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PROSECUTORIAL VINDICTIVENESS
AND PLEA BARGAINING:
WHAT ARE THE LIMITS?—
BORDENKIRCHER v. HAYES

It is undisputed that the practice of negotiating pleas is crucial to the continued existence of the criminal justice system. Historically and statistically, it is evident that the entire criminal justice system is premised on the assumption that 90 percent of all cases will never go to trial. Yet, until recently, plea bargaining was conducted sub silentio amidst forthright assertions that the practice itself was unconstitutional. It was not until 1971 that the Supreme Court sanctioned plea bargaining as a necessary and indeed advantageous

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1. "The widely held opinion that prosecutors never bargain is a myth. As a practical matter they must in order to stay in business." Polstein, How to "Settle" a Criminal Case, 8 PRAC. LAW. 35, 37 (1962). See Santobello v. New York, 404 U.S. 257 (1971), where the Supreme Court stated that plea bargaining "is an essential component of the administration of justice. . . . If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Id. at 260. See also M. FRANKEL, CRIMINAL SENTENCES (1972) in which the author states that "the great majority (ranging in some jurisdictions to around 90 percent) of those formally charged with crimes plead guilty." Id. at vii; Bechefsky, Another Slant — Plea Bargaining: An Essential Component of Criminal Justice, 52 CAL. S. B. J. 214 (1977).

2. Mr. Chief Justice Burger expressed this practical consideration in his address to the American Bar Association in 1970 when he stated: "It is an elementary fact, historically and statistically, that the system of courts—the number of judges, prosecutors, and of courtrooms—has been based on the premise that approximately 90 percent of all defendants will plead guilty, leaving only 10 percent, more or less, to be tried." N.Y. Times, Aug. 11, 1970, at 24, col. 4.


4. Santobello v. New York, 404 U.S. 257 (1971). The defendant, Santobello, was originally indicted on two felony counts involving illegal gambling. The prosecutor agreed to make no sentence recommendation if the defendant would plead guilty to the lesser included offense of possession of gambling records. Upon sentencing, a new prosecutor, apparently unaware of the "deal", recommended the maximum sentence. The Supreme Court openly acknowledged that plea bargaining was a necessary component of the criminal justice system, but stated that due process required that the state live up to its part of any bargain struck. While accepting the constitutionality of plea bargains, the Supreme Court admonished that "all of these considerations presuppose fairness in securing agreement between an accused and a prosecutor." Id. at 261.
process. However, this approval did not preclude the imposition of requirements to assure that any plea entered by the defendant was within the mandates of the Due Process Clause of the Fourteenth Amendment. Most recently, in *Bordenkircher v. Hayes*, the Supreme Court limited this constitutional protection by holding that the due process requirement prohibiting governmental vindictiveness is not applicable to post-plea bargaining reindictments when a defendant insists on his constitutional right to plead not guilty.

This Note will examine the Supreme Court's decision and demonstrate that it is grounded on faulty legal analysis and that it failed to come to grips with the real legal issue presented by the facts. It will further show that the Court's incorrect analysis resulted in the sanctioning of blatant prosecutorial vindictiveness in an effort to preserve the constitutionality of plea bargaining. Finally, the Note will suggest an alternative approach to reconciling the need for prosecutorial discretion in plea bargaining and the protection of a defendant's due process rights.

**Factual Background**

Paul Lewis Hayes was indicted in Fayette County, Kentucky, for passing a forged instrument in the amount of $88.30. After the defendant had retained counsel, the prosecutor offered to recommend a five year prison sentence if Hayes would plead guilty to the forgery charge. The defendant, insisting on his innocence and his right to

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5. While discussing the advantages of plea bargaining and the constitutionality of the practice, the Court stated that plea bargains increased the prompt disposition of cases, decreased the amount of time an accused who could not post bond would be in jail awaiting trial, and possibly increased the likelihood of rehabilitation of the accused. *Id.* at 261.

6. U.S. Const. amend. XIV. See, e.g., Santobello v. New York, 404 U.S. 257 (1971) (requirement that the prosecutor keep his part of the bargain); Brady v. United States, 397 U.S. 742 (1970) (right to counsel during plea negotiations); Boykin v. Alabama, 395 U.S. 238 (1969) (requiring that the trial record indicate that the guilty plea was entered voluntarily and knowingly).


8. See, e.g., North Carolina v. Pearce, 395 U.S. 711 (1969), where the Court required that a sentencing judge affirmatively establish any increase in sentence given to a defendant who had successfully appealed and set aside his original conviction. The Court stated that: due process . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial . . . due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. *Id.* at 725.

9. 98 S. Ct. at 665. The offense was punishable by a term ranging from two to ten years in prison. See KY. REV. STAT. § 434.130 (1970) (repealed 1974).

10. Justice Powell in his dissenting opinion states: "I observe, at this point, that five years in
trial, refused the offer. The prosecutor warned that if Hayes did not accept the bargain, the state would reindict him under Kentucky’s Habitual Criminal Statute, which carried a harsher sentence for an

prison for the offense charged hardly could be characterized as a generous offer.” 98 S. Ct. at 671 (Powell, J., dissenting).

11. There is no doubt from the record that the statement of the prosecutor to the defendant was a threat. During cross examination of the defendant the prosecutor admitted the intimidation by stating:

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?

Id. at 665 n.1.

12. At the time of Hayes’ conviction the statute read as follows:

Conviction of felony; punishment on second and third offenses. Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of a felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner in or out of this state.

KY. REV. STAT. § 431.190 (1970) (repealed 1975). Hayes’ first conviction resulted from a charge of rape brought when he was 17 years old. He pleaded guilty to the lesser included offense of “detaining a female.” He was sent to a reformatory for five years. His second offense was robbery for which he was sentenced to five years in prison, but received probation. 98 S. Ct. at 671 (Powell, J., dissenting). Thus, his conviction on the forgery charge was a conviction of a third felony under the statute. It seems ironic that the statute has since been repealed and Hayes would not qualify as an habitual criminal under the new statute. The present statute describes two classes of persistent felony offenders. A felony offender in the second degree must be more than 21 years old and have been convicted of one previous felony. A felony offender in the first degree (which is the special category of Hayes) must be more than 21 years and be convicted of a felony after conviction of two prior felonies. The statute defines a previous felony as:

a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

(a) That a sentence to a term of imprisonment of one (1) 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:

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted; or

2. Was on probation or parole from any of the previous felony convictions at the time of the commission of the felony for which he now stands convicted; or

3. Was discharged from probation or parole on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted.

KY. REV. STAT. § 532.080 (1977 Interim Supp.). Hence the conviction for detaining a female would not apply as a previous felony under the new statute since Hayes was under 18 when he committed the offense and a term of imprisonment was not imposed for that conviction.
accused with a record of two prior felony convictions. Hayes' refusal to accept the plea offer led the prosecutor to follow through with his threat and obtain a second indictment for the enhanced charge.

The defendant was tried and convicted on the initial forgery charge and, in a separate proceeding, was adjudged an "habitual criminal" and given the mandatory life sentence. After a futile attempt at state appellate review, Hayes filed a writ of habeas corpus in the United States District Court for the Eastern District of Kentucky, which was rejected. The United States Court of Appeals reversed Hayes' conviction, stating that once a discretionary decision has been made to indict an accused for a lesser charge than the facts may warrant, a subsequent indictment under a more severe charge for the same offense is an unconstitutional burden on the defendant's right to plead not guilty.

13. There is no question that the Habitual Criminal Statute in Kentucky was constitutional. See Spencer v. Texas, 385 U.S. 554 (1967); Oyler v. Boles, 368 U.S. 448 (1962); Gryger v. Burke, 334 U.S. 728 (1948); Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). These cases involved similar statutes which were upheld against various constitutional attacks including due process, ex post facto laws, cruel and unusual punishment, equal protection, privileges and immunities, and various procedural attacks.

14. The use of a recidivist or habitual offender statute as a tool for inducing a defendant to plead guilty is not unusual in the criminal justice system. See J. Bond, Plea Bargaining and Guilty Pleas § 5.08 (1975); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 57-58 (1966) (although the author indicates that an indictment under these types of statutes is rare). For a discussion of the use of habitual offender statutes as a "lever" in plea negotiations, see J. Klein, Let's Make a Deal 101-11 (1976), where the author describes the statutes as significant factors in persuading a reluctant defendant to plead guilty. The social policy underlying utilization of the statutes is the welfare of the community and not the rehabilitation of the accused. For a discussion of how this "preventive detention" philosophy may affect the constitutional rights of all the community, see Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970). See also Brown, West Virginia Habitual Criminal Law, 59 W. Va. L. Rev. 30 (1956); Note, Court Treatment of General Recidivist Statutes, 48 Colum. L. Rev. 238 (1948).

15. 98 S. Ct. at 666. This rather harsh penalty for the forgery of a check of less than a hundred dollars is surprising but not unique. In People ex rel. Mareley v. Lowes, 24 N.Y. 249, 172 N.E. 487 (1930) the defendant was convicted under an habitual criminal statute, because he had "previously stolen chickens, certain automobile parts and a motorcycle." Id. at 488. That court reversed his conviction, stating that, since the sentence was suspended on one of the prior convictions, it did not qualify as a "conviction" under the state's habitual criminal statute.

16. The opinion of the Kentucky Court of Appeals was not published. 98 S. Ct. at 666.
17. The opinion of the District Court was not reported. 98 S. Ct. at 666 n.4.
19. Id. at 44. The court stated that "although a prosecutor may in the course of plea negotiations offer a defendant concessions relating to prosecution under an existing indictment . . . he may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial." Id.
The United States Supreme Court granted certiorari and, in a 5-4 decision, reversed the holding of the court of appeals. In concluding that the prosecutor's action was permissible, the Court considered cases which turned on two distinct constitutional principals: the acceptability of plea bargaining; and the prohibition of governmental vindictiveness. The Supreme Court upheld the prosecutor's action despite evidence of vindictiveness and defended its holding on the ground that a rigid constitutional standard affecting the prosecutor's discretionary decisions would adversely affect the entire plea bargaining process.

ANALYSIS OF THE COURT'S OPINION

A complete understanding of the Court's rationale in Hayes necessitates a review of the case law regarding plea bargaining and governmental vindictiveness. The Court has long recognized that a guilty plea has a significant effect on a defendant since it involves relinquishment of various constitutional rights, including the right to trial by a jury, the right to confront one's accusers, and the right against self-incrimination. In reality, it is a conviction in that it is a

21. Four justices dissented. Justice Blackmun, joined by Justices Brennan and Marshall, argued that the Court was deviating substantially from the sound rules laid down in cases regarding retaliatory state action. 98 S. Ct. at 669 (Blackmun, J., dissenting). Justice Blackmun would have affirmed the lower court and applied this due process standard to plea bargaining. Id. Justice Powell, filing a separate dissent, noted that although he would agree with the majority in theory, the facts in this case required reliance on the vindictiveness cases and not on the acceptability of plea bargaining. 98 S. Ct. at 671 (Powell, J., dissenting).
22. Reviewing the cases decided on the issue of vindictiveness, the Court found that the instant case did not involve this issue. "It held that the Hayes case did not turn on due process limitations of state retaliation against a defendant who asserts a constitutional right. The Court said that the due process consideration against vindictiveness was not applicable to the plea bargaining process because of the prosecutor's need for virtually unbridled discretion, stating that "a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." 98 S. Ct. at 669.
23. Having recognized the practical necessity of plea bargaining, it is clear that the Court would hesitate to question the constitutionality of this process. But see Note, The Supreme Court, 1969 Term, 84 Harv. L. Rev. 30, 148-56 (1970) for a discussion of the Court's analysis of two cases, Brady v. United States, 397 U.S. 742 (1970) and Parker v. North Carolina, 397 U.S. 791 (1970), in light of the Court's ruling in Jackson v. United States, 390 U.S. 570 (1968). Jackson led practitioners to believe that plea bargaining may be held unconstitutional since it places unnecessary burdens on a defendant's choice to assert his constitutional rights. The Supreme Court held the guilty pleas rendered in both Brady and Parker constitutional since they had been entered knowingly and voluntarily. The Note suggests that the Court's analysis fails to deal adequately with prior decisions that limited the imposition of difficult choices when a defendant attempts to assert his constitutional rights.
24. U.S. CONST. amend. VI.
25. Id.
26. U.S. CONST. amend. V.
final determination of the charges against the defendant.\textsuperscript{27} The severity of the deprivation of rights concomitant with an admission of guilt has induced courts to require that a plea be entered voluntarily\textsuperscript{28} and knowingly,\textsuperscript{29} and that negotiations be conducted in the presence of counsel.\textsuperscript{30}

Plea bargaining itself was finally given recognition as a constitutionally permissible practice in \textit{Santobello v. New York},\textsuperscript{31} in which the Supreme Court required that any offer made by the state to induce a defendant to plead guilty be adhered to by the prosecutor. The acceptance of plea bargaining as a practical necessity is evidenced by the Court's recent statement that "whatever may be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."\textsuperscript{32} The \textit{Hayes} decision also involved the concept of state retaliation or vindictiveness. The vindictiveness cases are premised on the Due Process Clauses of the Fifth and Fourteenth Amendments.\textsuperscript{33} Due process has been defined to encompass a prohibition of vindictiveness or retaliatory state action against a defendant for asserting constitutional rights. The Court has held that due process of law forbids vindictiveness to play any part in a judge's

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27. Boykin v. Alabama, 395 U.S. 238, 243 (1969). In \textit{Boykin}, the defendant was charged with robbery and pleaded guilty to a five count indictment. Emphasizing the importance of a guilty plea, the Court reversed the conviction since the record did not indicate that the defendant voluntarily and understandingly waived his constitutional rights when he pleaded guilty to the charges. \textit{See} Pointer v. Texas, 380 U.S. 400 (1965) (applying the Sixth Amendment to the states via the Fourteenth Amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (holding the Fifth Amendment applicable to the states through the Due Process Clause of the Fourteenth Amendment). \textit{See also} Kercheval v. United States, 274 U.S. 220 (1927) where, speaking generally of guilty pleas, the Court stated that "a plea of guilty differs in purpose and effect from a mere admission or an extra judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." \textit{Id.} at 223.

28. In \textit{Shelton v. United States}, 246 F.2d 571 (5th Cir. 1957), the court held that a guilty plea would withstand a due process attack only if it was made voluntarily. The defendant in \textit{Shelton} apparently pleaded guilty to a charge of interstate transportation of a stolen vehicle in return for the dismissal of other charges and a recommendation by the prosecutor of a sentence of one year. Plea bargaining was not specifically acknowledged, but the court said that a positive inducement to a defendant to plead guilty would not render that plea involuntary.

29. Boykin v. Alabama, 395 U.S. 238 (1969) required that the record clearly indicate that a plea of guilty was entered knowingly and understandingly.

30. Brady v. United States, 397 U.S. 742 (1970). The defendant in \textit{Brady} was convicted of kidnapping and pleaded guilty after his codefendant pleaded guilty and he was told that the codefendant would testify against him at trial. Although the Supreme Court did not reverse his conviction on the ground that his plea was not voluntary, it required that the defense attorney be present during any plea negotiations between the prosecutor and the defendant. Since the defendant's attorney was present, Brady's plea was considered voluntary.


33. U.S. \textit{CONST.} amends. V, XIV.
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determination of sentence for a defendant who was found guilty on retrial after a successful post-conviction attack on his original conviction.\(^{34}\)

This protective rule has been held to be fully applicable to the prosecutor,\(^{35}\) since he surely would have a motive to discourage appeals.\(^{36}\) It has been extended by lower courts to prohibit prosecutorial action in increasing charges after a mistrial,\(^{37}\) after a request for a change of venue,\(^{38}\) and after a refusal to waive a right to trial.\(^{39}\) The vindictiveness cases, therefore, ensure that a defendant need not fear punishment for the assertion of a constitutional right.\(^{40}\)

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34. North Carolina v. Pearce, 395 U.S. 711 (1970). The defendant need not prove actual retaliatory motivation since the "mere apprehension" of vindictiveness may unconstitutionally deter a defendant's assertion of his rights. In *Pearce*, the Court stated that:

> Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

*Id.* at 725.

35. Blackledge v. Perry, 417 U.S. 21 (1974). The defendant was originally charged with the misdemeanor of assault with a deadly weapon, under N.C. GEN. STAT. § 14-33 (b)(1) (1969), following an altercation with another inmate in the North Carolina penitentiary. He was indicted on the felony charge of assault with a deadly weapon with intent to kill and inflict bodily injury under N.C. GEN. STAT. § 14-32 (a) (1969), after he filed an appeal from his conviction on the misdemeanor charge. The Court concluded that the *Pearce* rule was necessary to prevent the appearance of vindictiveness. 417 U.S. at 28.


37. United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974), where the court admonished the prosecutor for indicting a defendant for first degree murder after he had been granted a mistrial on the charge of second degree murder.

38. United States v. DeMarco, 550 F.2d 1224 (9th Cir. 1977). The defendant moved for a change of venue, and the government subsequently indicted the defendant on a second count based on substantially the same facts. In discussing its rationale for dismissing the second count, the court stated that "*Blackledge [Perry]* and *Pearce* each establish a prophylactic rule imposing limits upon prosecutorial discretion . . . when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due process implication." *Id.* at 1227.

39. United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976). The defendant was indicted on a misdemeanor charge. He pleaded not guilty and refused to waive his right to be tried by a district judge and his right to a jury trial. The prosecutor then reindicted the defendant on a felony charge. The court held that this prosecutorial action was in violation of the due process of law requirements established pursuant to *Pearce* and *Perry*. The Court did note, however, that the holding did not bar any reindictment after a defendant refused to waive a jury trial, since new facts and a changed circumstance could negate the presumption of vindictiveness that accompanied the reindictment. *Id.* at 1370 n.4.

40. The *Pearce* rule applies only to situations in which an accused faces a realistic apprehension that state vindictiveness will be a decisive factor in the disposition of his case. A harsher sentence at a trial *de novo* after conviction in a court of limited jurisdiction does not necessarily indicate vindictiveness. See Colten v. Kentucky, 407 U.S. 104 (1972) in which the Court, while affirming *Pearce*, held that "the hazard of being penalized for seeking a new trial, which under-
Prior to Hayes, plea bargaining and state vindictiveness were dealt with as distinct constitutional issues. The constitutional permissibility of plea bargaining was premised on the theory that a bargain benefits both the state and the accused. This rationale sanctioned a bargaining scheme that was mutually beneficial to the accused and the state and was the result of practical necessity. The defendant, Hayes, however, characterized plea bargaining as a practice that penalized a defendant who does not accept the state's bargains and insists on the full assertion of his constitutional rights. This characterization clearly suggests that vindictiveness and plea bargaining could no longer remain separate issues. In Hayes, the Supreme Court was presented with the choice of either synthesizing the two independent lines of cases, or declaring one line controlling.

The factual framework established by the Supreme Court effectively predetermined which line of cases the Court would follow. This can best be demonstrated by reviewing the substantive difference between the facts as accepted by the court of appeals and the factual premise stated by the Supreme Court. The Supreme Court saw no difference between a subsequent indictment on a more serious charge and the holding in Pearce” is not present in a system which allows a trial de novo as a matter of right. Id. at 116. Similarly, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Court upheld the defendant’s harsher sentence upon retrial following a successful post-conviction attack because the sentencing was done by a jury. The fears of retaliation in such a case were deemed insignificant since a jury would have no motive to punish the defendant for asserting his constitutional rights.

This analysis is in keeping with the theory that a state may not condition a benefit on the relinquishment of a constitutional right. For an interesting survey on the various benefits that the Congress and the states have attempted to condition on a waiver of a constitutional right, see Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960). See also Danforth, Death Knell for Pre-Trial Mental Examination? Privilege Against Self-Incrimination, 19 Rutgers L. Rev. 489 (1965); Macgill, Selective Conscientious Objection: Divine Will and Legislative Grace, 54 Va. L. Rev. 1355 (1968). Conditioning a constitutional right, as opposed to a state benefit, upon a waiver of a different right is equally repugnant to the Constitution. See Van Alstyne, In Gideon’s Wake: Harsher Penalties and the “Successful” Criminal Appellant, 74 Yale L. J. 606 (1965); Comment, Another Look at Unconstitutional Conditions, 117 U. Pa. L. Rev. 144 (1968). Cf. Garrity v. New Jersey, 385 U.S. 493 (1967) (declaring that self-incriminating testimony induced by fear of loss of employment was inadmissible); Griffin v. California, 380 U.S. 609 (1965) (holding that neither the trial judge nor the prosecutor may comment on a defendant’s failure to take the stand in his own defense); Malloy v. Hogan, 378 U.S. 1 (1964) (holding that a defendant could not be held in contempt for asserting his right to remain silent). Thus, the Court would be in a difficult position if the plea bargaining process was considered punitive to those defendants who did not avail themselves of the benefits of a plea offer. Although there would not be a “condition” on their assertion of their constitutional rights, there would be a negative repercussion for their refusal to do so if their sentences were increased.

Brief for Respondent at 22, Bordenkircher v. Hayes, 98 S. Ct. 663 (1978). The defendant argues that he “refused to accept the prosecutor’s plea bargain, . . . , braved the hazards of a trial on the more serious habitual offender charge, and received a sentence to life imprisonment.” Id. at 11 (emphasis added).
against a defendant who refuses to plead guilty and the situation where the prosecutor begins plea negotiations with two indictments and makes an offer to reduce the charges by dismissing one of them. 43 However, the court of appeals did not question whether the prosecutor had the authority to bring both charges initially, but focused on whether the prosecutor could make a discretionary decision to bring an additional indictment after plea negotiations had failed. 44

It has been recognized that the prosecutor has broad discretion in his decision to prosecute a case. 45 A prosecutor may bring as many or as few charges against a defendant as he feels are warranted, as long as the facts justify the charge. 46 Generally, the courts give wide latitude to prosecutorial discretion and defer to the prosecutor's initial decision. 47 This latitude is premised on the assumption that the prosecutor's decision to charge or refrain from charging is due to his good faith judgment regarding what is in the public interest. 48 Standards defining the boundaries of prosecutorial discre-
tion include the acceptability of charging a defendant with a lesser charge than the facts would indicate if "the public interest is best served and even-handed justice is best dispensed by this more flexible and individualized determination." 49

In Hayes, the prosecutor was aware of all the facts regarding the crime when he chose to indict the defendant on the unenhanced charge of forgery. 50 It is, therefore, reasonable to assume that the prosecutor's initial assessment of the case led him to forego the habitual offender charge. 51 This would indicate that the prosecutor's failure to indict Hayes under the enhanced charge initially was premised on his belief that not securing that indictment was commensurate with the ends of justice. There is more than a mere chronological distinction between an initial two-count indictment and an original one-count indictment with an additional subsequent indictment upon failure of a plea bargain. Therefore, the Supreme Court's initial categorization of the facts in this case was faulty. Because a discretionary decision to refrain from prosecuting the habitual offender charge had been made, the subsequent contradiction of that decision raised the presumption that the motivation for the additional charge was vindictive.

The court of appeals addressed the question of vindictiveness as part of a continuum, observing that the prosecutor's action after the bargaining session was unconstitutional. By holding that the prosecutor's action in Hayes was no different than the action taken by a prosecutor who would initially have indicted the defendant under

\[(iv) \text{possible improper motives of a complainant;}
\]

\[(v) \text{prolonged non-enforcement of a statute, with community acquiescence;}
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\[(vi) \text{reluctance of the victim to testify;}
\]

\[(vii) \text{cooperation of the accused in the apprehension or conviction of others;}
\]

\[(viii) \text{availability and likelihood of prosecution by another jurisdiction.}
\]

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) 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
Standards with Commentary § 3.9, The Prosecution Function (1971).

49. Id. Comment to subsection (b). See ABA Standards, Pleas of Guilty § 1.8 (a) (iii)
(Approved Draft 1968).

50. 98 S. Ct. at 671 (Powell, J., dissenting).

51. Id.
both counts, the Supreme Court's factual framework limits the question of vindictiveness to the boundaries of the plea bargaining table. This perspective requires the Supreme Court to view the issue of vindictiveness as that which inheres in the closed door sessions of negotiation between the defendant and the state in criminal cases, instead of the vindictiveness that is exhibited in post-plea bargaining retaliation. Thus, the change in the emphasis and analysis of the facts by the Supreme Court altered the perspective from a continuous process to a static compartmentalization.

The Supreme Court's interpretation of two aspects of the court of appeals' decision substantiated this hypothesis. First, the Court stated that the "ultimate conclusion" of the court of appeals "seems to have been that a prosecutor acts vindictively ... whenever his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations."52 This interpretation is inaccurate; a more precise interpretation of the appellate court's decision would be that there is evidence of vindictiveness when a prosecutor charges a defendant with a more serious offense after an offer of leniency has been rejected.53 The appellate court's decision did not turn on influences regarding an advantageous position in plea negotiations, but on influences reflecting the prosecution's disappointment after the plea offer was rejected. Second, the Supreme Court stated that the court of appeals' holding was premised on the substance of the plea bargain offer. Clearly, this interpretation is not warranted because the appellate court did not find that the substantive offer was a violation of due process; the court held that the subsequent actions of the prosecutor gave rise to the constitutional limitation.54 Thus, it was a procedural violation on the part of the state, not directly related to the substance of the offer, which led to the due process violation.

It is contended that the Supreme Court's misconstruction of the facts and its misunderstanding of the appellate court's opinion created an insurmountable problem for the Court, which could be alleviated only by limiting the decision to the plea bargaining rationale. Having

52. 98 S. Ct. at 667.
53. The appellate court makes its ruling clear. See note 44 supra. In explanation of its ruling the court states: "Accordingly, if after plea negotiations fail, he [the prosecutor] then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charges is vindictiveness." 547 F.2d at 44-45.
54. The court of appeals' decision was limited since the court found nothing in the record indicating that any event occurred between the initial indictment and the subsequent indictment that would have influenced the prosecutor's decision other than the defendant's insistence on his right to a trial. Presumably the result would have been different if the prosecutor had given some explanation for his conduct. Id. at 44.
characterized the issue as limited to the plea negotiation sessions, and given the dichotomy of the case law prior to \textit{Hayes}, the Court was faced with three logical alternatives. The first alternative was to synthesize the case law and apply the vindictiveness standard to plea bargaining. The second was to treat the two lines of cases as mutually exclusive and declare the vindictiveness cases controlling. The third alternative was to consider the plea bargaining and vindictiveness cases separately, but to hold the plea bargaining cases determinitive. Analysis of the first two alternatives will demonstrate that the Court's acceptance of the third alternative was inevitable, given its initial premises.

The first alternative, synthesis of the case law, would have required a choice between holding plea bargaining unconstitutional or subjecting the substantive plea bargain to judicial scrutiny. If the vindictiveness standard was applied to plea bargaining, the Supreme Court would be forced to face squarely the issue of punishment in that process which has been strategically ignored in the past. Since the prosecutor's motive in offering the defendant a more lenient sentence, and in threatening to reindict Hayes if he refused to accept the offer, was to persuade the defendant to forego his right to trial, the vindictiveness cases would hold this action unconstitutional. This result could be avoided only by restricting the ruling on the applicability of the vindictiveness cases to specific situations where the defendant alleges that he was punished by the prosecutor or some other state official for the assertion of his constitutional rights. However, this would require judicial review of plea bargaining on

\textsuperscript{55} The Supreme Court states that the situation is different from situations where the prosecutor brings an additional charge, after a defendant has refused to plead guilty, without giving notice to the defendant. The Court is not clear, but it would seem to substantiate the hypothesis that the analysis is limited to the bargaining session itself, since that is how the defendant, Hayes, got his "notice": \textit{See} United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976); United States \textit{ex rel.} Williams \textit{v. McMann}, 436 F.2d 103 (2d Cir. 1970). The Supreme Court cites these cases but does not explicitly endorse them. \textit{See also} United States \textit{v. Andrews}, 444 F. Supp. 1238 (E.D. Mich. 1978), where the court distinguished \textit{Hayes} by stating that the decision was limited to the "dynamics" of plea bargaining. In that case, the defendants were indicted for an additional conspiracy charge after they were successful in obtaining release after being granted bail. The court's holding was based on the fact that the prosecutor's action was not a legitimate part of our criminal justice system.

\textsuperscript{56} \textit{See} note 41 and accompanying text \textit{supra}.

\textsuperscript{57} This would not necessarily be the result without the Supreme Court's faulty premises. For factual situations where this would not result, \textit{see} Simpson \textit{v. Rice}, 395 U.S. 711 (1969) (companion case to \textit{Pearce}); United States \textit{v. Gerard}, 491 F.2d 1300 (9th Cir. 1974); United States \textit{ex rel.} Williams \textit{v. McMann}, 436 F.2d 103 (2d Cir. 1970).

\textsuperscript{58} \textit{But see} Brady \textit{v. United States}, 397 U.S. 742 (1970); Parker \textit{v. North Carolina}, 397 U.S. 790 (1970), where the Court hints that there may be negative aspects to plea bargaining.
a case by case basis, and one of the primary reasons for the acceptability of plea bargaining as constitutional stemmed from the practical realizations of judicial economy afforded by this process. Therefore, the Court would be understandably reluctant to reaffirm the constitutionality of plea bargaining by opening a “Pandora’s box” of litigation surrounding plea negotiations. The Supreme Court in *Hayes* foreclosed this possibility by declaring that, as long as a defendant is properly chargeable under a statute, the decision to prosecute or reduce the charge and the decision to offer a plea bargain is entirely within the prosecutor’s discretion. While acknowledging that discretion may be abused, the *Hayes* court held that the prosecutor did not engage in unethical conduct in that instance. Thus, this first option would have offered the Court the choice between two undesirable results—the declaration of plea bargaining as unconstitutional or the acceptance of a flood of litigation which the Court had indicated it would not review.

The second alternative would treat the vindictiveness and plea bargaining cases as mutually exclusive and declare the vindictiveness cases to be controlling. Given the Supreme Court’s factual perspective, this alternative was impractical since the plea bargaining cases

59. The American Bar Association has proposed standards relating to the prosecutor’s use of his discretion during plea bargaining. See ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.1. In pertinent part, the section provides as follows:

§ 3.1 Propriety of plea discussions and plea agreements.

(a) In cases in which it appears that the interest of the public in the effective administration of criminal justice . . . would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.

(b) The prosecuting attorney, in reaching a plea agreement, may agree to one or more of the following, as dictated by the circumstances of the individual case:

(i) to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(ii) to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to the defendant’s conduct; or

(iii) to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere.

(c) Similarly situated defendants should be afforded equal plea agreement opportunities.

could not be distinguished in a context that is limited to plea bargaining negotiations. The court of appeals was able to avoid this situation by conceptualizing the facts as continuous and by holding the prosecutor's subsequent action unconstitutional. This distinction of plea bargaining was impossible under the Supreme Court's static interpretation of the facts in *Hayes*.

Consequently, the Supreme Court's analysis centered on the third alternative. The same factual characterization that prevented the Court from distinguishing the plea bargaining cases from this context allowed it to distinguish easily the vindictiveness cases in three different areas. First, the Court stated that the vindictiveness cases involved a unilateral imposition of a punishment by the state, but argued that this element was not present in the "give and take" of plea negotiations. This analysis is clearly incorrect if the facts are considered as a continuum. Obviously, the prosecutor's subsequent indictment was unilateral, but by confining the analysis to the plea bargaining table, this action is classified as a result of a bilateral agreement. Second, the Court agreed that to punish a person for his assertion of constitutional rights is "patently unconstitutional," but it stated that there is no such element of punishment in plea bargaining. This analysis is inconsistent with the undisputed fact that the prosecutor indicted Hayes because of the defendant's refusal to plead guilty. The third distinction was that, although the prosecutor's action in *Hayes* may have a chilling effect on a defendant's assertion of constitutional rights, this apprehension is "inherent" in the forced choice situation of plea bargaining. The imposition of a difficult choice in the assertion of one's constitutional rights is, according to the Court, an "inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas."

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61. This may be better understood by considering each step the prosecutor took in his action with Hayes. At step 1, he indicted the defendant; at step 2 he made the plea offer with the concomitant threat to reindict; at step 3, he reindicted the defendant. The appellate court focused on step 3 and held this action unconstitutional. The Supreme Court characterized the situation as centered on step 2. Therefore, any discussion of the prosecutor's action is inherently tied to the plea bargaining process.

62. 98 S. Ct. at 668.

63. *Id.* The only way to rationalize this statement is through the isolation of the prosecutor's decision to reindict on the subsequent charge within the plea negotiation, and to admit the prosecution's "interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty." *Id.*

64. 98 S. Ct. at 667 n.7.

65. *Id.* at 668, citing Chaffin v. Stynchcombe, 412 U.S. 17,31 (1973). The Court's statement does not address the argument that the plea bargaining process not only imposes this choice on the defendant but also leaves him in a worse position if he refuses the offer than if he accepts it. "Under America's regime of guilty plea bargaining, an offender who has exercised the right to
The Court does not factually distinguish any of the vindictiveness cases. The result of this analysis is that the Supreme Court has insulated plea bargaining from the due process mandate against prosecutorial vindictiveness. This is evident from the fact that the vindictiveness cases are in no way disturbed, despite the Court's approval of the prosecutor's action in *Hayes*. On the contrary, their basic legitimacy is affirmed even though the Court holds that they are misapplied in the context of plea bargaining.

**ALTERNATIVE SOLUTION**

The Court could have chosen a middle ground which would have resulted in a more workable and equitable solution to this conflict. This alternative would have allowed the Court to acknowledge the vindictive aspect of plea bargaining without declaring the process unconstitutional. This option would utilize the rationale of *United States v. Jackson* and *Brady v. United States*, and would adequately deal with the Supreme Court's dual concerns of upholding the constitutionality of plea bargaining and limiting judicial review of substantive plea bargains.

In *Jackson*, the Supreme Court held that the death penalty provided in the Federal Kidnapping Act was an unconstitutional burden on a defendant's assertion of his right to a jury trial. The statute provided that the death penalty could be given only upon jury recommendation, and it contained no procedure for the death penalty for those who waived their right to a jury trial and pleaded guilty. The punishment scheme in the statute was held unconstitutional because it made the risk of death the price of a jury trial, and it therefore chilled the free exercise of a constitutional right. The Court held that, if the only purpose or effect of the statute was to "chill the assertion

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66. See note 52 and accompanying text supra.

67. The Court's narrow ruling held "only that the course of conduct engaged in by the prosecutor in this case" was constitutional. 98 S. Ct. at 669.

68. 390 U.S. 570 (1968). The defendant was charged under the federal kidnapping statute that provided the death penalty if the jury recommended it. There was no provision for the death penalty for those who waived their right to a jury trial or pleaded guilty. The defendant asserted that the statutory scheme was an unconstitutional burden on his assertion of his constitutional rights.

69. 397 U.S. 742 (1970). The defendant was convicted under a kidnapping statute similar to the one in *Jackson*. The Court upheld his conviction because he pleaded guilty and limited its examination to whether the plea was voluntary.
of constitutional rights by penalizing those who choose to exercise them, [then] it would be patently unconstitutional." 70

In Brady, the Court upheld a similar statute against the defendant's assertion that fear of the death penalty induced him to plead guilty, which chilled his assertion of constitutional rights and therefore rendered his plea involuntary. 71 Brady's guilty plea was voluntary, the Court held, because it was only partially induced by fear of the death penalty, and there were other factors that were more determinative. Jackson did not render all pleas induced by fear of the death penalty per se involuntary and therefore unconstitutional. Requiring the defendant to make a difficult choice in deciding among the assertion of various constitutional rights does not automatically render the necessity of making a decision itself unconstitutional. Since Brady's decision to plead guilty could have been attributed to the fact that his co-defendant would testify at his trial, the Court held that the plea was entered voluntarily.

It has been argued that the true Jackson-Brady distinction turns on strict necessity. 72 Jackson held that although Congress may have the inherent power to impose the death penalty, it may not be imposed "in a manner that needlessly penalizes the assertion of constitutional rights." 73 The question was not whether the effect was incidental or intentional, but whether it was unnecessary and consequently excessive. The Brady Court could not invalidate the defendant's plea of guilty without "necessarily invalidat[ing] the widespread practice of plea bargaining, which the Court thought essential to our system of criminal justice." 74

If the Supreme Court in Hayes had utilized this rationale, the issue of punishment could have been acknowledged forthrightly without invalidating the plea bargaining process. 75 Acknowledgement that the

70. 390 U.S. 570, 581 (emphasis added).
72. Justice Marshall's dissent in Chaffin v. Stynchcombe, 412 U.S. 17 (1973) argued this proposition. He stated that the jury's ability to impose a higher sentence upon retrial was an unnecessary burden on the defendant's right to trial and that Jackson and Brady did not "involve assessments of the relative severity of the burden on the right to choose to be tried by a jury; they turned on the question of strict necessity." Id. at 45-46 (Marshall, J., dissenting). See also Note, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 162 (1968), where the author gives three elements that arguably distinguish the Jackson ruling from plea bargaining. One of the elements is that Jackson's forced choice was needless but since plea bargaining "arguably serves vital policy interests that are unattainable in any other way ..." it is a necessary burden and therefore the Jackson rationale would be inapplicable. Id. at 162.
73. 390 U.S. 570, 583.
75. Commentators openly suggest that there is a punitive aspect to plea bargaining. See, e.g., Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev.
chilling, penalizing effect of plea bargaining was necessary to the existence of the criminal justice system does not necessarily mean that it "needlessly" penalizes the assertion of a defendant's right to plead not guilty. It must be admitted that plea bargains may benefit some defendants substantially. Accordingly, the punishment involved may be incidental and the restraint on the defendant's assertion of constitutional rights would be necessary and therefore constitutional.

Even if it is conceded that plea bargaining may be a necessary limitation on a defendant's rights, it does not follow logically that vindictive state action is a necessary component of that system. The Court could acknowledge that incidental burdens on the defendant which may accrue under the plea bargaining system should not include subsequent vindictive action when the offer is rejected by the accused. Apprehension is an inevitable component of any negotiation process, but blatant vindictive action after the fact is not necessary. Thus, the Court could have affirmed plea bargaining as a necessary element of our criminal justice system, but also said that blatant prosecutorial vindictiveness is a needless burden on that system and is therefore unconstitutional.

A second concern in this type of analysis would be the fear of a flood of cases dealing with the substance of the bargain. However, this decision would not rest on the substantive bargain, but on the post-bargain process of reindictment. In keeping with the Jackson-Brady rationale, the Court could hold plea bargaining constitutional and merely state that the prosecutor's vindictive action was unconstitutional. By limiting the decision in plea bargaining cases to actual vindictiveness, the Court could avoid reviewing the prosecutor's bargaining power and discretion. This would create no greater burden than the Court already experiences in abuse of discretion charges.

564 (1978). The author candidly suggests that "[t]he right to reject the proposed plea bargain is largely chimerical." Id. at 579. Similarly, in an article on the effects of fixed sentencing procedures on the plea bargaining process, it has been stated that:

With the restriction of the parole board's discretion, a defendant who is considering whether to accept a proposed plea agreement need not fear that the parole practices may, to some extent, deprive him of the apparent benefit of his bargain; nor can a defendant who chooses to stand trial hope that parole practices will ameliorate the penalty that our system of justice threatens for his exercise of a constitutional right. Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. Pa. L. Rev. 550 (1978) (emphasis added). 76. See note 42 supra.

77. Lower courts have been able to deal adequately with judicial review of prosecutorial vindictiveness without disturbing the substantive offer. See, e.g., MacDonald v. Musick, 425 F.2d 373 (9th Cir. 1970), where the defendant was charged with drunk driving and the prosecutor offered to dismiss the charge if the defendant would stipulate that there was probable
The counter-argument to this type of review is that it will have no appreciable effect on the system, since an aggressive prosecutor would merely indict all defendants under the most extensive charges imaginable. Justice Blackmun, in his dissenting opinion in Hayes, offers a convincing answer to this objection.\(^{78}\) He indicates that prosecutorial overcharging has never been openly sanctioned, but even if it were, there are three reasons why the Court should not allow the prosecutor to bring subsequent charges against a defendant after the initial indictment.\(^{79}\) First, if the prosecutor is forced to charge prior to plea negotiations, he would be forced to make his charging decision based on the average case, which would at least limit the personal animosity that a prosecutor may feel toward a particular defendant for asserting his constitutional right. Second, if the prosecutor must initially charge the defendant with all applicable charges, or waive the right to indict, the process will be kept in the public view. This is certainly in keeping with the majority's fear of sending plea bargaining “back into the shadows from which it has so recently
emerged." The third rationale is that a defendant has no way of knowing that the prosecutor actually has the authority to do what he threatens. Obviously, after the Supreme Court's decision in Hayes, defendants may know that the prosecutor has the authority to recharge them under an enhanced statute. However, while acknowledging that the action engaged in by this prosecutor was acceptable, the Court emphasized that the limits on prosecutorial discretion do exist. Hence, defendants may not know whether another threat by a prosecutor will be permissible, so they may be more likely to "play it safe" and accept the prosecutor's threat as valid. The effect would be to keep the bargaining process in the "shadows" because the defendants will be inclined to consent to the prosecutor's offer and avoid the dilemma of Hayes. These situations dramatically point out the need for the Supreme Court to separate the plea bargaining process from overt vindictive state action.

CONCLUSION

The Supreme Court's analysis in Hayes was based on a misconstruction of the factual framework and an inaccurate interpretation of the impact of the appellate court's decision. This misconception altered the decision appreciably and forced the Court into the anomalous situation of either accepting prosecutorial vindictiveness subsequent to a plea negotiation failure or totally dismantling the plea bargaining process. An alternative solution which would uphold the constitutionality of plea bargaining but limit blatant prosecutorial vindictiveness has been proposed. This alternative would have enabled the Court to candidly admit that there are punitive aspects inherent in plea bargaining, but hold that this chilling effect on a defendant's assertion of his constitutional right is a necessary element of that system. The alternative would have limited the chilling effect by declaring that blatant prosecutorial vindictiveness was unnecessary and therefore unconstitutional. Thus, judicial review of prosecutorial action would not increase appreciably, since the Court presently reviews abuse of discretion charges. Finally, even if the alternative approach would tend to induce prosecutors to avoid the vindictiveness issue by initially overcharging a defendant, there are sound policy reasons for separating plea bargaining from other overt prosecutorial vindictiveness.

80. 98 S. Ct. at 669.

81. The majority seems to indicate that the defendant's knowledge of the prosecutor's intended action was a significant factor in the Hayes decision. Id. at 666.
Bordenkircher v. Hayes is a significant decision in the area of pretrial criminal procedure because it extends prosecutorial discretion during plea negotiations into the realm of near non-reviewability. This is startling when it is realized that plea negotiations were not given constitutional sanction until 1971, and the acceptance of plea bargaining, at least in part, was to prevent the process from being "shrouded in secrecy and deliberately concealed by participating defendants, defense lawyers, prosecutors, and even judges." In an effort to preserve the constitutionality of plea bargaining, the Hayes decision may have succeeded in again insulating the plea bargain from judicial and public view.

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