate to low visibility prosecutorial discretion.[175]

Defendant Hayes was denied a constitutional right, the right to have the legislature or an independent judge set his sentence. He was denied procedural due process, because the law under which he was sentenced was a sham. He was denied the cleansing effect of legislative decisionmaking because the legislators knew that the statute would be rarely enforced. Unless legislators are forced to take their lawmaking seriously, they may legislate arbitrarily.[176] The prosecutor in *Hayes* did nothing wrong; the Kentucky legislature did. Plea bargaining is valid so long as the prosecutor's discretion is bound by what the legislature, or its independent surrogate, the judge, believes is reasonable. In *Hayes*, it was not, and so the habitual criminal conviction should have been reversed.

D. BEYOND A NORMATIVE THEORY

This normative theory does not resolve every systemic coercion case. The issue posed by *McAuliffe v. New Bedford, Garrity v. New Jersey*, and *Gardner v. Broderick* can only uncomfortably be forced into its mold.[177] Whenever systemic coercion is rational but uncompelling, when there exists no omnipresent referent and there is no reasonable way to apply a separation of powers doctrine, it is not clear how a court should resolve the case. A complete answer to the systemic coercion problem I leave for another day. I have, I believe, provided a coherent framework for analyzing many of the systemic coercion cases.

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recidivist statutes primarily fall upon the shoulders of petty criminals. Katkin, *Habitual Offender Laws: A Reconsideration*, 21 BUFFALO L. REV. 99, 106 (1971).

174 Katkin, *supra* note 173, at 105 & n.32.

175 Prosecutorial discretion has been characterized as "the broadest discretionary power in criminal administration." Vorenberg, *supra* note 17, at 678 (footnote omitted). It is subject to minimal judicial review. Oyler v. Boles, 368 U.S. 448 (1962); *see* Linda R.S. v. Richard D., 410 U.S. 614 (1973).

176 *See* People v. Anaya, 194 Colo. 345, 347-52, 572 P.2d 153, 155-58 (1977) (Carrigan, J., dissenting); State v. Cory, 204 Or. 235, 282 P.2d 1054 (1955); Note, *Court Treatment of General Recidivist Statutes*, 48 COLUM. L. REV. 238, 252 & n.121 (1948). *See also* A. BICKEL, *supra* note 139, at 148-56 (concept of dissuetude).

177 At first glance, a private industry standard seems to be the appropriate referent in these cases. However, two problems exist: there frequently is no job in the private sector analogous to that in the public sector, and even if there is one, it is not clothed with the public interest, arguably an essential consideration. The strictures of the Constitution weigh more heavily upon the shoulders of the government than upon private employers, suggesting that a private industry standard could at best function only as a test for invalidation.