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Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in Bordenkircher v. Hayes

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Introduction

Over the years, the Supreme Court has emphasized that a prosecutor has a constitutional obligation, transcending his or her role as an advocate, to see that the trial a defendant receives is fair. Thus, for example, due process requires a prosecutor to correct testimony that the prosecutor knows is false, even if that testimony is not brought out by the prosecutor.[1] Due process also obligates a prosecutor to turn over to the defense exculpatory evidence without being requested to do so.[2] But if a prosecutor bears a constitutional obligation to ensure the fairness of the trial, is there any constitutional obligation on his part to see that a defendant receives a trial at all? More specifically, is it wrong for a prosecutor to bring additional charges against a defendant expressly for the purpose of pressuring the defendant into entering a plea of guilty to reduced charges? It is this latter question — which the Supreme Court addressed in *Bordenkircher v. Hayes*[3] — that is the subject of this article.

The first section of the article raises some of the difficult questions which face a prosecutor in deciding whom and what to charge. The second section is concerned with the Court's opinion in *Bordenkircher v. Hayes*. The third section presents some of the implications of *Hayes*

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1. Napue v. Illinois, 360 U.S. 264 (1959). *See also* Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 294 U.S. 103 (1935).

2. *See* United States v. Agurs, 427 U.S. 97 (1976).

3. 434 U.S. 357 (1978).

for jurisdictions seeking to enact "determinate sentencing" legislation, which is aimed at limiting the broad sentencing discretion of courts in favor of specific penalties for each offense.[4]

I. Prosecutorial Discretion

A. The Charging Decision

Consider a prosecutor faced with the task of drawing up an indictment against a defendant who has passed four forged checks over a two month period. Assume that the penalty for passing a forged check is a maximum sentence of ten years with no minimum, that the evidence against the defendant is relatively strong on each check, and that the prosecutor personally believes that based on what he knows about the defendant, a sentence of two or three years would seem appropriate. How should a prosecutor prepare the indictment?

If the prosecutor charges the defendant with four counts of passing a forged check, the defendant will be exposed to a possible sentence of as much as forty years in prison; if the prosecutor charges only one count, the sentence exposure is reduced to ten years, a term which comes closer to the prosecutor's view of the appropriate sentence. But should the prosecutor, in reaching a decision to indict, be guided either by the total sentence exposure to which the defendant could be subjected, or by his own view of what sentence the case merits?

One view of the prosecutor's role which suggests indicting the defendant on all four offenses sees the prosecutor as an advocate for the state whose primary responsibility is to enforce the law against all offenders. Where the defendant has committed four separate offenses and the evidence is strong on each of them, each ought to be prosecuted. For the prosecutor to "bury" three of the offenses would simply not be consistent with the facts of the defendant's criminal activities.[5] Whether the statutory penalties are too severe in the prosecutor's opinion is of no consequence; the prosecutor's duty is to enforce the laws as written, not to use discretion to soften the law.[6]

4. *See* notes 113-25 and accompanying text *infra*.

5. It has been observed that prosecutors in England have an obligation to bring charges that fully reflect the facts of the case. *See* Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America—II*, 1971 CRIM. L. REV. 218, 221-22 (1971); *See generally*, Cooper, *Plea-Bargaining: A Comparative Analysis*, 5 N.Y.U. J. OF INT'L L. & POL. 427, 436-42 (1972); Thomas, *Plea Bargaining in England*, 69 J. CRIM. L. 170 (1978).

6. It may also be the case that at some future time it will be important that the defendant's criminal record accurately reflect the number of crimes he has committed. A recent Rand study of the criminal careers of habitual offenders, based on detailed interviews with 49 such offenders in the California prison system, found that there was a small class of

The reply will certainly be that this position presents too narrow a view of the prosecutor's role.[7] The prosecutor's responsibility is to enforce the law, but this responsibility is not to be carried out in a mechanical fashion.[8] In American jurisdictions, unlike those on the European continent, prosecutors are given discretion over whether to prosecute and what charges to bring.[9] We have come to expect prosecutors to consider a range of factors including the nature of the criminal act and the background of the offender in deciding whether to proceed and, if so, what charges to file. The need for broad discretion in the enforcement of criminal statutes is often attributed to the severity of American statutory penalties.[10] While there are some conceptual problems in suggesting that a prosecutor's responsibility to enforce the law should yield in some cases because of the severity of the very law that the prosecutor has sworn to uphold, the American Bar Association

"intensive" habitual offenders who pursued criminal activity with much more persistence and skill than other habitual offenders, and who were responsible for many times more crimes. J. Petersilia, R. Greenwood & M. Lavin, Criminal Careers of Habitual Felons, No.R-2144-DOJ, at 31, 113 (August, 1977) [hereinafter cited as RAND STUDY]. In order to distinguish intensive offenders from those who were "intermittent" offenders, the study concluded that a more systematic attempt to investigate and prove additional counts would be a significant help. *Id.* at 120-21.

7. For historical background, see generally Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927); Comment, *The Plea Bargain in Historical Perspective*, 23 BUFFALO L. REV. 499 (1974).

8. "But even if our criminal proscriptions were framed with exquisite discrimination, it would still be necessary for the human beings who operate the criminal process to exercise judgment about whether or not to arrest, release, prosecute, dismiss, or accept a plea of guilty in a given case. The criminal law is neither a slot machine nor a computer." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 290 (1968). *See also* Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

9. The German system, for example, requires that prosecutors prosecute virtually every felony. Prosecutors do have discretion in prosecuting misdemeanors, but there are statutory standards governing the non-prosecution of misdemeanors and judicial approval must be obtained if the prosecutor decides not to go forward with the charges. *See* Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1974); Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 458-59 (1974). *But see* Wovin, *The Role of the Prosecutor in French Criminal Trials*, 18 AM. J. COMP. L. 483, 488-92 (1972). *See also* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 193-95 (1969) [hereinafter cited as DAVIS, DISCRETIONARY JUSTICE]; K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976). For a recent debate over the applicability of the civil law model to the American system of criminal justice, see Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977); Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978); Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978).

10. *See* Herrmann, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 468, 473 (1974); Rosett, *Discretion, Severity and Legality in Criminal Justice*, 46 S. CAL. L. REV. 12, 13-14 (1972).

Standards for the Prosecution Function adopt a broad view of prosecutorial discretion. The Standards state that a prosecutor "is not obligated to present all charges which the evidence might support," and also that one of the factors the prosecutor "may properly consider in exercising his discretion" is "the disproportion of the authorized punishment in relation to the particular offense of the offender."[11] Presumably a prosecutor may give such disproportionate punishment consideration not only in deciding whether to charge but also in choosing the number of counts to be charged.

It has also been suggested that part of the role of the prosecutor is to fill gaps or deficiencies in a criminal code and to "individualize justice."[12] Consider, for example, the following view on prosecutorial enforcement of the criminal code from the President's Commission on Law Enforcement and Administration of Justice:

> [A] criminal code has no way of describing the difference between a petty thief who is on his way to becoming an armed robber and a petty thief who succumbs once to a momentary impulse. The same criminal conduct may be the deliberate act of a professional criminal or an isolated aberration in the behavior of a normally law abiding person. The criminal conduct describes the existence of a problem, but not its nature or source. The system depends on prosecutors to recognize these distinctions when bringing charges.[13]

This statement concerns the initial decision to charge, not what to charge. But if a prosecutor ought to consider carefully the prospective

11. ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, *The Prosecution Function* § 3.9(b)(iii) (Approved Draft 1971). Section 3.9(b) reads in full as follows: "The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;

(ii) the extent of the harm caused by the offense;

(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;

(iv) possible improper motives of a complainant;

(v) prolonged non-enforcement of a statute, with community acquiescence;

(vi) reluctance of the victim to testify;

(vii) cooperation of the accused in the apprehension or conviction of others;

(viii) availability and likelihood of prosecution by another jurisdiction."

12. *See* LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 534 (1970).

13. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE — TASK FORCE REPORT: THE COURTS 5 (1967). *See also* F. W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 5-7 (1970).

defendant as an individual before bringing a charge of petty theft, the same considerations would seem relevant when deciding whether to expose a defendant to a ten-year or a forty-year sentence.

This broad view of prosecutorial discretion has some disturbing aspects. First, the notion that "the same criminal conduct" as defined by the statute should be prosecuted differently based on factors quite divorced from the crime in question seems to imply that the defendant is being punished less for the crime than for these other factors.[14] Is it not inconsistent with justice, rather than "individualizing justice," to apply a rule of law differently to different people for reasons not specified in the statute?[15] And should justice be a matter of *discretion*?[16]

14. Several state courts have struggled with the equal protection implications of a situation where the same criminal conduct was covered by two different statutes carrying different penalties, leaving it to the prosecutor's discretion to select which charge to bring. In Olsen v. Delmore, 48 Wash. 2d 545, 295 P.2d 324 (1956), the Washington Supreme Court held that certain provisions of the Uniform Firearms Act which permitted the prosecutor to charge the same conduct either as a felony or a misdemeanor violated the equal protection clause of the state and federal constitutions. *See also* State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959). *But see* People v. McCollough, 57 Ill. 2d 440, 313 N.E.2d 462 (1974).

In Berra v. United States, 351 U.S. 131 (1956) the Supreme Court held that where the exact same conduct was covered by two statutes, one a misdemeanor and one a felony, and the defendant was charged with the felony, the defendant was not entitled to an instruction permitting him to be found guilty of violating the more lenient statute. In dissent, Justice Black, joined by Justice Douglas, felt that the record raised a more serious question of whether the defendant was properly charged with the more serious crime. For Justice Black, sentencing the defendant under the felony statute was plain error: "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. . . . Of course it is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed f. a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney." *Id.* at 139-40.

15. Formal justice would seem to demand that the law be applied equally to persons within the class defined by the statute. *See* J. RAWLS, A THEORY OF JUSTICE 58-59 (1971).

16. With respect to the discretionary power to be lenient, Professor Davis warns: "[T]he discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient, and injustice from the discretionary power not to be lenient is especially frequent; the power to be lenient is the power to discriminate." DAVIS, DISCRETIONARY JUSTICE, *supra* note 9, at 170 (footnote omitted). Judge Breitel has remarked of prosecutorial discretion: "It makes easy the arbitrary, the discriminatory, and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption. It is conducive to the development of a police state — or, at least, a police-minded state. Breitel, *Controls in Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960). *See also* Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971).

Second, how does one tell when a petty thief "is on his way to becoming an armed robber"? If a criminal code has "no way of describing" the differences among petty thieves, perhaps the problem lies not in the limits of our language, but in the limits of our knowledge.[17] Finally, even if these distinctions should be made, why should it be the prosecutor who makes the controlling decision? After all, both petty thieves will eventually come before a sentencing judge, and if the judge determines that in one case it is "an isolated aberration in the behavior of a normally law abiding person," a very slight sentence or even no sentence may be imposed.

In the example of the check case, the prosecutor does not have ultimate control over sentencing. It will be up to the court to decide what sentence is appropriate. Given the broad sentencing discretion of a trial judge, and the dominant sentencing philosophy which demands the "punishment should fit the offender,"[18] why is it necessary that a prosecutor also have some responsibility to see that the charges brought "fit the offender" in terms of sentence exposure, especially where the sentencing judge will have more information about the defendant when it is time to impose a sentence? And although it sounds reassuring to suggest that a prosecutor should temper the charges to insure an appropriate sentence, is such a role consistent with the prosecutor's role as an advocate for the state? Certainly there are strong indications that many prosecutors see their function in the sentencing process as that of an advocate for a law enforcement point of view.[19]

But even if our example is a proper case for the exercise of the prosecutor's charging discretion, strategic considerations may make the decision difficult. It may be significantly easier for a prosecutor to obtain a conviction on an indictment charging four forged checks than on one charging a single violation. Four counts of check passing will undercut defenses stressing confusion or mistake and make jury sympathy in response to these defenses less likely. It may be easier for the jury to convict on individual counts where each count is seen as part of a pattern. And with four counts there may be room for jurors to compromise if deadlocks develop as to the proper verdict. While a single count indictment does not foreclose proof of the other violations for certain

17. *See* note 50 and accompanying text *infra*.

18. Williams v. New York, 337 U.S. 241, 247 (1949). See also the discussion of Lockett v. Ohio, 98 S. Ct. 2954 (1978), in the text accompanying note 108 *infra*. *See also* United States v. Grayson, 98 S. Ct. 2610, 2614 (1978) (Supreme Court review of the developments that led to individualized punishment).

19. *See* Note, *The Prosecutor's Role in California Sentencing: Advocate or Informant?*, 20 U.C.L.A. L. REV. 1379, 1402 (1973).

evidentiary purposes,[20] courts are nevertheless reluctant to admit "other crimes" evidence. The safer course for the prosecutor is to avoid having admissibility turn on a favorable evidentiary ruling and to indict on four counts, thus insuring that the evidence of all four checks is independently admissible. One can hardly blame a prosecutor for giving weight to such strategic matters in the charging decision. Before a prosecutor worries overly about a defendant's sentence exposure, the prosecutor must first be concerned with convicting the defendant. The realities of trial work and the requirement of proof beyond a reasonable doubt suggest that a prosecutor should be most reluctant to draw up an indictment that lessens the chances for conviction to any significant degree.

B. Plea Bargaining

Another strategic consideration that suggests indicting the defendant on all four counts is the realistic likelihood of plea bargaining. If the defendant is exposed to a possible sentence of up to forty years in prison, he or she may be tempted to enter a plea to minimize that exposure. While it may be unlikely that a judge would impose such a harsh sentence, there is little the defendant can do should the judge give a sentence that jolts expectations.[21] If the prosecutor has a strong case, why should the defendant not remove any risk of a long sentence? Besides, a plea may move the court to some leniency.[22] Perhaps the smart

20. FED. R. EVID. § 404(b). Evidence of other crimes may be admitted to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

21. *See* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1095 (1976) [hereinafter cited as Alschuler, *The Trial Judge's Role*].

22. Whether a judge ought to take into account in sentencing the fact that the defendant pleaded guilty is a matter of some concern, for it means that a defendant who exercises his constitutional right to trial will receive a harsher sentence. See Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 869-70 (1974). *See generally* Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204 (1956). There can be no doubt, however, that defendants who are convicted after trial do get longer sentences. *See* Alschuler, *The Trial Judge's Role*, *supra* note 21, at 1082-87; Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Court: Defendants Convicted After Trial*, 1967-68, 4 J. LEGAL STUD. 369, 380-89 (1975) [hereinafter cited as Tiffany, Avichai & Peters, *Statistical Analysis*].

In Brady v. United States, 397 U.S. 742 (1970), the Supreme Court seemed to approve more lenient treatment for those who plead guilty: "[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the state and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Id.* at 753. Besides the factor of remorse or repentance, it has also been suggested that a

move for both the prosecutor and the defendant would be to agree to a plea to a single count. The prosecutor could further enhance the bargain by recommending a two or three year sentence.

If the prosecutor charges only a single count, however, there will be substantially less reason for the defendant to enter a plea. The sensible approach for a prosecutor who wants to obtain a plea would be to indict on all four counts, and then to compromise the case through plea bargaining with a result that both sides consider fair. As the Supreme Court noted in upholding the constitutionality of plea bargaining in *Brady v. United States*,[23] "both the state and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law."[24] Where the maximum penalty is very high, a plea yields what the Court termed a "mutuality of advantage,"[25] allowing the state to conserve prosecutorial and judicial resources while the defendant significantly reduces his sentence exposure.[26]

Viewed in this way, plea bargaining appears to be a means of avoiding the problems which surround the charging decision by permitting the state and the defendant to reach a compromise that is satisfactory to both sides. From the defendant's point of view, a plea allows him to avoid the hazards of appearing before a judge who has sentencing discretion. The defendant gives up his chance for an acquittal, but the certainty of a lesser sentence may be well worth the exchange. From the prosecutor's point of view, the state is saved the expense of a trial and the defendant's acceptance of a single count provides some assurance that the sentence will be reasonable.

The problem with this model is that the plea bargain will yield a reasonable compromise only if the indictment prepared by the prosecutor is itself reasonable. The defendant's acceptance of the plea bargain does not justify the original charging decision. That the defendant may be sufficiently worried by a forty-year exposure to accept a plea bargain does not resolve the questionable propriety of using the four count indictment as the base of negotiations. Plea bargaining may yield a sensible compromise of the risks presented, but should a four count

sentencing judge may properly consider the fact "that the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other offenders." ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.8(a)(vi) (Approval Draft 1968).

23. 397 U.S. 742 (1970).

24. *Id.* at 752.

25. *Id.*

26. *Id.*

indictment have been one of these risks? And of course there may be no "compromise" if the defendant elects to go to trial. If the prosecutor has some obligation to see that the defendant's sentence exposure is reasonable, should that not be true even if the defendant elects to exercise his constitutional right to a trial?

The broad charging discretion of the prosecutor and the practice of plea bargaining has led to the frequent complaint that prosecutors "overcharge" in order to obtain plea bargaining leverage and thereby induce the defendant to plead guilty.[27] One way prosecutors are claimed to overcharge is by "multiplying 'unreasonably' the number of accusations against a single defendant."[28] In our example, if the prosecutor were to decide to file a four count indictment to gain plea bargaining leverage, this would constitute an example of such overcharging. Another form of overcharging occurs where a prosecutor charges "a single offense at a higher level than the circumstances of the case seem to warrant."[29]

"Overcharging," at least as the term is used in this article, is not premised on the claim that there is insufficient evidence to support either the multiplied counts of the indictment or the aggravated level of a particular charge. There is no dispute that a prosecutor has an obligation to bring only those charges that can in good faith be supported by the evidence.[30] Rather the vice of overcharging is thought to lie in the prosecutor's use of a high sentence exposure to induce a defendant to plead guilty. It is argued that if a prosecutor is willing to accept a plea to a single count or a lesser included offense because there remains an "adequate scope of punishment" for the defendant, this same reasoning

27. "[I]t is often true that before an official can soften the harsh punishment called for by the criminal code, he must persuade the accused to acquiesce, and to agree that he deserves some punishment, no matter how mild. . . . [I]f a prosecutor is able to charge a man with attempted murder when he wants him convicted of disturbing the peace, the accused had better plead guilty to disturbing the peace lest the book be thrown at him." A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINING IN THE AMERICAN COURTHOUSE 155 (1976). *See also* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 81 (1966); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968) [hereinafter cited as Alschuler, *The Prosecutor's Role*].

28. Alschuler, *The Prosecutor's Role, supra* note 27, at 85. Professor Alschuler terms such multiplication of counts "horizontal overcharging." *Id.*

29. *Id.* at 86. Professor Alschuler terms charging an offense at an aggravated level "vertical overcharging."

30. "The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial." ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, *The Prosecution Function* § 3.9(e) (Approved Draft 1971).

should apply in the initial charging decision.[31] The attack on overcharging is premised on the assumption that the same factors that move a prosecutor to accept a plea should have been considered in the decision to charge. But this depends on one's view of the prosecutor's role. For one could also say that plea bargaining forces a prosecutor to take on some of the responsibilities of a sentencing judge, and that in accepting a plea, a prosecutor is considering factors which properly are the concern of the judge in sentencing rather than the prosecutor in charging.[32]

In a system where a prosecutor is required to bring all the charges which are reasonably supported by the evidence, the attack on overcharging is obviously without force. On the other hand, if the prosecutor is obligated to consider the "appropriate" sentence for the defendant in deciding what to charge, charging solely for plea bargaining leverage is inconsistent with that obligation. In a system such as ours which relies on plea bargaining to dispose of close to ninety percent of its cases,[33] it seems fair to say that the broad discretion granted prosecutors to limit the severity of the charges against a defendant is unlikely to be frequently exercised where it will undercut plea bargaining leverage. For this reason the attack on overcharging, if sustained by the Supreme Court, could have broad implications for it demands that in reaching a charging decision, a prosecutor not consider the strategic advantage that certain counts would yield in subsequent plea bargaining.

31. Consider the following paragraph from Professor Alschuler's attack on overcharging: "When the issue is not what charges to file initially, but what charges to retain when a defendant is willing to plead guilty, the prosecutors' philosophy undergoes a remarkable change. One Manhattan prosecutor, who says that 'of course' a defendant should be charged with forty armed robberies 'if there are that many,' reports that he rarely insists on a plea of guilty to more than one count, even of a forty-count indictment. The only issue in practice, he says, is how serious the single count should be. In defense of this practice, the prosecutor argues that a single conviction at the highest level usually allows the court 'adequate scope for punishment' for even the most serious offender. It has apparently never occurred to the prosecutor that the same reasoning might be applied from the very beginning, or that it might be applied to defendants who stand trial." Alschuler, *The Prosecutor's Role*, *supra* note 27, at 89 (footnote omitted).

32. See note 19 and accompanying text *supra*.

33. It is generally conceded that roughly 90% of all criminal convictions are obtained by pleas of guilty. See NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966).

II. *Bordenkircher v. Hayes*

Last term in *Bordenkircher v. Hayes*[34] the Supreme Court was confronted with a factual situation raising serious questions about the use of the prosecutor's charging powers to obtain plea bargaining leverage. In *Hayes*, the defendant had originally been indicted by a grand jury on a charge of uttering a forged check in the amount of $88.30.[35] Under Kentucky law at that time, this charge carried a maximum sentence of ten years.[36] In plea negotiations the prosecutor offered to recommend a sentence of five years if Hayes pled guilty. He also warned Hayes that if he did not plead guilty and "save the court the inconvenience and necessity of trial," he would return to the grand jury and seek an indictment under the Kentucky Habitual Criminal Act[37] which mandated a life sentence if Hayes were convicted.[38] Hayes did not plead guilty and was convicted in the check case. In a separate proceeding he was found to be a habitual criminal and sentenced to life imprisonment.[39]

A. The Habitual Criminal Statute

At the time Hayes was convicted, the Kentucky Habitual Criminal Act provided that "[a]ny person convicted a . . . third time of felony . . . shall be confined in the penitentiary during his life."[40] Hayes had been charged with rape when he was seventeen and had pled guilty to the lesser offense of "detaining a female," and had been sent to a reformatory. He had also been previously convicted of robbery and sentenced to five years but was placed on probation.[41] As a result of the broad statutory language in the Habitual Criminal Act, Hayes' third conviction — the check case — resulted in a mandatory life sentence

34. 434 U.S. 357 (1978).

35. *Id.* at 358.

36. KY. REV. STAT. § 434.130 (repealed 1974).

37. KY. REV. STAT. § 434.190 (repealed 1975).

38. During the trial on the habitual criminal charge, the defendant brought out the manner in which he was indicted. 434 U.S. at 358-59. In the cross-examination of Hayes the prosecutor asked: "Isn't it a fact that I told you at that time [the initial bargaining session] that if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?" 434 U.S. at 358 n.1.

39. *Id.* at 359.

40. KY. REV. STAT. § 431.190 (repealed 1975).

41. The particular facts of Hayes' background are brought out in Justice Powell's dissenting opinion. 434 U.S. at 370 (Powell, J., dissenting).

even though his previous convictions had not resulted in any penitentiary confinement.

As noted earlier, one of the factors frequently offered in defense of broad prosecutorial discretion in charging is the severity of American statutory penalties;[42] it would be hard to find a more compelling example of this severity than the habitual criminal statute applied to Hayes. A comparison with even the present law in Kentucky shows how extreme the prior law was. Under present law,[43] the offender's two prior felony offenses: (1) must have been committed when the offender was over eighteen; (2) a sentence of at least one year must have been imposed on each; and (3) the defendant must have been imprisoned under such sentence prior to the commission of the present felony.[44] Both of Hayes' prior convictions fail these tests; moreover, even if Hayes' prior convictions had qualified him for sentencing as an habitual offender, the present law would have provided only an enhanced sentence of from ten to twenty years for the forgery conviction instead of a mandatory life sentence.[45]

The statute under which Hayes was convicted and other habitual offender statutes of similar nature rest on a questionable constitutional basis. If the purpose of the statute is to punish the defendant more severely because his series of felonies evidences greater culpability, a mandatory life sentence seems far out of proportion when the three felonies are themselves relatively minor. Recently, the Fifth Circuit in *Rummel v. Estelle*[46] held the Texas habitual offender statute, a statute almost identical to the former Kentucky law,[47] unconstitutional as ap-

42. *See* text accompanying note 10 *supra*.

43. KY. REV. STAT. § 532.080 (1975).

44. *Id.* Section 532.080(2) (1975) reads as follows: "A persistent felony offender in the second degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or convicition of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one year or more or a sentence to death was imposed therefore; and

(b) That the offender was over the age of eighteen (18) years at the time the offense was committed; and

(c) That the offender was discharged from probation or parole within five (5) years of the date of commission of the felony for which he was last convicted."

45. Forgery in the first degree in Kentucky is a class C felony, KY. REV. STAT. § 516.020 (1975), which makes it punishable by a sentence of not less than 5 years nor more than 10 years, KY. REV. STAT. § 532.060 (1975). A defendant who is found to be a persistent felony offender and who has been convicted of a class C felony would be punishable by a sentence of not less than 10 years nor more than 20 years. KY. REV. STAT. § 532.080(4)(c) (1975).

46. 568 F.2d 1193 (5th Cir. 1978).

47. Article 63 of the Texas Penal Code provided: "Whoever shall have been three times

plied to a defendant who received a life sentence after he was convicted of obtaining $120 under false pretenses. His previous convictions were for credit card fraud amounting to $80, and passing a forged check in the amount of $28. The court held that the mandatory life sentence imposed on Rummel was so grossly disproportionate to his nonviolent crimes that it violated the cruel and unusual punishment clause.[48]

It seems likely that such habitual offender statutes are premised not on a theory of aggravated culpability, but on the need to protect society from someone who has proven dangerous and who, it is believed, will continue to commit crime.[49] The initial problem is that society does not seem to have the ability to predict an individual's propensity to commit crime, especially violent crime, with much reliability, even given full psychiatric evaluations.[50] Second, there is evi-

convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." TEX. PENAL CODE ANN. Art. 63 (Vernon 1925). This statute has been slightly reworded in the revised Texas Penal Code. *See* TEX. PENAL CODE ANN. § 12.42(d)(Vernon 1974).

48. 568 F.2d at 1200. The Fifth Circuit based its analysis on *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert denied*, 415 U.S. 983 (1974). In *Hart*, the Fourth Circuit held a West Virginia recidivist statute which mandated a life sentence for any defendant convicted three separate times of offenses "punishable by confinement in a penitentiary" unconstitutional as applied to a defendant who had been convicted of: (1) writing a $50 check on insufficient funds in 1949; (2) transporting a $140 forged check across state lines in 1955; and (3) perjury in 1968. In reaching its conclusion the court considered four factors. The first was the nature of the offenses. Here the court emphasized the fact that all of Hart's offenses were nonviolent. *Id.* at 141. The second factor was the legislative purpose, which the court indicated was the deterrence of other potential lawbreakers and the protection of society from a habitual criminal. Both of these objectives, the court felt, could have been achieved with a lesser penalty. *Id.* The third factor was the punishment the defendant would have received in other jurisdictions. Here the court noted that only three other states, Indiana, Kentucky, and Texas, then had a mandatory life sentence for third offenders. *Id.* at 142. Finally, the court considered the punishment for other offenses in West Virginia which showed that only three other crimes — first degree murder, rape, and kidnapping — carried life sentences while a host of other violent crimes had lesser penalties. *Id.* On the basis of all the factors the court concluded that the life sentence imposed on Hart was cruel and unusual punishment. *Id.* at 140-43.

49. *See* Hart v. Coiner, 483 F.2d 136, 141 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

50. *See* Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1099 (1976) ("With few exceptions . . . there is *no* empirical evidence to support the position that psychiatrists have any special expertise in accurately predicting dangerousness."); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 452 (1974) ("Neither psychiatrists nor other behavorial scientists are able to predict the occurrence of violent behavior with sufficient reliability to justify the restriction of freedom of persons on the basis of the label of potential dangerousness.") *See also* Dix, *Administration of the Texas Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977); Megargee, *The Prediction of Dangerous Behavior*, 3 CRIM. JUST. & BEHAVIOR 3 (1976); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES OF GEN-

dence that those persons commonly sentenced as habitual offenders are often "worn-out" offenders at the end of their high-crime careers, which usually coincide with the teens and early twenties.[51] Finally, although one study of multiple offenders found a small class of "intensive" offenders who pursued crime with far greater persistence and skill than other multiple offenders and who were responsible for a disproportionately high percentage of crime,[52] the study concluded that such offenders could not be identified by their prior criminal records and that, in general, the predictive value of a prior record is weak.[53] Against this background one cannot help but conclude that those statutes which select defendants who will supposedly continue to commit crime solely on the basis of a three-felony rule which does not differentiate among felonies and which mandates a life sentence constitute an arbitrary and dangerous use of the criminal law. While some estimate of a defendant's dangerousness has usually been considered as a factor by the judge in the sentencing process,[54] a mandatory lifetime preventive detention carries the threat of future crimes to the extreme.[55] *Rummel* suggests that at some point punishment, for whatever purpose, has a limit. If the state wants to keep a defendant beyond such point, it should be required, as it is in other commitment cases,[56] to show that the defendant presents a substantial risk of dangerous conduct within the reasonably foreseeable future.

ERAL PSYCH. 397 (1972); von Hirsch, *Prediction of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717 (1972).

51. *See* Boland, *Punishing Habitual Criminals*, Wall St. J., April 11, 1978, at 24, col. 4. A Rand study of habitual offenders in California found that the level of criminal activity declined with age. The study concluded that: "[I]f an objective of sentencing is to prevent future crime by incapacitating high-risk offenders our data suggests it is counterproductive to concentrate on older habitual offenders. The greatest effect in crimes prevented would come from imprisoning the younger more active offenders since individual offense rates appear to decline substantially with age." RAND STUDY, *supra* note 6, at 120.

52. *See* RAND STUDY, *supra* note 6, at 31, 113.

53. *Id.* at 120.

54. Professor Norval Morris has questioned whether a defendant's "dangerousness" should be a factor in sentencing at all. Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1164-73 (1974).

55. Whether the criminal law should permit the preventive confinement of a person has frequently been questioned. Francis Wharton argued that, "[T]his contradicts one of the fundamental maxims of English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue." WHARTON, CRIMINAL LAW § 2 (12th ed. 1932) (footnote omitted). For a discussion of different types of preventive detention and the constitutional questions involved, *see generally* Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEXAS L. REV. 1277 (1973).

56. *See, e.g.*, Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969) (commitment of sexual psychopath); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) (commitment after acquittal by reason of insanity).

In plea bargaining, an habitual offender statute gives a prosecutor tremendous leverage. In the example presented above, whether the indictment charges one count of passing a forged check or four counts is unlikely to make a significant difference in the ultimate sentence (although a forty-year exposure may make a defendant nervous). In *Hayes*, however, the indictment on the habitual criminal statute mandated a life sentence upon conviction. This resulted in the odd situation that while the prosecutor had no control over the sentence on the check count — his recommendation was not binding on the court[57] — by indicting under the habitual criminal statute the prosecutor had the power to bring a mandatory life sentence into the negotiations. Because of the tremendous leverage they give a prosecutor, habitual offender statutes are frequently and primarily[58] used for plea bargaining purposes. In exchange for a plea, a defendant is not "bitched," that is, charged with being an habitual offender.[59]

B. *Blackledge v. Perry*

In seeking habeas corpus relief in federal court, Hayes claimed that the prosecutor's conduct during the plea bargaining had violated the principles of *Blackledge v. Perry*,[60] a decision designed to protect defendants from the vindictive exercise of prosecutorial discretion. More specifically, Hayes argued that by threatening to reindict him as an habitual criminal solely because he insisted on exercising his right to trial, the prosecutor's conduct violated the due process clause.

Perry was an extension of an earlier case, *North Carolina v. Pearce*.[61] In *Pearce*, the defendant had successfully attacked his state conviction on appeal and, after a retrial, had received a more severe prison sentence than that imposed after the first trial. The Supreme Court held that in order to ensure that a defendant's right of appeal

57. Under Kentucky law the court is not bound to follow the prosecutor's recommendation, and if the judge decides not to follow it the defendant is not entitled to withdraw his guilty plea. *See* Couch v. Commonwealth, 528 S.W.2d 712 (Ky. 1975).

58. *See* Ferguson, *The Law of Recidivism in Texas*, 13 McGILL L.J. 663 (1967); Klein, *Habitual Offender Legislation and The Bargaining Process*, 15 CRIM. L.Q. 417, 426-36 (1973) [hereinafter cited as Klein]. *See also* RAND STUDY, *supra* note 6, at 40-41.

In *Hayes*, an amicus curiae brief filed on behalf of 49 inmates in Texas prisons claimed that each of the inmates had been threatened with indictment as an habitual offender if the defendant refused to plead guilty. Brief of Amicus Curiae on Behalf of Jimmy Harris, Mitchell Ray Rodgers and Other Texas Prison Inmates Similarly Situated Urging Affirmance at 2-5, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

59. *See* Klein, *supra* note 58, at 427. *See also* Buckman, Price & Vineberg, *The Legislative Intention*, 13 McGILL L.J. 553, 555 (1967).

60. 417 U.S. 21 (1974).

61. 395 U.S. 711 (1969).

would remain "free and unfettered,"[62] and to protect a defendant from vindictiveness on the part of the sentencing judge for having successfully attacked his first conviction, due process requires that whenever a judge imposes a more severe sentence after a new trial the reasons for so doing must affirmatively appear in the record.[63] Moreover, these reasons must be based on conduct of the defendant occurring after the time of the original sentence.[64] Such a rule was thought necessary to ensure that the sentence was not the result of vindictiveness or a retaliatory motive on the part of the sentencing judge.[65]

In *Blackledge v. Perry*, the Court extended *Pearce* to protect a defendant from the possibility of vindictiveness on the part of the prosecutor. In *Perry* the defendant, who had been involved in a prison altercation in North Carolina, was convicted of assault with a deadly weapon, a misdemeanor. After Perry exercised his right under North Carolina law to a trial de novo in a higher court, the prosecutor obtained a felony indictment for assault with a deadly weapon with intent to inflict serious bodily injury based on the same incident. The Supreme Court ruled that the prosecutor's action was constitutionally impermissible, even though there was no specific evidence of bad faith or malice.[66] The Court indicated that due process protects a defendant from the fear that a prosecutor will retaliate by "upping the ante" against a defendant who exercises his right to a trial de novo.[67]

Perry has proved difficult to apply for two reasons. First, the opinion might be read to preclude a prosecutor from raising the charges against a defendant for even a very good reason.[68] Courts, however, have put the *Pearce* gloss on *Perry* and have allowed prosecutors to justify an increase in charges by affirmatively showing that the increase is not motivated by vindictiveness.[69] A rule that a prosecutor would always be bound by the initial charging decision, in order to protect a defendant from the "possibility of vindictiveness," would have unfortunate implications, for it would mean that newly discovered evidence justifying more serious charges could not be the basis of such new

62. *Id.* at 724.
63. *Id.* at 726.
64. *Id.*
65. *Id.* at 725.
66. 417 U.S. at 28-29.
67. *Id.* at 28.
68. *See, e.g.*, Note, *Criminal Procedure — Protection of Defendants Against Prosecutorial Vindictiveness*, 54 N.C.L. REV. 108, 113 (1975).
69. *See* United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974).

charges.[70]

The second problem is an extension of the first: if *Perry* allows a prosecutor to bring more serious charges, what sort of justification for "upping the ante" is acceptable? In *Pearce* the Court limited the trial judge to "objective information . . . occurring after the time of the original sentencing proceeding."[71] But the initial charging decision may involve independent policy considerations and it is unclear how the *Pearce* rule should apply when such policy matters are present. For example, in *United States v. Lippi*[72] the prosecutor filed a complaint charging the defendant, a postal employee, with obstructing the mail on two occasions. Both charges were misdemeanors, but subsequent to the defendant's arraignment, the prosecutor developed information that would support a series of felony charges. The prosecutor told the defense attorney, however, that office policy favored the handling of postal cases before United States magistrates, who have jurisdiction to hear misdemeanors if the defendant waives his right to a district court trial.[73] The prosecutor told the defense attorney that if the defendant would consent to having the original complaint heard before the magistrate, the prosecutor would not bring the additional charges. After the defendant elected to have the matter tried in the district court, the prosecutor obtained an indictment charging the defendant with a series of felony charges for delaying and destroying the mail. The defendant then sought to have the felony charges dismissed on the authority of *Blackledge v. Perry*.

Lippi presents an important factual twist on the *Perry* case, for in *Lippi* a specific policy led the prosecutor to charge initially at the misdemeanor level. While the prosecutor had sufficient facts to obtain a felony indictment prior to the defendant's choice of a forum, a felony

70. A footnote in *Blackledge v. Perry* stated that the outcome would have been different "if the State had shown it was impossible to proceed on the more serious charge at the outset." 417 U.S. at 29 n.7. The Court cited Diaz v. United States, 223 U.S. 442 (1912), where the charge was raised from assault and battery to murder on retrial because the victim had died after the first trial.

71. 395 U.S. at 726. In United States v. Ruesga-Martinez, 534 F.2d 1367, 1370 (9th Cir. 1976), the defendant was initially charged with a misdemeanor, but after he had refused to waive his right to be tried by a district court judge, the prosecution obtained a felony indictment. The Ninth Circuit reversed his conviction because the evidence which justified the felony indictment was known to the government when the misdemeanor was charged. In the course of its opinion the court suggested that inexperience on the part of the prosecutor who had drawn up the complaint would not be an acceptable excuse even if established. *Id.* at 1370.

72. 435 F. Supp. 808 (D.N.J. 1977).

73. The jurisdictional limits on trials by United States magistrates are set out at 18 U.S.C. § 3401 (1976).

charge would have forced the case into the district court, defeating the policy aimed at relieving the district court docket. Not only was there a clear reason for attempting to have the case tried before the magistrate, but the defendant was informed both of the policy and of the evidence in the prosecutor's possession that would justify felony charges. Once the defendant decided to proceed to trial in the district court, the policy favoring the filing of charges at the misdemeanor level no longer applied.

The absence of a reason for maintaining the charges at the misdemeanor level does not in itself justify filing felony charges, but at least it provides an explanation for the prosecutor's action. The court in *Lippi*, however, dismissed the felony charges, concluding that the original offer was not a proper charging concession but a "threat of retaliation."[74] The thrust of the court's opinion seemed to be that the prosecutor had a "stake" in keeping the case before the magistrate and that the use of his charging powers to achieve that goal was improper.[75] But prosecutors frequently use their charging powers to achieve objectives in which they have a "stake" — to obtain information, to secure testimony, and to obtain pleas.[76] Moreover, a prosecutor will usually have a far greater stake in obtaining a plea than was true in *Lippi*. Was it therefore wrong in *Hayes* for the prosecutor to use his charging powers as a threat to try to obtain a plea?[77]

74. 435 F. Supp. at 814.

75. *See id.* at 814. United States v. DeMarco, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977), a highly publicized case stemming from the preparation of former President Nixon's 1969 tax return, was similar to *Lippi* in certain respects. DeMarco was indicted in the District of Columbia and moved for a change of venue to California. DeMarco, like Lippi, was warned in advance that if he succeeded in transferring the case, the government would bring additional charges. After insisting on his venue rights, Demarco's indictment was transferred to California. The government then obtained a second indictment. The Ninth Circuit held that dismissal of the second indictment was mandated by *Perry* because the facts which led to the second indictment were known to the government when the first indictment was returned, and there was no sound explanation for the second indictment. *Id.* at 1226. *Lippi* differs from *Demarco* in the presence of an established policy in *Lippi* which explained the decision to withhold felony charges until after the defendant insisted on trial in the district court.

76. There are limits, however, on the prosecutor's use of charging discretion to achieve other objectives. In MacDonald v. Musik, 425 F.2d 373, 375 (9th Cir.), *cert. denied*, 400 U.S. 852 (1970), the Ninth Circuit held that it was impermissible under the Civil Rights Act for a prosecutor to offer to dismiss a drunk driving charge only if the defendant agreed to stipulate that there was probable cause for the arrest — a waiver of the defendant's rights — which would have foreclosed any civil suit against the arresting officers. *See also* Boyd v. Adams, 513 F.2d 83, 89 (7th Cir. 1975).

77. One of the cases relied on by the district court in *Lippi* was the Sixth Circuit's opinion in *Hayes*, Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976) which had held that the prosecutor's action violated Blackledge v. Perry. 435 F. Supp. at 812.

C. The Court's Opinion

In *Hayes* the Court held that the prosecutor's warning to Hayes that he would be indicted as an habitual criminal if he refused to plead guilty to the forged check charge and the prosecutor's subsequent obtaining of the habitual criminal indictment on which Hayes was convicted did not violate due process. Writing for the five-member majority, Justice Stewart emphasized that Hayes had been warned at the outset of the plea conference of the prosecutor's intention to seek a recidivist indictment so that "[a]s a practical matter . . . this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain."[78] Justice Stewart concluded that while confronting the defendant with the risk of more severe punishment may have "a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable' — and permissible — 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' "[79]

The majority struggled hard to distinguish *Hayes* from *Perry*. In some respects the position of Hayes was even stronger than that of Perry. First, the right to trial is of constitutional dimension,[80] and it would seem logical that the Court would be at least as protective of the right to a trial as it was of the statutory appellate procedure in *Pearce* and the statutory right to a second trial in *Perry*.[81] Second, the prosecutor expressly linked the habitual offender charge to the defendant's insistence on going to trial, thus directly penalizing Hayes' exercise of a constitutional right. Yet the Court found the cases distinguishable, observing that this was not a situation where the prosecutor had brought a more serious charge without notice *after* plea negotiations on the original indictment had ended with the defendant's insistence on going to trial. Hayes, the Court emphasized, was fully informed of the prosecutor's intent to seek a recidivist indictment "at the *outset* of the plea negotiations."[82] It is the "unilateral imposition of a penalty" in *Pearce* and *Perry* that the Court felt distinguished those cases from "the give-and-take negotiation common in plea bargaining" in *Hayes*.[83]

78. 434 U.S. at 360-61.

79. 434 U.S. at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

80. Both the right to appeal and the right to a trial de novo are statutory. *See* United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

81. *See* Alschuler, *Plea Bargaining and Its History* (to be published in 79 COLUM. L. REV. (1979)).

82. 434 U.S. at 360 (emphasis added).

83. *Id.* at 362.

There were two dissenting opinions. Justice Blackmun, joined by Justices Brennan and Marshall, argued that *Pearce* and *Perry* should control because "vindictiveness is present to the same extent" as it was in those cases.[84] The prosecutor had made "a discretionary determination that the interests of the state are served by not seeking more serious charges"[85] and then had reindicted solely "to discourage the [defendant] from exercising his right to a trial."[86] For Justice Blackmun, whenever a prosecutor follows plea negotiations concerning one indictment with a second indictment charging a more serious crime, there is a strong inference of vindictiveness. Due process should therefore require the prosecution to "justify its action on some basis other than discouraging respondent from the exercise of his right to trial."[87]

According to the other dissenter, Justice Powell, who carefully reviewed the defendant's background, the prosecutor had apparently initially made "a reasonable, responsible judgment" that it was "not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment."[88] The prosecutor having then sought the harsher indictment and having specifically acknowledged that the reason for the new indictment was the defendant's insistence on exercising his constitutional rights, Justice Powell concluded that this case fell within the prohibition that "if the only objective of a state practice is to discourage the assertion of constitutional rights, it is 'patently unconstitutional.' "[89] While Justice Powell would not go so far as the other dissenters and automatically require a prosecutor to justify seeking a new indictment on a more serious charge following unsuccessful negotiations, here the prosecutor had specifically acknowledged that he obtained the harsher indictment because of the defendant's insistence on going to trial. Therefore, no such inquiry into the prosecutor's motive was required.

The majority's attempt to distinguish *Perry* by emphasizing the timing of the imposition of the penalty in *Perry* seems to distort the meaning of that case. Under the *Hayes* analysis, *Perry* would apparently have been decided differently if *prior* to his notice of appeal, Perry had been told that the filing of this notice would lead to his reindictment on a felony charge. On such facts there would have been no "unilateral imposition of a penalty," for Perry would have been "fully informed" and the decision whether or not to appeal would have been

84. *Id.* at 367 (Blackmun, J., dissenting).
85. *Id.* (quoting Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976)).
86. 434 U.S. at 367.
87. *Id.*
88. *Id.* at 371. (Powell, J., dissenting).
89. *Id.* at 372 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 32 n.20 (1973)).

a matter of "choice." But the point of *Perry* was not the way in which the penalty was imposed; it was simply that a penalty had been attached to the exercise of the right to appeal. Although if told in advance what the exercise of his right to appeal would precipitate, Perry would have known the consequences of his choice, the choice was one that Perry should not have had to make. Presumably, under the majority's analysis of *Perry*, *Lippi* would now also be decided differently simply because the defendant was informed in advance that he would be indicted as a felon if he elected to be tried in district court.[90] But this is surely too easy, for *if* the prosecutor's action was improper *retaliation* for the exercise of the right to be tried before a federal judge, the fact that it was first communicated in a *threat to retaliate* should make no difference.

It is hard to see how the Court could have distinguished *Perry* from *Hayes*, or from any other plea bargaining situation. If plea bargaining fails and the defendant decides to exercise his right to trial, he will face stiffer charges and probably a heavier sentence upon conviction.[91] Part of the plea bargaining system is to ensure that the defendant pays the price of a higher sentence exposure for going to trial, and this is exactly what the Supreme Court has meant in the past by "vindictiveness." Moreover, in *Perry* the fear of vindictiveness on the part of the defendant was emphasized, not the actual motive of the judge or prosecutor.[92] But rather than singling out this case for different treatment because of the prosecutor's statement, the Court was frank in recognizing that the prosecutor's motive was no different in *Hayes* than in other plea bargaining cases. This led the Court to conclude that a prosecutor's arguably improper motive was inherent in the plea bargaining system and that "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[93] Both dissenting opinions responded in brief footnotes to the challenge of the majority's assertion that the prosecutor's use of his charging power in this case was no different from the normal plea bargaining situation. Justice Powell stated that although as a practical matter overcharging is generally unreviewable, he would condemn the practice of charging when occasioned "not by a consideration of the public

90. *See* notes 73 & 74 and accompanying text *supra*.
91. *See* note 22 *supra*.
92. 417 U.S. at 28.
93. 434 U.S. at 364.

interest but by a strategy to discourage the defendant from exercising his constitutional rights."[94] Justice Blackmun replied that:

> Although prosecutors, without saying so, may sometimes bring charges more serious than they think appropriate for the ultimate disposition of a case, in order to gain bargaining leverage with a defendant . . . this Court, in its approval of the advantages to be gained from plea negotiations, has never openly sanctioned such deliberate overcharging or taken such a cynical view of the bargaining process.[95]

It is true that in *Brady v. United States*,[96] where a unanimous Court upheld the practice of plea bargaining, there was a limiting footnote, cited by both dissenters in *Hayes*, in which the Court stated: "We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."[97] But the next line of the footnote — left out of both dissenting opinions in *Hayes* — indicated the Court's narrow meaning by declaring that "[i]n Brady's case there is no claim that the prosecutor threatened prosecution *on a charge not justified by the evidence.*"[98] And considering the Court's frank analysis of the workings of plea bargaining in *Brady*, to now state that a prosecutor cannot use his charging power for leverage in plea bargaining would indeed, as the majority observes, "contradict the very premises that underlie the concept of plea bargaining itself."[99]

Consider the standard proposed by Justice Blackmun — a prosecutor ought not to bring charges more serious than he thinks "appropriate for the ultimate disposition of a case"[100] without any consideration of plea bargaining leverage. While the proposed standard is not clear, presumably the prosecutor would charge at the point where he hopes to conclude the plea bargaining. But then there would be no bargaining leverage, for these charges would apply whether or not the defendant decided to go to trial. The only way to induce a plea would be for the prosecutor to accept a plea at a level *below* what the prosecutor thinks "appropriate for the ultimate disposition of [the] case." Thus, there would be little meaningful bargaining if the prosecutor must *start* negotiations with charges he considers appropriate for the outcome. Justice Powell's dissenting opinion is also somewhat confusing. It insists

94. *Id.* at 371 n.2 (Powell, J., dissenting).
95. *Id.* at 368 n.2 (Blackmun, J., dissenting).
96. 397 U.S. 742 (1970).
97. *Id.* at 751 n.8.
98. *Id.* (emphasis added).
99. 434 U.S. at 365.
100. *Id.* at 368 n.2 (Blackmun, J., dissenting).

that pleas are "essential to the functioning of the criminal-justice system" and that they afford "genuine benefits" to society,[101] yet it tells prosecutors that they should charge by consideration of the public interest *without* the motive of discouraging the defendant from standing trial. Is it in the public interest to discourage defendants from exercising the right to trial or is it not? Justice Powell tries to have it both ways.

The result of adopting the reasoning found in the dissenting opinions would be to place prosecutors in an intolerable position. They would remain under administrative pressure to conserve state resources and to secure a high percentage of pleas, yet be instructed to charge in the "best interests of the state" *without* thought of plea bargaining leverage. Since obtaining a plea avoids much of the preparation for trial as well as the uncertainties of proving guilt beyond a reasonable doubt, it can be expected that prosecutors would quickly come to see maximum charges as justified by "the interests of the state." This is particularly likely when there are substantial questions about the proper use of prosecutorial discretion in reaching a charging decision, even apart from the plea bargaining considerations.[102]

While there are definite weaknesses in the majority opinion, there is a certain honesty in the acknowledgement that having recognized that plea bargaining is "an essential" and even a "highly desirable" component of the administration of justice,[103] the Court can hardly be surprised that prosecutors use their charging discretion to discourage defendants from standing trial. As long as there is sufficient evidence to support the charges that are brought, *Hayes* has made it clear that there is nothing unconstitutional in using the prosecutor's charging discretion to obtain plea bargaining leverage.

The implications of *Hayes* for the *Perry* line of cases would seem to be substantial if lower courts take the Court at its word and apply *Perry* only to cases involving the "unilateral imposition of a penalty." But perhaps courts should frankly view *Hayes* as an exception to *Perry* because of the strong policies supporting the practice of plea bargaining. Courts would then remain free to apply *Perry* to attempts by prosecutors — with or without prior notice to defendants — to discourage defendants from exercising procedural rights other than the right to trial unless the prosecutor's action is supported by policies as strong as those supporting plea bargaining. Whether the desire of the prosecutor

101. *Id.* at 372 (Powell, J., dissenting).
102. *See* text accompanying note 19 *supra*.
103. Santobello v. New York, 404 U.S. 257, 260-61 (1971).

in *Lippi* to keep postal cases from burdening the district court docket[104] would meet such a standard is doubtful. It might seem strange that the prosecutor in *Lippi* could threaten to "up the ante" to discourage the defendant from going to trial, though not to discourage the defendant from having his trial in the district court; yet such a result is consistent with the special status the Court has conferred on plea bargaining.

D. Other Possible Solutions

There are a number of ways *Hayes* might have been decided differently and, of course, the abolition of plea bargaining is one. But no one on the Court seems prepared at this time to reassess the constitutionality of plea bargaining. And given the costs in time and money of the modern American jury trial, one wonders whether the system of criminal justice could realistically be expected to provide a jury trial for every defendant without some substantial streamlining of procedures.[105]

Yet short of doing away with plea bargaining, a distinction might have been drawn in *Hayes* on the basis of the habitual offender statute there involved. The notion that a prosecutor has an obligation to charge based on the sentence exposure which would be "appropriate for the ultimate disposition of the case" seems to blur the role of the prosecutor and the role of the judge and, even if such a standard were workable, it would eliminate almost all plea bargaining. But where the charge carries with it a fixed life sentence and there is no intervening sentencing authority to review the appropriateness of the sentence, the

104. *See* text accompanying note 73 *supra*.

105. Professor Langbein suggests that the most important factor in the growth of prosecutorial discretion and the development of plea bargaining has been the steady accretion of evidentiary and procedural safeguards which has transformed the nature of the jury trial: "The practices that so protract modern American jury trial — extended voir dire, exclusionary rules and other evidentiary barriers, motions designed to preserve appellate issues, maneuvers and speeches of counsel — all are late growths in the long history of common law criminal procedure. They have, however, made jury trial unworkable as a routine procedure for our burgeoning criminality and have led to the system of nontrial disposition that exists in well over 90 percent of felony cases." Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 445-46 (1974).

More recently, Professor Langbein has written in greater detail about the historical development of plea bargaining. Langbein, *Understanding the Short History of Plea Bargaining* (unpublished draft). Professor Langbein explains that trial in the early eighteenth century was a summary procedure, and that over the last two centuries pressure for greater safeguards against mistaken conviction led in Anglo-American procedure to the common law of evidence and the "lawyerization" of the trial which made our trial procedure unworkable as a routine dispositive procedure for serious cases. In Continental legal systems, similar pressures led to reforms in the nonadversarial procedure which preserved the right to trial. *Id.* at 3-4, 8-9.

Court might have reasoned that the prosecutor has a special responsibility not to invoke such a sentence for plea bargaining purposes without a prior determination that the defendant is indeed a dangerous person and a continued threat to the public.

The main problem with reaching such a result in *Hayes* is that it seems inconsistent with the legislative intent behind the habitual offender statute, which was not to transfer sentencing discretion to the prosecutor but to remove it entirely. If that purpose is legitimate, the Court could hardly say that the prosecutor has a constitutional obligation to first exercise his discretion and determine whether the defendant is dangerous before invoking a life sentence. And if the removal of sentencing discretion from the court in the case of a thrice-convicted felon is not legitimate, then the sentencing responsibility ought properly to be exercised by the judge or jury, not the prosecutor.

In cases involving the death penalty, the Court has been willing to strike down statutes that restrict the sentencing discretion of the judge or jury. In *Woodson v. North Carolina*,[106] one of the constitutional deficiencies of North Carolina's mandatory death sentence was its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[107] And in *Lockett v. Ohio*,[108] decided last Term, the Court had occasion to expand on the requirement of individual sentencing consideration in death penalty cases. In *Lockett* the Ohio statute in question mandated the death penalty for a defendant found guilty of aggravated murder unless the defendant was able to show one of three narrow mitigating circumstances.[109] In the plurality opinion[110] Chief Justice Burger concluded that the statute violated the Eighth and Fourteenth Amendments because those amendments "require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor* any as-

106. 428 U.S. 280 (1976).

107. *Id.* at 303 (plurality opinion).

108. 98 S. Ct. 2954 (1978).

109. The three mitigating circumstances were the following:

(1) The victim of the offense induced or facilitated it;

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; and,

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975).

110. Justices Stewart, Powell and Stevens concurred in the section of Chief Justice Burger's opinion dealing with the lack of mitigating circumstances in the Ohio statute. 98 S. Ct. 2954 (1978).

pect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[111]

While these opinions appear to lend support to the argument that the statute in *Hayes* is unconstitutional because it mandates a life sentence without allowing the sentencing judge to consider mitigating circumstances surrounding the offense or the defendant's character and background, the Court made it very clear in both *Woodson* and *Lockett* that these cases rest " 'on the predicate that the penalty of death is qualitatively different' from any other sentence."[112] And in *Lockett*, although the plurality opinion extolled the virtues of individualized sentencing, the opinion also emphasized that "individualized sentencing . . . [is] not constitutionally required"[113] and that "legislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases."[114] Given the broad language in *Lockett* it seems unlikely that the Court in the foreseeable future will require that some sentencing discretion be reposed in the judge in a noncapital case, even though the effect is to remove an important control over plea bargaining.

III. *Hayes* and Fixed Sentences

Hayes stands as a sobering reminder that we ought not rely too heavily on the notion that prosecutors are buffers against the severity of the law. There are priorities which a prosecutor may, and perhaps should, place ahead of limiting the sentence exposure of a defendant, such as the need for information or testimony, deterrence of other check forgers, or forcing a defendant to resign a position of responsibility. After *Hayes*, a prosecutor should feel free to use his charging power to pressure a defendant to enter a plea, as long as the charges are reasonably supported by the evidence.

Normally, given the broad sentencing discretion of the trial judge, the charging decision is not crucial in determining the sentence.[115] *Hayes* differs in this respect, however, because the fixed sentence of life imprisonment places tremendous leverage at the prosecutor's disposal. Until recently, fixed sentences were the exception; in the last several

111. 98 S. Ct. at 2957 (footnotes omitted) (emphasis added).

112. Lockett v. Ohio, 98 S. Ct. at 2962 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

113. 98 S. Ct. at 2962.

114. *Id.*

115. *See* Alschuler, *The Prosecutor's Role*, *supra* note 27, at 95.

years, however, there has been a reaction against sentencing schemes which vest broad discretion in judges and parole boards.[116] One reason for this reaction is the enormous disparity in sentencing that has resulted from indeterminate sentencing. One study of fifty federal judges in the Second Circuit, who were asked to sentence twenty defendants and were given identical files on each defendant, resulted in serious disparities in the sentences these judges would have imposed.[117] Other studies have shown similar results.[118]

The reaction to these apparent injustices has led to determinate sentencing legislation, aimed at limiting and structuring sentencing discretion. Such reform may be achieved in a wide variety of ways: a state may eliminate all flexibility by setting fixed or flat-time sentences for each crime;[119] or a state may set a mandatory minimum for each crime with departures allowed for specified aggravating or mitigating reasons;[120] or perhaps it may enact sentencing guidelines.[121] Whatever form the legislation takes, any narrowing of the sentencing discretion of the trial judge will increase the importance of the charging decision because the way a crime (or series of crimes) is charged will have certain sentencing consequences. Thus, for example, the allegation of certain aggravating factors may increase the sentence directly, while the failure to allege that a crime was one of a series may bar consideration by the court of the other crimes in sentencing.[122]

116. *See, e.g.*, D. FOGEL, ". . . WE ARE THE LIVING PROOF. . .": THE JUSTICE MODEL FOR CORRECTIONS (1975); M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 102-24 (1972); REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter cited as FAIR AND CERTAIN PUNISHMENT]; STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971) (prepared for the American Friends Service Committee).

117. The study is reported in Dershowitz, Background Paper in FAIR AND CERTAIN PUNISHMENT, *supra* note 116, at 103.

118. *See, e.g.*, A 1972 Sentencing Study, Southern District of New York, 119 CONG. REC. 660 (1973); GAYLIN, PARTIAL JUSTICE 6-14 (1974); Clarke & Koch, *The Influence of Income and Other Factors on Whether Criminal Defendants Go to Prison*, 11 L. & SOC'Y REV. 57 (1976); Tiffany, Avichai & Peters, *Statistical Analysis, supra* note 22, at 369, 390; Harries & Lura, *The Geography of Justice,* 57 JUDICATURE 392 (1974).

119. FAIR AND CERTAIN PUNISHMENT, *supra* note 116, at 16.

120. *Id.*

121. The proposed federal criminal code which was passed by the Senate but died in the House Judiciary Committee would have required judges to follow guidelines or else give reasons for departing from them, which could be reviewed on appeal. S. 1437, 95th Cong., 2d Sess. §§ 2003, 3725 (1978).

122. California has enacted legislation which has these consequences. *See generally* Messinger & Johnson, *California's Determinate Sentencing Statute: History and Issues*, DETERMINATE SENTENCING: REFORM OR REGRESSION? 13 (Special Conference, March 1978) [hereinafter cited as Messinger & Johnson].

One result of determinate sentencing will be a more open plea bargaining system in which defendants will no longer have to rely heavily on "predictions" by defense attorneys or prosecutors concerning the likely significance of charge reductions on sentencing.[123] A plea to a reduced charge will be directly reflected in the sentence. On the other hand, determinate sentencing may increase the leverage of prosecutors,[124] and *Hayes* adds emphasis to those urging that any movement toward determinate sentencing be part of a complete overhaul of a state's criminal statutes, especially those statutes affecting the severity of penalties.[125] Severe penalties, as *Hayes* demonstrates, will place too much power in the hands of the prosecutor.

Conclusion

Indeterminate sentencing, where the trial judge has broad discretion over the sentence, has to a large extent given us the luxury of not worrying about why prosecutors use their charging discretion in certain ways. While occasionally there are nervous hints that the decision not to charge ought not to be left without review,[126] when prosecutors do bring charges — even large numbers of very serious charges — high maximum and low minimum penalties ordinarily enable judges to reach results in accord with our sense of justice. *Hayes* forces us to care how prosecutors charge, and the whole movement toward determinate sentencing is sure to lead to renewed interest in the topic of prosecutorial discretion in enforcing the law. If we have become skeptical of the way in which trial judges (who are often more experienced and more objective than prosecutors) have used their sentencing discretion, it seems doubtful, despite *Hayes*, that prosecutors can long expect to exercise unfettered discretion in deciding whom and what to charge.

123. *See, e.g.*, United States *ex rel.* Scott v. Mancusi, 429 F.2d 104 (2d Cir. 1970), *cert. denied*, 402 U.S. 909 (1971); Cortez v. United States, 337 F.2d 699 (9th Cir. 1964).

124. For an attack on fixed sentences because of the power it would give prosecutors in plea bargaining, see Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978).

125. *See* FAIR AND CERTAIN PUNISHMENT, *supra* note 116, at 18, 28. The California legislation was coupled with significant decreases in the maximum penalties. *See* Messinger & Johnson, *supra* note 122, at 16, 30.

126. *See* K. DAVIS, DISCRETIONARY JUSTICE, *supra* note 9, at 191 n.2, 211-12 (1969).