Plea Bargaining and the Supreme Court: The Limits of Due Process and Substantive Justice

By KEVIN J. O'BRIEN*

Introduction

Plea bargaining has become a fixture of our system of criminal justice, and has generated a vast literature in explanation and defense of its operation. Yet, because of the ideals to which our criminal procedure is committed, arguments in favor of plea bargaining are discomfiting even for its strongest supporters. The right not to plead guilty is the keystone of the criminal defendant's constitutional guarantees; its invocation brings into play, directly or indirectly, all the legal procedures that protect him from government oppression. Consequently, when a defendant agrees to a plea bargain and foregoes his right to require the government to prove him guilty beyond a reasonable doubt, many other important rights become empty or unnecessary.[1] We recognize that a right, even if alienable, must be protected in a manner consistent with the importance of the values it embodies. Arguably, a system that allows so critical a right simply to be bartered away—particularly as routinely as our system does—cannot claim to "take rights seriously."[2] The abdication of the determination of guilt and innocence to a contractual mode, and to the arbitrariness of variables that characterizes bargaining, seems inconsistent with the assumption that

* Member, New York Bar. A.B., 1974, Harvard College; B.Phil., 1976, Oxford University; J.D., 1979, Harvard University.

1. A guilty plea is tantamount to conviction and constitutes a surrender of the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's accusers, among other safeguards. McCarthy v. United States, 394 U.S. 459, 464-67 (1969); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). Generally, a guilty plea does not preclude review of so-called jurisdictional defects, such as the imposition of double jeopardy. *See* Westen, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308, 1330-34 (1978).

2. *See* Wertheimer, *Freedom, Morality, Plea Bargaining, and the Supreme Court*, 8 PHIL. & PUB. AFF. 203, 229-34 (1979). *See also* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1395-98 (1970).

rights define a *system* of criminal justice at all.[3]

This incongruity has registered with a strong and certainly the most influential supporter of plea bargaining, the Supreme Court. Its defense of plea bargaining to date has been an ambivalent mixture of expansive talk and defensive action. On the one hand, the Court speaks of the "venerable institution"[4] of bargaining for guilty pleas as "not only an essential part of the [criminal] process but a highly desirable part for many reasons."[5] This practice is said to yield "mutuality of advantage"[6] and "benefit [to] all concerned."[7] The Court has enumerated the benefits a criminal defendant can expect from a "properly administered" plea bargaining program: avoidance of extended pretrial incarceration and the uncertainties and stresses of a trial; swift disposition of his case; and a prompt start on the road to rehabilitation.[8]

On the other hand, the Court has equipped the bargaining defendant with constitutional safeguards whose nature bespeaks cautiousness concerning the extent to which the actual operation of plea bargaining can be justified. The defendant must be aware of his legal rights and the direct legal consequences of his actions; and must be free of coercive or independent illegal pressures, for his negotiated guilty plea to be valid.[9] To that end, he also has the right to competent advice of counsel.[10] The government is obligated to keep its bargaining promises, at least where the defendant would otherwise be prejudiced.[11] And before accepting a negotiated plea, the sentencing judge must be provided with a record of the bargaining, which he must inspect for clear evidence that the plea was constitutionally voluntary.[12]

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3. It has frequently been observed that plea bargaining is irrational in that it produces enormous discrepancies in sentencing that cannot be explained by relevant differences among defendants or among the types of charges against them. *See* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and Presumptive Sentencing*, 126 U. PA. L. REV. 550, 563-76 (1978); Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 573-82 (1977). *But see* Church, *In Defense of "Bargain Justice,"* 13 L. & SOC'Y REV. 509 (1979).

4. Parker v. North Carolina, 397 U.S. 790, 808 (1970) (Brennan, J., dissenting).

5. Santobello v. New York, 404 U.S. 257, 261 (1971).

6. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (quoting Brady v. United States, 397 U.S. 742, 752 (1970)).

7. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

8. *Id. See also* Brady v. United States, 397 U.S. 742, 752 (1970).

9. Brady v. United States, 397 U.S. at 742, 749-58 (1970). *See also* McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 899-904 (1980).

10. Brady v. United States, 397 U.S. 742, 758 (1970); McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

11. Santobello v. New York, 404 U.S. 257, 262 (1971).

12. Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978); Boykin v. Alabama, 395 U.S. 238,

These protections share one feature that is of paramount interest: they are strictly *procedural*, like those offered by other standard apologies for plea bargaining.[13] They are designed, that is, to enhance the relative bargaining freedom or power of the criminal defendant, without stipulating how this freedom or power can be used. It is no small part of their merit in the eyes of the Court that these protections require no judgment upon the *content* of or *reasons* for the choices the government poses to a bargaining defendant, and therefore no judgment upon the *outcome* of the bargaining. As the Court has emphasized in the recent case of *Bordenkircher v. Hayes*:[14] "[T]he substance of the plea offer itself" is not an object of judicial scrutiny, in the absence of a violation of the legislature's classification of chargeable offenses, or the prosecutor's reliance on "race, religion, or other arbitrary classification."[15]

These two poles in the Court's approach to plea bargaining—the promise of substantive benefits, and the practice of proceduralism—have not been integrated, testifying to the uneasy status of plea bargaining. The Court has paid lip service, but no more, to the ideal of mutuality of advantage. A determination of the defendant's "advantage" from plea bargaining would seem to require a comparison with his fate in the absence of the practice, which perhaps could be informed by statistics and educated hypotheses.[16] But this is just the sort of outcome-oriented enterprise the Court in *Hayes*, as we noted, rejected outright. The disavowal is deeply consistent in a sense. A thoroughgoing proceduralist is indifferent to outcome, by definition; his design is to avoid the uncertain or arbitrary exercise of power that the state's intervention in individual outcomes produces, by trusting to the free interplay of interests of the litigating parties, constrained only by procedure. On this view, action to remedy even recognizably outrageous results must be suspended for the sake of more general and more valuable goals, such as personal freedom or security, or overall efficiency. While the Supreme Court has stopped short of articulating these premises in the context of criminal justice, cases such as *Hayes* reveal the extent of its underlying agreement with them. It is not surprising, therefore, that

242-43 (1969). *See also* FED. R. CRIM. P. 11, for the more extensive duty of examination imposed upon federal courts.

13. *See, e.g.*, FED. R. CRIM. P. 11(e), *discussed in* Advisory Committee Note, 62 F.R.D. 271, 283-86 (1974); ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.1-4 at 60-78 (Approved Draft 1968). *But see* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 at 244-47, 614-15 (1975).

14. 434 U.S. 357 (1978).

15. *Id.* at 362, 364-65.

16. *See, e.g.*, the analysis in Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CALIF. L. REV. 471, 486-501 (1978).

the Court has *never* tested its theory of mutuality of advantage, even in those cases where it has invoked it.[17] The Court's commitment to substantive ends in plea bargaining has been purely rhetorical, subverted by its adherence to proceduralist premises.

Consideration of the Court's ambivalence returns us to the anomaly of plea bargaining. In its plea bargaining decisions, the Court has defined its constitutional duty as insuring that the criminal defendant be a free and rational chooser, without considering the sorts of choices that are available to him. In focusing its scrutiny on a process of decisionmaking, divorced from a point of departure or arrival, the Court has evaded the question of the proper response to a defendant's assertion of his right not to plead guilty. The conflict between a system of rights and plea bargaining, however, does not disappear for the Court's wishing it so.[18]

It is hard to escape the conclusion that neither an abstract assurance of mutual advantage nor a strict proceduralism is an effective response to the problem of plea bargaining. The Court, in other words, has not succeeded in persuading that the anomalous features of plea bargaining either are justified by a substantive good to the defendant or can be safely ignored. This insight can be confirmed by a study of the Supreme Court's two latest plea bargaining decisions, *Bordenkircher v. Hayes*[19] and *Corbitt v. New Jersey*;[20] such a study is undertaken in Part I.

This, however, is only the beginning of our inquiry. It remains to be seen what the consequences are of an alternative approach to plea bargaining—one that would enforce substantive justice. In particular, we must investigate whether or not such an approach can establish persuasive discriminations, for purposes of constitutional analysis, among plea bargaining strategies and among the other ways that use of the right not to plead guilty can be discouraged in the criminal system. Since almost any government act can, under the appropriate circumstances, inhibit the defendant's assertion of this right, it is incumbent under a substantive approach to establish principles of discrimination.

17. *See* notes 5-8 *supra*.

18. Admittedly, one way to resolve the conflict, akin to cutting the Gordian knot, is simply to deny that there is a unique right to trial as opposed to a general right to a procedure for the accurate determination of guilt. On this assumption, if plea bargaining is reasonably accurate, the conflict disappears. *See* McCoy & Mirra, *supra* note 9. Accuracy alone, however, can only begin to explain the procedures (and the public legitimacy) of a criminal trial.

19. 434 U.S. 357 (1978).

20. 439 U.S. 212 (1978).

This task is pursued in Parts II through IV, unfortunately without much success. As is explained, larger difficulties, both in the criminal justice system and in the constitutional theory the Supreme Court has developed for it, militate against an alternative approach to plea bargaining. These difficulties in the end may vindicate the Court's capricious defense of the practice, notwithstanding the toll it takes on defendants' rights.

I. Recent History

Both *Bordenkircher v. Hayes* and *Corbitt v. New Jersey* involve plea bargainings that failed, despite the genuine threat of a mandatory life sentence upon conviction after trial.

In *Hayes*, the earlier case, the defendant was indicted by a Kentucky grand jury for uttering a forged check of $88.30, an offense then punishable under state law by two to ten years in prison.[21] During a pretrial conference with the state prosecutor following arraignment, Hayes was offered a five-year sentence should he plead guilty. The prosecutor also threatened that, if Hayes did not—in the words of the prosecutor's own trial testimony—"save the court the inconvenience and necessity of a trial,"[22] he would be indicted under an habitual criminal statute that required a life sentence if Hayes were convicted, by reason of his two prior felony convictions.[23] Despite the disparity between the gravity of the alleged offense and a life sentence, this threat was genuine under the terms of the statute.[24] When the defendant chose not to plead guilty and insisted on a jury trial, the prosecutor obtained a new indictment, and Hayes was ultimately convicted by a jury and sentenced to a life term. His petition for a federal writ of *habeas corpus* was denied in an unreported district court decision, later reversed by the Court of Appeals for the Sixth Circuit[25] on the grounds

21. *See* KY. REV. STAT. § 434.130 (repealed 1975).

22. 434 U.S. at 358 n.1.

23. Hayes had pleaded guilty in 1961, at the age of 17, to a charge of detaining a female—a lesser included offense of rape—and had served a five-year term in a reformatory. Nine years later, he was convicted of robbery and was sentenced to five years of imprisonment, but was released immediately on probation. *See id.* at 359 n.3; *id.* at 370 (Powell, J., dissenting).

24. Kentucky's Habitual Criminal Act provided that "[a]ny person convicted a . . . third time of [a] felony . . . shall be confined in the penitentiary during his life." KY. REV. STAT. § 431.90 (1973). The state legislature repealed this statute in 1975, replacing it with a statute, KY. REV. STAT. § 532.080 (Supp. 1977), under which Hayes could have been sentenced, at most, to a term of 10 to 20 years in prison. *See* Bordenkircher v. Hayes, 434 U.S. at 359 n.2; *id.* at 371 n.3 (Powell, J., dissenting).

25. Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976).

that the state's bargaining terms were vindictive and hence unconstitutional. The Supreme Court, in a five-to-four decision, reversed the judgment.

Justice Stewart's majority opinion sets out to do more than demonstrate the error in the Court of Appeals' ruling "that the substance of the plea offer itself violated the limitations imposed by the Due Process Clause."[26] It attempts to make "substance" irrelevant to constitutional inquiry into plea bargaining, almost by definition. The Court of Appeals had relied on *Blackledge v. Perry*,[27] a nonbargaining case which turned on the "realistic likelihood of 'vindictiveness' "[28] inhering in a prosecutor's reindictment of a defendant who successfully appealed an earlier conviction. The Supreme Court rejected the applicability of *Perry*, because "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[29] The *Perry* line of cases is considered in detail in Part IV of this essay, but two aspects of the Court's treatment of it in *Hayes* deserve mention here. First, the Court made the categorical assumption that plea bargaining involves meaningful "give-and-take," a state of affairs it connected with the accused's "free[dom] to accept or reject the prosecution's offer."[30] Second, the Court took these features to belie completely any suspicion of "punishment or retaliation" in plea bargaining, even when enhanced charges are threatened and then brought against a defendant.

The first step exemplifies the proceduralist philosophy. Freedom to choose among negotiable options is the basic justification of the safeguards the Court has installed within the plea-bargaining process. To protect this ideal, the Supreme Court in *Hayes* reaffirmed its confidence that criminal defendants who bargain with the aid of these safeguards " 'arguably possess relatively equal bargaining power' "[31] and are at least "presumptively capable of intelligent choice in response to prosecutorial persuasion . . . ."[32]

These presumptions are untenable for many typical plea bargaining situations. In particular, the state's monopoly of power often manifests itself either in an unwillingness to "give" as well as to "take,"

26. 434 U.S. at 362.
27. 417 U.S. 21 (1974).
28. *Id.* at 27.
29. 434 U.S. at 363.
30. *Id.*
31. *Id.* at 362 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)).
32. *Id.* at 363.

or in bargaining from an initial position so designedly lopsided that the appearance of subsequent reciprocity is illusory.[33] The bargaining of the prosecutor in *Hayes*—an "offer" of a five-year sentence recommendation against a backdrop of mandatory life imprisonment—fits within the latter category. Yet *Hayes* failed to address this problem at all. Even such plea bargaining abuse as the *Hayes* majority did acknowledge was assimilated into a proceduralist analysis. Justice Stewart took care to differentiate between the situation in *Hayes* and one in which a prosecutor promises adverse or lenient legal treatment for a person other than the bargaining defendant. His concern was that such a tactic "might pose a greater danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider."[34] Rather than raise the substantive and more trenchant objection that it would be unfair and would offend due process to tie a third party's fate to unconnected (and possibly unconcerned or ill-informed) decisions of the bargaining defendant, Justice Stewart mentioned only the need for the bargainer's rationality of choice.

The second step in the Court's reasoning, equating freedom to make a rational choice with the absence of prosecutorial punishment or vindictiveness, reveals still more tellingly the narrowness of proceduralism. The test adopted by most courts for identifying the voluntariness of a guilty plea "in a constitutional sense"[35] is essentially twofold: First, was the defendant fully aware of his relevant rights and of the direct consequences of pleading or not pleading guilty? Second, was his choice free of coercion and other influences that, if not illegal in themselves, can be said to have "overborne" his will or otherwise to have absolved him of responsibility for his act?[36] Supplying these admittedly vague standards with even their broadest meaning, the inquiry they define is limited to the state of mind of the defendant.[37] Hayes'

33. *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58-62, 85-105 (1968). *See also* Alschuler, *The Supreme Court, the Defense Attorney and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975).

34. 434 U.S. at 364 n.8. *See also* Brady v. United States, 397 U.S. 742, 758 (1970).

35. 434 U.S. at 363.

36. The classic cases on the subject include Schneckloth v. Bustamonte, 412 U.S. 218, 236-42 (1973); Brady v. United States, 397 U.S. 742, 747-48 (1970); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). For a general discussion, see Wesien & Westin, *supra* note 16, at 477-512; Alschuler, *The Supreme Court, the Defense Attorney and the Guilty Plea*, *supra* note 33.

37. Inquiries into voluntariness have their prescriptive aspects, of course. An individual's act is always voluntary or involuntary in relation to a standard supplied by "deep, even if inarticulate, feelings of our society." Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring). *See also* Colombe v. Connecticut, 367 U.S. 568, 602-03 (1961) (Frankfurter, J.). This standard reflects society's judgments concerning not only cause and effect, but also

choice may have been voluntary in the required sense, but psychological impairment is not a prerequisite for vindictiveness or retaliation, as the Court of Appeals understood. If criminal defendants, like other groups under the Constitution, should be able to exercise rights free from the threat of government punishment, then whether or not they are able to bow to the threat freely and intelligently is certainly immaterial. A determination of voluntariness—of how a defendant makes his choice from among available options—cannot substitute for an evaluation of the options themselves in terms of their severity, their good faith, or some other attribute.[38] Indeed, the clarity with which a

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the types of knowledge and action that are valuable. Thus, Aristotle, who gave us the concept of voluntariness, confessed that it is impossible to regard the throwing of goods overboard in a storm as voluntary, because "no one would choose any such act in itself." ARISTOTLE, NICOMACHEAN ETHICS, at line 1110a19 (Ross trans. 1941). *See also* Grano, *Voluntariness, Free Will, and The Law of Confessions*, 65 VA. L. REV. 859, 880-95 (1979); Nozick, *Coercion*, in PHILOSOPHY, SCIENCE, AND METHOD 440, 458-65 (1969).

Nevertheless, even a normative judgment about a chooser's state of mind must be distinguished from a judgment about the choices that can be put to any chooser, regardless of state of mind. *See* note 38 and accompanying text *infra*.

38. Several important Supreme Court controversies over criminal rights have turned on this distinction. In McMann v. Richardson, 397 U.S. 759 (1970), the majority advanced a purely psychological test for the validity of a guilty plea. The defendants in that case argued that their guilty pleas, prompted by the possibility of the introduction of coerced confessions at their trial, were invalid, in particular because the state court procedure in effect at the time of the pleas permitted even an involuntary confession to come before the jury; the jury was merely instructed to disregard the confession if it found it improperly obtained. Subsequent to the pleas, and prior to *Richardson*, the Supreme Court declared this practice an abridgement of due process as an unreliable means of determining the voluntariness of a confession and unduly open to the risk of conviction based on an involuntary confession. *See* Jackson v. Denno, 378 U.S. 368 (1964). But the Court in *Richardson* refused to invalidate the guilty pleas on the retroactive basis of *Jackson*. It reasoned that the pleas were "voluntary and intelligent," the result of competent advice by counsel; "[c]ounsel for these respondents cannot be faulted for not anticipating *Jackson v. Denno* or for considering the New York procedures to be as valid as the four dissenters in the case thought them to be." 397 U.S. at 773. Justice Brennan's dissent properly pointed out that the Court's "formalism" prevented it from seeing that there are " 'considerations that the government cannot properly introduce' into the pleading process"; "the critical question is not, as the Court insists, whether respondents knowingly decided to plead guilty but *why* they made that decision." *Id.* at 778, 784 (citation omitted & emphasis in original) (Brennan, J., dissenting).

The same lines were drawn in Brady v. United States, 397 U.S. 742 (1970). There the Court upheld the validity of a guilty plea to a charge under a provision of the Federal Kidnapping Act, despite the fact that in an earlier decision (rendered nine years after Brady's plea), United States v. Jackson, 390 U.S. 570, 582 (1968), the Court had invalidated that same provision because its death-penalty formula had an "excessive" chilling effect on the assertion of the right to a jury trial. The Court in *Brady* simply satisfied itself that the defendant's plea was psychologically voluntary, a finding it correctly saw as not precluded by *Jackson*. 397 U.S. at 746-47. The logic of *Jackson*, however, was altogether different: "It is no answer to urge . . . that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it

person's will is revealed to be "free" often bears an inverse relation to the extent of the penalties in store for him, for the simple reason that "the more unpleasant the alternative, the more real the consent to a course which would avoid it."[39]

None of the Court's procedural preoccupations in *Hayes* could dull the force of the fact that a defendant with a record of five years in reform school was sentenced to life imprisonment for uttering an $88 forged check, and that this fate was brought on precisely because Hayes exercised his right to trial. The Court at one point mentioned the "mutuality of advantage" that supposedly attaches to plea bargaining,[40] but even this solitary gesture in the direction of a substantive inquiry was ambiguous; the Court went on to explain the phrase by the fact that the defendant and the prosecutor "each [has] his own reasons for wanting to avoid trial."[41] This begs the question, inasmuch as the prosecutor's action gave Hayes more than ample "reason" to waive his rights.[42] When the government has the power to *create* reasons in the mind of criminal defendants, the logical questions would seem to be, how ought that power be exercised, and what kinds of reasons are appropriate?

The *Corbitt* case offers the Court's most recent explanation of its constitutional philosophy of plea bargaining. Under review in that case was a New Jersey statutory scheme[43] that made life imprisonment mandatory for those convicted by a jury of first-degree murder, and a prison term of not more than thirty years mandatory for those convicted by a jury of second-degree murder. Bench trials were forbidden, as were guilty pleas to murder indictments. The statute permitted an accused indicted for murder only one recourse other than a jury trial: a plea of *nolo contendere*, upon acceptance of which the trial judge could impose either of the types of punishment the jury could have meted out. The accused in *Corbitt* was indicted for murder and proceeded to trial, where the state presented its case on a theory of felony murder, a crime defined in New Jersey as first-degree murder. Corbitt was convicted and sentenced to the mandatory life term.[44] Since a *nolo con-*

necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." 390 U.S. at 583 (emphasis in original).

39. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267 (1947).

40. 434 U.S. at 363.

41. *Id.*

42. The State of Kentucky went so far as to characterize Hayes' decision to stand trial as "unreasonable" in light of the options presented to him. *See* Brief for Petitioner at 15-16, Bordenkircher v. Hayes, 434 U.S. 357 (1978).

43. N.J. STAT. ANN. §§ 2A:113-1 to -5 (West 1969) (repealed 1978).

44. 439 U.S. at 216.

tendere plea could possibly have won Corbitt a sentence of not more than thirty years, he claimed that his rights to a jury trial and against compelled self-incrimination had been unconstitutionally burdened. The New Jersey Supreme Court rejected this contention[45] and the United States Supreme Court, by a six-to-three vote, affirmed.[46]

Perhaps the most striking aspect of the *Corbitt* opinion is the assumption by Justice White, writing for the majority, that plea bargaining in any defensible form was somehow at stake. New Jersey's statutory system, for several reasons that should have been obvious, did not guarantee the flexible "give-and-take," equal distribution of bargaining power and informed, rational choice that so impressed the Court in *Hayes*. First, it specified bargaining with the judge who, barring a plea agreement, would also preside at the defendant's trial. The unique power and prestige of the trial judge within the criminal justice system makes judicial intimidation of bargaining defendants a real possibility, despite the presence of procedural safeguards. Partly for this reason, federal judges are forbidden by the federal rules from participating in plea bargaining.[47] Second, nothing in the statute required the trial judge to bargain, in the ordinary sense of that word; he was required only to impose a sentence within the range provided by statute in the event of a *nolo* plea. Indeed, a judge's responsibilities, unlike those of a prosecutor, do not demand involvement with the initial charge that ordinarily either frames the bargaining or is itself the subject of negotiations. This means that he is less likely to possess the familiarity with circumstances surrounding the alleged offense that enables a prosecutor so inclined to tailor his negotiations to the individual case before him.[48] Finally, because bargaining was not a necessary

45. State v. Corbitt, 74 N.J. 379, 378 A.2d 235 (1977).

46. Also rejected by both courts was Corbitt's equal protection argument that New Jersey's statute discriminated against those who pursued their right to a jury trial. *See* 439 U.S. at 225-26.

47. *See* FED. R. CRIM. P. 11(e)(1), *discussed in* Advisory Committee Note, 62 F.R.D. 271, 283-86 (1974). For a discussion of the problems raised by judicial participation in plea bargaining, see generally Scott v. United States, 419 F.2d 264, 271-74 (D.C. Cir. 1969) (Bazelon, C.J.); Note, *supra* note 3, at 583-85. At least one court has denied the applicability of *Hayes* to judicial conduct. *See* Schaffner v. Greco, 458 F. Supp. 202, 209 n.17 (S.D.N.Y. 1978).

48. Justice Stevens observed in dissent that, unlike the procedures under review, "[i]n the bargaining process, individual factors relevant to the particular case may be considered by the prosecutor in charging and by the trial judge in sentencing . . .; the process does not mandate a different standard of punishment depending solely on whether or not a plea is entered." Corbitt v. New Jersey, 439 U.S. at 231-32 (footnotes omitted) (Stevens, J., dissenting). This overstates the contrast, inasmuch as a New Jersey judge had some discretion in deciding whether to accept the *nolo* plea and in setting sentence, as Justice White stressed in response to the dissent. *See id.* at 224 n.14 (White, J.). Justice White also maintained that

prelude to the judge's decision, the defendant could not be assured of the judge's intentions at the time he must decide whether or not to exercise his rights. Even if he had the benefit of competent counsel, he risked taking the critical step of foregoing his right to trial without knowledge of the degree of official leniency, if any, responsive to his overture.[49] An intelligent choice, therefore, could not be presumed to the extent that it was in the ideal adumbrated in *Hayes*. The Court cited nothing in the record that belied these risks in the *Corbitt* case. Nevertheless, Justice White asserted in *Corbitt* that "[t]here is no difference of constitutional significance between *Bordenkircher* [*v. Hayes*] and this case," and he particularly stressed the presence of free and rational choice in each case.[50]

Corbitt shows the Court's rhetoric of "mutuality of advantage" in a most cynical light. Serious students of plea bargaining have noted its potential for promoting a more individualized, flexible and participatory determination of guilt and sentence, which in turn could result in more accurate ascertainment of guilt, more appropriate sentencing, and increased political and moral legitimacy of the criminal system generally.[51] In this conception might lie the beginning of a reconciliation between the criminal defendant's constitutional rights and the reality of plea bargaining, achieved through redefinition of those rights as well as reform of the reality.[52] But this insight can hardly be what the Court had in mind in *Corbitt*, in the absence of any evidence of meaningful bargaining. The only "advantage" of magnitude yielded

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some rigidity is inherent in any plea bargaining that "go[es] forward within the limits set by the legislature," such as mandatory sentencing. *Id.* Any rigidity, however, seems antithetical to the ideal of plea bargaining sketched in *Hayes* and other cases. Even if imposed uniform standards or procedures can rid plea bargaining of its worst caprices and abuses, *see generally* Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972), they necessarily deprive it *pro tanto* of its distinctive advantages when compared to a trial: speed, precision, and flexibility.

49. *See* State v. Corbitt, 74 N.J. 379, 415-17, 378 A.2d 235, 253-54 (1977) (Pashman, J., dissenting).

50. 439 U.S. at 221-24. Justice Stewart, the author of *Hayes*, concurred in the result in *Corbitt*, but disagreed with the equation with *Hayes*, because "there is a vast difference between the settlement of litigation through negotiation between counsel for the parties, and a state statute such as is involved in the present case." *Id.* at 227.

51. *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 95-99 (1966); Advisory Committee Note to FED. R. CRIM. P. 11, 62 F.R.D. 271, 281-82 (1974); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 10-11 (1967); Note, *supra* note 3, at 566-82.

52. For an example of the kind of rethinking of criminal rights required, along more communal, less adversarial lines, see Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

by the New Jersey system is the government's: saving the time and money of the beleaguered criminal justice system. As Justice Stevens noted in dissent, "New Jersey does not seriously contend that [the statute] has any other purpose or effect than to penalize assertion of the right not to plead guilty. Its argument [is] that the statute is justified by a valid state interest in conserving scarce prosecutorial resources . . . ."[53] Systematic efficiency is, we have noted, a quintessentially proceduralist argument,[54] and it restates in the starkest way the incongruity of plea bargaining within a system of rights. Cutting back on constitutional guarantees will invariably be economical for the government, providing it with a convenient, nearly tautological excuse for retreat from constitutional requirements. Yet in the criminal context particularly, where the stakes of the individual's confrontation with the state are the most dramatic, utilitarian considerations cannot be allowed to dictate the respect his rights are owed.

The benefits to criminal defendants that the Court has mentioned in other plea bargaining cases—earlier release from pretrial incarceration, avoidance of trial and its pains, and an early start at rehabilitation[55]—seem equally to miss the point. The premise of this effort at compensating defendants is that their rights have a price. Surely not just any coin will do, however. It would be sophistical to suggest, for example, that the Court's hypothetical benefits justify the sentence exposure thrust upon defendant Hayes by a frustrated prosecutor. This is, one hopes, why the Court never attempted to do so. *Corbitt* may be subject, though less dramatically, to the same criticism. In at least some situations, in other words, the prosecutor cannot offer a high enough price. Unfortunately, the Supreme Court to date has not seen fit to explore the limitations this undeniable fact places on its sanction of plea bargaining. It can be presumed that such limitations would be severe, if only because the enumerated advantages to the defendant are, in themselves, scarcely realistic or substantial when measured against the consequences of a guilty plea.[56] Moreover, it is clear by the Court's own voluntariness test that the proposed benefits were not sufficiently weighty in *Hayes* and *Corbitt*, even if they were authentic, for in each

53. 439 U.S. 212, 229-30 (Stevens, J., dissenting); *accord*, Brief for Appellee at 34, Corbitt v. New Jersey, 439 U.S. 212 (1978).

54. *See* notes 16-17 and accompanying text *supra*.

55. *See* note 8 *supra*.

56. It is widely observed that economics alone offers a serious justification for plea bargaining as currently practiced. *See, e.g.*, Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1313-14 (1975); Note, *supra* note 3, at 571-82; Note, *supra* note 2, at 1403-07.

of these cases the defendant refused to agree to a plea bargain, despite the enormous risks this course entailed. Even short of second-guessing voluntary choice, one will often be able to conclude that the benefits that can be offered to the bargaining defendant lack substance.

II. The Domino Theory

The conclusion to be drawn from *Hayes* and *Corbitt* is that the Court's proceduralism can ensure for the plea bargaining defendant neither a fair outcome nor other substantive advantages that outweigh the relinquishment of his rights. It would be premature, however, to call for substantive justice in plea bargaining on this basis alone. We must appreciate the full extent to which constitutional theory and the criminal system are wedded to proceduralism. In fact, a proceduralist approach to plea bargaining may be neither a vice nor a virtue, but a necessity. The last possibility is what underlies the Court's ultimate defense of plea bargaining.

The nature of this defense was prefigured in *Brady v. United States*,[57] one of a trilogy of cases in which the Court first acknowledged the constitutionality of plea bargaining.[58] In that case, the Court rejected the argument that a guilty plea proven to be voluntary is invalid if motivated by fear of a jury's statutory power to inflict the death penalty, even if subsequent to the plea the statutory penalty is determined to be unconstitutionally burdensome of the right to a jury trial.[59] There was no evidence of any overt bargaining by the parties in *Brady* or in either of the companion cases. The Court came to discuss plea bargaining only in the course of considering this more general problem: how, if at all, the Constitution should distinguish those situations in which the defendant's state of mind prevents a voluntary plea from those situations in which the simple necessity of choosing a plea "involves the making of difficult judgments."[60] The Court made a distinction that was decidedly pragmatic. "The State to some degree," stated Justice White's majority opinion, "encourages pleas of guilty at every important step in the criminal process."[61] This is, of course, true. The criminal process is designed to give the defendant the chance to plead out at any point, which is exactly why the Court has been so solicitous

57. 397 U.S. 742 (1970).

58. The other cases were McMann v. Richardson, 397 U.S. 759 (1970) and Parker v. North Carolina, 397 U.S. 790 (1970).

59. That was the holding in United States v. Jackson, 390 U.S. 570 (1968). For a discussion of *Jackson*, *Brady* and *McMann v. Richardson* see note 38 *supra*.

60. McMann v. Richardson, 397 U.S. 759, 769 (1970).

61. *Brady*, 397 U.S. at 750.

of his freedom to choose.[62] Once the state begins to move against a defendant by, for example, accumulating evidence, it necessarily applies pressure to plead guilty. The result is that a high percentage of convictions rest on guilty pleas. Plea bargaining, the Court observed, is a clear illustration of these basic facts.[63] The Court concluded that Brady's knowingly and freely made plea could be invalidated only at the price of a philosophically inherent and statistically overwhelming feature of our criminal justice system. Such a result, consistently adhered to, would

> require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected courts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.[64]

For these reasons, the Court felt justified in looking only at the psychological history of Brady's plea to determine its validity.

In *Hayes* and *Corbitt*, the Court also pointed to the necessarily legitimate objective of facilitating guilty pleas, this time as justification for otherwise objectionable aspects of plea bargaining. The majority opinion in *Hayes*, in defense of the prosecutor's threat, observed that "a 'discouraging effect on the defendant's assertion of his trial rights [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.' "[65] It is one of "the very premises that underlie the concept of plea bargaining" that "the prosecutor's desire to induce a guilty plea" is justified.[66] Thus, implied the Court, it is impossible to differentiate in principle between offering leniency or threatening legal punishment. By virtue of upholding plea bargaining, "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 forego his right to

62. Justice Harlan, in oft-quoted words, made the point this way: "The criminal process . . . is replete with situations requiring 'the making of difficult judgments' as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." McGautha v. California, 402 U.S. 183, 213 (1971) (citation omitted).

63. *See* Brady v. United States, 397 U.S. at 751-52.

64. *Id.* at 753.

65. 434 U.S. at 364 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

66. *Id.* at 364-65.

plead not guilty."[67] This same language was quoted in *Corbitt*, to the effect that there can be "no *per se* rule against encouraging guilty pleas."[68]

The thrust of this argument is to address hypothetical consequences that could engulf the system, rather than the actual behavior of the parties to the case. It is in the nature of a "Domino Theory": if the prosecutor's threat in *Hayes* or the statutory inhibition in *Corbitt* is deemed unconstitutional by reason of the character of the pressure exerted, then the Court is powerless to stop short of wholesale condemnation of a system that offers—and requires—difficult choices. It is evidently one thing to criticize plea bargaining practices on the grounds of a defendant's insufficient freedom or rationality; this is an empirical, case-by-case approach that accepts at least tacitly the legitimacy of the free bargaining process and its attendant bumps and bruises.[69] It is another thing to criticize plea bargaining by calling into question the mutual pressures that define it and many of the transactions within our criminal justice system.

Is the Court's conclusion sound? Is it necessarily the case that the fate of plea bargaining and even of the criminal justice system at large depends on whether or not the prosecutor's threat in *Hayes* is viewed as inherently unsound, apart from the state of mind of the defendant? This is perhaps the pivotal question raised by *Hayes* and *Corbitt*. A valid Domino Theory is a serious obstacle to the substantive approach to plea bargaining that cases such as *Hayes* and *Corbitt* invite. For, if the Court is correct as to this theory and its scope, two conclusions follow: (1) Pressures within the criminal process to plead guilty cannot be differentiated for constitutional purposes, except on proceduralist grounds of voluntariness; (2) therefore, intervention to redress abuse in substantive terms—to exercise a measure of control over the content of a bargaining defendant's choices, or over the reasons for which choices

67. *Id.* at 364.

68. 439 U.S. at 218-19 & nn.8-9. The *Corbitt* majority added, "withholding the possibility of leniency from . . . those who go to trial . . . cannot be equated with impermissible punishment as long as our cases sustaining plea bargaining remain undisturbed." *Id.* at 223-24.

69. The voluntariness test is a particularly passive way of protecting a defendant's constitutional interests. In focusing on a defendant's response to his environment of choices, it uncritically presumes their validity. In *Brady*, for example, the objective fact that the death penalty provision was unconstitutional as unduly inhibitive of the right to a jury trial simply was not relevant from the point of view of the defendant's subjective state of mind at the time of his plea. *See* note 38 *supra*. Concern with voluntariness thus can be seen as a retreat into the defendant's mind that to a large extent leaves the defendant at the mercy of the government's decisions about his choices.

are presented to him—entails radical change of the entire system of criminal justice. From this point, a third conclusion is easy enough, particularly for a judicial body: We ought not to intervene in plea bargaining for substantive reasons.

The task of the remainder of this article is to come to grips with this logic. In Part IV, two constitutional approaches are examined as substantive techniques for scrutinizing ways by which the criminal process discourages the exercise of the right not to plead guilty. In Part III, the general difficulties these approaches must face are explored.

III. Obstacles to a Substantive Approach to Plea Bargaining

An initial objection to the Court's Domino Theory might focus on its failure to distinguish plea bargaining from other practices. It is apparent that plea bargaining differs from other ways by which the criminal justice system inhibits assertion of the right not to plead guilty, by virtue of its reciprocity, or what the Court has termed "give-and-take." It could be argued, therefore, that plea bargaining, at least in theory, is not threatened by an approach that takes seriously the right not to plead guilty. This was Justice Brennan's view, when he balked at the Court's attempt in *Brady* to construct a Domino Theory:

> The argument [of the majority] appears to reduce to this: because the accused cannot be insulated from *all* inducements to plead guilty, it follows that he should be shielded from *none* . . . [But we] are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his rights to a jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punishment are stated in "unalterable form."[70]

Upon inspection, however, this argument is unpersuasive.[71] Jus-

70. Parker v. North Carolina, 397 U.S. 790, 808-09 (1970) (Brennan, J., dissenting in *Parker* and concurring in *Brady*). Subsequently, in *Hayes*, this argument and its language was carelessly used, not to criticize the Domino Theory, but to buttress the Court's finding of voluntary choice. *See* notes 29-39 and accompanying text *supra*.

71. Justice Brennan made two other unsuccessful attempts in *Parker* to distinguish plea bargaining and the type of statute involved in *Parker* and *Brady*. First, he maintained that "the legislatively ordained penalty scheme may affect any defendant," tempting even defendants aware of their innocence to plead guilty. 397 U.S. at 809 (Brennan, J., dissenting). But the risk of false pleas is apparently great in all forms of plea bargaining, despite procedural safeguards. *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 33, at 60-69; Alschuler, *supra* note 56, at 1278-306. Second, Justice Brennan noted the

tice Brennan's sanctification of the bargaining element in plea bargaining is paradoxical, for reciprocity seems to make plea bargaining more inherently antagonistic to the defendant's rights—not less—than other, unilateral forms of deterrence. Plea bargaining is an attempt to reach a "meeting of minds" on the laying down of a fundamental right; there is no other point to undertaking it. The consensual aspect of plea bargaining underscores that its discouraging effect is no accident. By contrast, for example, the state's accumulation of evidence, a non-bargaining activity, is not necessarily intertwined with the defendant's desires and can be characterized in terms of an independent purpose, namely preparation for trial. From at least this perspective, plea bargaining not only is similar to other dominoes in its antagonism toward the exercise of the right not to plead guilty, but is the purest form of this antagonism. Assuming this purity does not itself constitute a reason for special condemnation of plea bargaining,[72] the majority in *Hayes* and in *Corbitt* was basically correct in seeing plea bargaining as emblematic of the problem of choice within the criminal process generally.

Having gone this far, another step seems to follow. Within plea bargaining itself, no tactic can be differentiated from others in terms of plea bargaining's defining goal of reaching consent on a guilty plea. Once one agrees with the Court in *Hayes* that "the simple reality" of plea bargaining is "the prosecutor's interest at the bargaining table . . . to persuade the defendant to forgo his right to plead not guilty,"[73] then the harshest tactic—as in *Hayes*—is no different in kind from the most generous concession. Each serves the prosecutor's legitimate institutional interest in the same way. That some tactics may "persuade" too well is not grounds for special criticism after *Hayes*. To this extent, the Domino Theory is correct in identifying plea bargaining with all other aspects of the criminal justice system that encourage guilty pleas.

The ways in which government may treat individual rights are limited by the Constitution. Yet this mandate is very difficult to obey in the case of criminal defendants, because the boundary between permissible and impermissible government burdens on their rights is relatively unclear. The difficulty stems from two general features of theorizing about a defendant's constitutional rights, each of which in its

unique severity of the capital punishment threat presented by the statutes in the two cases. *See* 397 U.S. at 809-10. This argument, too, could equally apply, in theory, to prosecutorial plea bargaining tactics.

72. There is in fact no basis in constitutional doctrine for distinguishing plea bargaining from other types of deterrence on the basis of inherent as opposed to "incidental" chilling effect. *See* notes 141-67 and accompanying text *infra*.

73. 434 U.S. at 364.

own way fortifies the Domino Theory. A consideration of these features sets the stage for the detailed examination of constitutional doctrines governing guilty pleas in Part IV.

The first characteristic is the absence of a frame of reference, either in the nature of things or within the four corners of the Constitution, that could serve to distinguish permissible from impermissible impact upon the rights of the criminal defendant. A useful contrast is the role the two religion clauses of the First Amendment play in protecting rights. In *Sherbert v. Verner*,[74] for example, a majority of the Supreme Court decided that a South Carolina statute that conditioned unemployment benefits on willingness to work could not be applied to a Seventh-Day Adventist who refused to work on Saturdays for religious reasons. Justice Brennan, writing for the Court, explained that the statute "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."[75] Since the basis of the decision was the free exercise clause, it was not open to the dissent to urge that, by the majority's logic, every enforcement of the Saturday work requirement was unconstitutional. Nor did it follow that every discouragement of religious exercise was forbidden, since under the majority's analysis one would first have to establish that the exercise came under the protection of the free exercise clause, and then find that its discouragement was sufficiently unreasonable and serious to implicate the Constitution's historic concern for religious liberty.[76] In short, the majority's analysis was circumscribed by the recognized boundaries of the free exercise clause. Notably, Justice Harlan in his dissent did not question these boundaries. He maintained that, by carving out an exception to the South Carolina law for religious observers, the Court was forcing the state to violate the neutrality toward religion mandated by the establishment clause.[77] The

74. 374 U.S. 398 (1963).

75. *Id.* at 404.

76. As the majority explained its analysis: "Plainly enough, appellant's conscientious objection . . . constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision . . . is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest. . . .'" *Id.* at 403 (citation omitted). South Carolina could not meet either of these tests. *See id.* at 403-08. More recently, the Court reiterated this approach in Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707 (1981).

77. *See* 374 U.S. at 422-23 (Harlan, J., dissenting). For a discussion of the tension between the establishment clause and the free exercise clause, see *id.* at 414-17 (Stewart J.,

two positions in *Sherbert* were in a sense symmetrical, for each religion clause allegedly required of South Carolina equal treatment for a discrete class, but a different class in each case: the class of all religious observers, according to the majority; the class of all who are unavailable for work on Saturdays, according to the dissent.

The disagreement in *Sherbert* thus was largely over what lines were relevant rather than whether line drawing was possible at all. In the context of the criminal process, however, the more basic issue arises, because no framework analogous to the religion clauses defines permissible and impermissible burdens on the right not to plead guilty. Short of finding a plea to be "involuntary in a constitutional sense" or burdened for reasons that abridge equal protection,[78] courts have recourse only to the relatively fluid and open-ended due process clause.

Compounding the difficulty here is the absence of a "natural" boundary, available to common sense, separating permissible from impermissible burdens upon the criminal defendant's rights. The universe of choice facing a defendant who ponders whether or not to plead guilty is almost entirely artificial—a creation of decisions made by the government.[79] Discrete government acts, combined with a backdrop of applicable legislation, define the criminal defendant's pleading risks at all stages of the criminal process, so that there is scarcely a pleading decision that cannot be attributed to the government's influence. This is obviously so in those cases where the defendant acts because of what might happen to him within the criminal system, yet even when a defendant makes a choice for reasons that are ultimately not self-regarding, it is usually triggered by his prospects at the hands of the government—as when a defendant pleads guilty to spare his family the

concurring) and Thomas v. Review Bd. of Ind. Employment Security Div., 450 U.S. 707, 722-27 (1981) (Rehnquist, J., dissenting).

78. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363-64 (1978).

79. The distinction between "natural" and "artificial" is used advisedly. The idea that influences upon individual choice can be categorized into products of government decisions, on the one hand, and natural or socially spontaneous forces, on the other, is obsolete. From the standpoint of our experience in the modern welfare state, *any* consideration that enters into a choice can be traced to some government act and hence can be seen as responsive in some degree to conscious policy. *See* Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1085-88 (1977). *See generally* R. WOLFF, THE POVERTY OF LIBERALISM 89-93 (1968). The distinction might be more accurately characterized as the difference in the degree to which government responsibility is direct and the degree to which we can pinpoint which governmental cause is responsible for which effect. These distinctions are not without moral and political significance. *See generally* J. SMART & B. WILLIAMS, UTILITARIANISM 77, 93-118, 135-50 (1973).

embarrassment or strain of trial.[80]

This pervasive government presence is not so clear in other areas where government action and the exercise of rights interact. Recently, for example, in *Harris v. McRae*,[81] the Court declared the constitutionality of the Hyde Amendment, which restricts the use of Medicaid funds for therapeutic or medically necessary abortions to categories far narrower than those applicable to funds used for medical purposes unrelated to abortion, including childbirth. A threshold question for the majority was whether or not the amendment constituted an infringement of a woman's due process interest in terminating pregnancy for the sake of her health.[82] Justice Stewart, writing for the majority, said it did not. Quoting the Court's earlier decision in *Maher v. Roe*,[83] he noted "the 'basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.' "[84] The abortion restriction in this case was of the latter variety; it was simply a refusal to subsidize a choice. The majority could therefore dispose of the due process contention as follows:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.[85]

Admittedly, the distinction made in the decision is problematic, for at least two reasons. First, it may be irrelevant to the due process argument, which arguably turns on the sheer discrepancy in consequences created by the amendment, and its inherent chilling effect, not on whether the government has taken affirmative steps to interfere with anyone's action.[86] Second, the distinction itself is less clear-cut than

80. An exception might have to be created for those presumably rare cases in which a defendant pleads guilty thinking it is the "right" thing to do, or because he feels the need to seek punishment.

81. 448 U.S. 297 (1980).

82. The validity of that interest was established in Roe v. Wade, 410 U.S. 113 (1973), affording constitutional protection to a woman's decision to terminate her pregnancy.

83. 432 U.S. 464 (1977) (due process does not require equal funding of childbirth and abortions not medically necessary).

84. 448 U.S. at 315 (quoting Maher v. Roe, 432 U.S. 464, 475 (1976)).

85. *Id.* at 316. *See also* Maher v. Roe, 432 U.S. 464, 474 & n.8 (1977).

86. This would be the approach taken under the due process doctrine of unconstitutional conditions, discussed at notes 141-67 and accompanying text *infra*. *See also* Harris v. McRae, 448 U.S. at 329-37 (Brennan, J., dissenting); *id.* at 349-57 (Stevens, J., dissenting);

Justice Stewart describes and so might not be able to bear the tremendous moral weight it must assume in his argument.[87] Nevertheless, a causal distinction exists here which, combined with the undeniable proposition that government cannot do everything, lends force to the *McRae* holding.[88] The situation is notably different in the criminal justice system where, except for uncommon circumstances, it just cannot be argued on behalf of the government that pressures to lay down the right to trial are "not of its own creation."

The second feature that fortifies the Domino Theory is this: present constitutional theory lacks a ready means for distinguishing excessively harsh terms from among the terms that the government presents defendants in order to obtain guilty pleas, which seriously hampers attempts to winnow out one-sided plea bargaining outcomes. This is not to deny that there are such outcomes, as the fate of *Hayes* should remind us: life imprisonment for uttering a forged check, meted out to a defendant lacking a prior prison record, expressly in response to his refusal to bargain. "The prosecutor's actions denied respondent due process," argued Justice Powell in his *Hayes* dissent, "because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights."[89]

Unfortunately, Justice Powell did not elaborate on his idea of "unique severity," which indicates the nature of the problem to be considered. Though the outcome in *Hayes* can be felt to be grossly disproportionate and unfair, we are still without *reasons* that explain why *Hayes* is wrong and yet why other cases where the government is vindicated, however similar the facts, are correct. We are entitled to justifications for a judicial decision that go more deeply and broadly than repetition of the intuitive sense that the particular case under review is right or wrong. Indeed, this degree of rationality may be imperative if the premise for our dialogue is that individuals possess ascertainable rights.[90] The search for a theory of proportionality has, however,

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Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (invalidating state statute similar to Hyde Amendment as an unconstitutional condition under state constitution); Moe v. Secretary of Admin. & Fin., 1981 Mass. Adv. Sh. 464, 417 N.E.2d 387 (1981) (invalidating state statute similar to Hyde Amendment as an unconstitutional condition under state constitution).

87. *See* note 79 *supra*.

88. The intuitive appeal of such an argument was once exploited by President Carter, who observed, in defense of the Court's decision in Maher v. Roe, 432 U.S. 464 (1977), that "there are many things in life that are not fair." N.Y. Times, July 13, 1977, at A1, col. 4.

89. 434 U.S. at 372-73 (Powell, J., dissenting).

90. The idea that individuals have specific rights against the state seems to entail ambitious claims for the consistency and determinacy of judicial decisionmaking, including even

proved unsuccessful. The *Hayes* case is painfully frustrating, because the outrage that the prosecutor's charge elicits seems impotent at the level of constitutional theory. More generally, we are deprived of a means by which certain government responses to the exercise of criminal rights could be singled out as unjustified without threatening the adversarial basis of the system itself.

We can best begin to illustrate the elusiveness of a standard for proportionality in a context other than that of plea bargaining. The Supreme Court has recently attempted to resolve an ambiguity in the scope of the Eighth Amendment prohibition against cruel and unusual punishment. In several of its capital punishment decisions, the Court seemed to suggest that the disproportionality of a criminal sentence is a sufficient consideration to warrant Eighth Amendment condemnation in cases not only of the death penalty, which is "unique in its total irrevocability,"[91] but of any punishment.[92] This suggestion has been substantially if not entirely repudiated by the Court in *Rummel v. Estelle*.[93] Justice Rehnquist, writing for the majority, upheld the application of a Texas recidivist statute to a defendant convicted on a felony count of obtaining $120.75 by false pretenses, notwithstanding that life imprisonment was the necessary result. The Texas statute dictated a life term for defendants with two prior felony convictions, and Rummel had previously been convicted of passing a forged check of $28.36 and fraudulently using a credit card to obtain $80 worth of goods—both felonies.[94] The facts strongly resemble those of *Hayes*, with one obvious exception: the absence of any plea bargaining. Rummel's sole basis for attacking his sentence was the Eighth Amendment, specifically its alleged strictures against sentencing grossly disproportionate to the crime.

Justice Rehnquist began with an historical analysis of the cases that was designed to show that disproportion *per se*, in the absence of the death penalty or some other extraordinary incident of the sentence, is simply not an Eighth Amendment issue for crimes concededly classi-

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the claim that there is a "single right answer" to the question: what rights do we have? *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, ch. 13 (1977); Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

91. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

92. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); *id.* at 601 (Powell, J., concurring in part and dissenting in part); Gregg v. Georgia, 428 U.S. 153, 171-73 (1976) (plurality opinion). *See also* Ingraham v. Wright, 430 U.S. 651, 657 (1977) (context of corporal punishment in public schools). *See generally* Clapp, *Eighth Amendment Proportionality*, 7 AM. J. CRIM. L. 253, 263-72 (1979).

93. 445 U.S. 263 (1980).

94. *Id.* at 265-66.

fiable as felonies.[95] The *Rummel* dissent, written by Justice Powell, vigorously disagreed with this construction of the case law.[96] Beyond this, Justice Rehnquist advanced an important reason, never effectively rebutted by the dissent, why the conviction should stand:

> [A] more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view . . . that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.[97]

The *Rummel* opinion proceeded to dwell at some length on the problems of line drawing across cases that can vary widely in their relevant circumstances. Justice Rehnquist admitted that "objective" determinations of excessiveness in punishment were possible in highly egregious cases in which, one might say, the facts speak for themselves.[98] What he emphatically denied was that general reasons could be given for such a judgment that would hold up in other contexts, even those as apparently extreme as Rummel's.

Justice Rehnquist took on each of the proportionality criteria suggested by Rummel. He thus observed that the absence of violence in each of Rummel's crimes could not sustain his Eighth Amendment argument, because many examples come to mind in which nonviolent crime merits severe punishment.[99] This shows that what we call the gravity of an offense does not vary along a single axis, but is informed by a wealth of incommensurable social concerns.

> The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different from a man who takes a smaller amount of money from the same savings and loan at the point of a gun. . . .
>
> In short, the 'seriousness' of an offense or pattern of offenses in modern society is not a line, but a plane.[100]

Rummel was found guilty of expropriating funds or goods totaling only

95. *See id.* at 271-76.

96. *Id.* at 287-93 (Powell, J., dissenting).

97. *Id.* at 275.

98. The majority admitted, for example, "that a proportionality principle would . . . come into play in the extreme example mentioned by the dissent, *id.* at 288, if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274, n.11. For an attempt to narrow the holding of *Rummel* by seizing upon this qualification, see Terrebone v. Blackburn, 624 F.2d 1363 (5th Cir. 1980).

99. 445 U.S. at 276-77, 281, 282 n.27.

100. *Id.* at 282 n.27.

about $230 over three separate offenses. Yet, taken by itself, the insignificance of the value involved in a case is not dispositive either. Could Rummel have been duly sentenced to life imprisonment, asked Justice Rehnquist, for crimes involving $5,000? $50,000? Line drawing of this kind is obviously "subjective."[101] Nor, according to the majority, would it avail Rummel to argue on the basis of the severity inherent in the Texas three-felony rule. Is it plausible to say that three felonies is insufficient warrant, but four felonies sufficient, for a life sentence?[102] The point at which a recidivist will be deemed to have demonstrated the propensities that merit a life term is perforce a matter "largely within the discretion of the punishing jurisdiction."[103]

With these questions, the majority neutralized Rummel's central argument: his massive presentation of statistics which unfavorably compared his fate with what would have happened had he been convicted of a comparable offense defined by the law of other states or convicted of a different type of offense under Texas law.[104] If, as the majority argued, different types of offenses are practically incommensurable in their seriousness, such statistics lose force.[105] They serve only to reflect the states' consensus, possibly a naive one, about crime. The majority's analysis suggests that statistical comparisons yield valid judgments about proportionality only if the complex variables that determine the gravity of offenses can be controlled. Apparently, only in unusual circumstances can this be done.[106]

Justice Rehnquist's *reductio ad absurdum* strategy for protecting the discretion of state prosecutors and legislators from judicial interference is not entirely persuasive. It is misleading, for example, to use the arbitrariness of all monetary classifications of offenses to suggest the absence of criteria for disproportionality. Any classification can seem arbitrary at the edges, and uncertainty over boundaries does not necessarily threaten our ability to pass judgment on examples within the core

101. *Id.* at 275.

102. *See id.* at 281.

103. *Id.* at 285. *See also* Oyler v. Boles, 368 U.S. 448, 456 (1962).

104. 445 U.S. at 279-84; *id.* at 297-302 (Powell, J., dissenting). On the uses of such comparative data, see Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119 (1979).

105. The majority cited additional reasons why "Rummel's extensive charts [do not] even begin to reflect the complexity of the comparison he asks this Court to make," *id.* at 280 (*e.g.*, the possibilities for parole, and the leeway that must be afforded a prosecutor in his charging decisions, *id.* at 280-81).

106. For example, where a state imposes a harsher penalty for a lesser included offense than the maximum sanction it authorizes for the greater offense, it is reasonably safe to conclude that the principle of proportionality has been violated. *See* Note, *supra* note 104, at 1137-41.

of the classification,[107] which is arguably where Rummel's predicament lies. The majority did concede at the outset that there are examples of punishment that can safely be condemned as disproportionate. Perhaps the necessary issue in *Rummel*, then, was whether the facts of the case fell within this special class. To that extent, Justice Rehnquist's concern with the objectivity of rules was simply a distraction.[108]

Yet, perhaps without realizing it, the majority opinion may have succeeded in establishing a more radical proposition: in cases where proportionality is at issue, our sense of a core (as opposed to a boundary) situation is itself an intuitive response to the facts of the case. In this way, the indeterminacy of concern to Justice Rehnquist can be said to infect all judgments about disproportionality.[109] Surely a monetary scale, or any other, can scarcely do justice to the complexity of society's moral and strategic judgments about particular offenses; it is possible to conceive of circumstances in which even a series of nonviolent crimes involving $230 could merit a term of life imprisonment. If this analysis is correct, any wrong done to Rummel is inexplicable by responsible line drawing. We might say that *Rummel* is a rare and easy case in which a confluence of factors indicating disproportion lies behind our judgment that the sentence imposed was excessive. In most cases, these factors will diverge. In either event, however, the absence of articulated principles for decision makes possible an argument from judicial humility that a finding of disproportionality would be irresponsible and unjustified.

This conclusion may overstate the effect of the *Rummel* decision. But it is undeniable that the majority successfully isolated extreme cases like Rummel's from the vast majority of cases, where decisions about proportionality are fraught with uncertainty. For our purposes, the bottom line of *Rummel* is that proportionality judgments are at best

107. *See generally* H.L.A. HART, THE CONCEPT OF LAW, ch. 7 (1961).

108. There is good reason to suspect that Justice Rehnquist's views in *Rummel* stem less from a consistent philosophy of judicial decisionmaking than from a determination to minimize federal court intervention in state criminal proceedings. In Godfrey v. Georgia, 446 U.S. 420 (1980), decided two months after *Rummel*, Justice White, joined by Justice Rehnquist, dissented from the Court's holding that the words "outrageously or wantonly vile, horrible or inhuman," which defined capital offenses in Georgia, had been capriciously interpreted in sentencing the petitioner to death. Justice White premised his dissent on the argument that the language "an unequivocal legislative mandate," could be responsibly and consistently interpreted by Georgia courts. *Id.* at 452-57 (White, J., dissenting).

109. This degree of skepticism is illustrated by Justice Rehnquist's concluding remark: "We all, of course, would like to think that we are 'moving down the road toward human decency[.]' *Furman* v. *Georgia*, 408 U.S. 238 at 410 . . . (Blackmun, J., dissenting). Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies." 445 U.S. at 283.

of very limited help in discriminating among plea bargainings and other pressures within the criminal process.

IV. Due Process and Plea Bargaining

The Court in *Hayes* and in *Corbitt* considered two doctrines of due process that seemed applicable to plea bargaining: in *Hayes*, the doctrine of "vindictive prosecution"; in *Corbitt*, the doctrine of "unconstitutional conditions" upon the assertion of rights. In each case, however, the substantive constitutional challenge to plea bargaining represented by the doctrine was rebuffed. This section will explore the degree to which the features of criminal justice and constitutional theory just considered ratify the Court's rejection of substantive criticism in these cases.

A. Vindictive Prosecution Doctrine

The doctrine proscribing judicial and prosecutorial vindictiveness was first set forth in *North Carolina v. Pearce*[110] and in *Blackledge v. Perry*.[111] The defendant in *Pearce*, after being convicted and sentenced to a twelve-to-fifteen-year term, successfully attacked his conviction on constitutional grounds, but was retried, convicted, and sentenced to a term that—when added to the time he had already spent in prison—amounted to a longer sentence than had been originally imposed. Justice Stewart, writing for the Court, first dismissed the suggestion that an increased severity in sentence upon reconviction, of itself, violates the Constitution.[112] The circumstances of the case, nevertheless, were such that the sentence could not be imposed. Justice Stewart reasoned that a harsher sentence imposed for "the explicit purpose" of punishing a defendant for exercising his right of appeal would be a "flagrant" violation of due process. And since the fear of retaliation could inhibit exercise even when a malign purpose is absent, due process also demands that a defendant be freed of the "apprehension of . . . a retaliatory motivation."[113] The Court therefore required that, whenever a judge imposes a harsher sentence after retrial, he state his reasons on record for purposes of appeal; if he cannot point in justification to the defendant's conduct subsequent to the initial sentencing, the new sentence is void. The state government in *Pearce* failed this test,

110. 395 U.S. 711 (1969).

111. 417 U.S. 21 (1974).

112. 395 U.S. at 719-23. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 23-26 (1973); Colten v. Kentucky, 407 U.S. 104, 115-16 (1972).

113. 395 U.S. at 723-25.

even though there was no evidence in the case of a subjective purpose that could be deemed retaliatory.[114] In *Perry*, the Court, once again through Justice Stewart, extended the *Pearce* doctrine to the prosecutor and his power of seeking indictment.[115] As in *Pearce*, the Court was not satisfied by a lack of actual malice or vindictiveness. Speaking to the facts of the case, it concluded that "a person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one . . . ."[116] So long as there exists "a realistic likelihood of 'vindictiveness,'" the defendant has been denied due process.[117]

In *Hayes*, the same Justice who authored these two opinions emphatically rejected their applicability to plea bargaining. This result is remarkable, because the doctrine announced in *Pearce* and in *Perry* is strikingly apposite *Hayes* despite the shift in context from assertion of rights of appeal to plea bargaining.[118] The prosecutor in *Hayes*, by his admission, "upped the ante" solely in response to Hayes' insistence on his right to trial; no intervening information about the defendant was brought forward to justify it. And inasmuch as the prosecutor openly threatened Hayes with this action unless he agreed to a plea bargain, the prosecutor went beyond the "realistic likelihood" of vindictiveness required by the Court in *Perry*.[119] When one considers, finally, that the

114. *Id.* at 726.

115. The Court in *Perry* did not expressly require the application of *Pearce's* prophylactic rule to prosecutors. Lower courts have done so, however, in the name of *Perry*. *See, e.g.*, United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976); United States v. Jamison, 505 F.2d 407, 416-17 (D.C. Cir. 1974) (relaxing the *Pearce* rule to allow a harsher indictment based on information not reasonably available until after the first indictment, regardless of whether or not the information concerns the defendant's post-indictment conduct).

116. 417 U.S. at 28-29.

117. *Id.* at 27.

118. The *Pearce-Perry* doctrine has not been applied to plea bargaining, with the exception of the lower court decision reversed by the Supreme Court in *Hayes*. Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976), *rev'd sub nom.* Bordenkircher v. Hayes, 434 U.S. 357 (1978). Lower courts have punished vindictiveness by prosecutors bargaining over rights other than the right not to plead guilty. *See, e.g.*, United States v. DeMarco, 550 F.2d 1224 (9th Cir.) (statutory venue right), *cert. denied*, 434 U.S. 827 (1977); United States v. Lippi, 435 F. Supp. 808 (D.N.J. 1977) (right to trial before a federal district judge rather than a federal magistrate). For post-*Hayes* recognition of the exemption of plea bargaining from vindictive prosecution doctrine, see, *e.g.*, United States v. Andrews, 633 F.2d 449, 455-57 (5th Cir. 1980); United States v. Allsup, 573 F.2d 1141, 1143 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978); United States v. Velsicol Chem. Corp., 498 F. Supp. 1255, 1262-63 (D.D.C. 1980).

119. The Court in *Hayes* at one point seemed to suggest that *Perry* is distinguishable because there the prosecutor brought his more serious charge "without notice" to the defendant, in contrast to the *Hayes* prosecutor's open bargaining. *See* 434 U.S. at 360. But it

rights at stake in *Hayes* exceed in magnitude the statutory right to appellate review protected in *Pearce* and in *Perry*,[120] Justice Stewart's about-face seems perverse. As Justice Blackmun summarized in his *Hayes* dissent: "Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness."[121]

Paradoxically, however, the Domino Theory suggests that it is precisely the *difficulty* of differentiating the most innocent plea bargaining from the contexts in which the Court historically has found vindictiveness that led the Court in *Hayes* to repudiate categorically the *Pearce-Perry* doctrine. The difficulty is implicit in the Court's formulation of the inhibitive and retaliatory element common to all plea bargaining. If "the prosecutor in this case . . . no more than openly presented the defendant with the unpleasant alternatives of foregoing trial or facing charges on which he was plainly subject to prosecution,"[122] out of his "legitimate . . . interest . . . to persuade the defendant to forego his right to plead not guilty,"[123] can plea bargaining ever be considered vindictive in the sense captured by *Pearce* and *Perry*? And if it can, how is it to be distinguished from other presentations of "unpleasant alternatives" in the criminal system and so singled out for prohibition? To answer these questions posed by the Domino Theory, it is necessary to define exactly what the Court has meant by "vindictiveness."

The *Pearce-Perry* doctrine carries strong intuitive appeal. The reasoning in *Pearce* begins with the premise that imposition of a heavier sentence for the "explicit purpose" of punishing a defendant for asserting his rights is patently wrong and unconstitutional. We are right to expect that a government official will act upon a conception of his duty that is free from vengefulness or spite—motives which, if nothing else, are simply wasteful and irrational in relation to the public

cannot be seriously maintained that *Perry* should have been decided differently if prior to his notice of appeal Perry had been told of the consequences of his action, since this has no bearing on the vindictiveness of the prosecutor's response. *See* Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in* Bordenkircher v. Hayes, 6 HASTINGS CONST. L.Q. 269, 277-79 (1978). Moreover, *Perry* rests alternatively on the "realistic likelihood" of a vindictive response, so the fact that a particular defendant is or is not aware of that likelihood when he makes his choice is again irrelevant. *See also* notes 130-32 and accompanying text *infra*.

120. The Court in *Pearce* conceded that nothing in the Constitution requires states to establish methods of appellate review. *See* 395 U.S. at 724-25. One lower court has understood *Pearce* and *Perry* to protect any defendant who asserts a right with "due process overtones." United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

121. 434 U.S. at 368 (Blackmun, J., dissenting).

122. *Id.* at 365.

123. *Id.* at 364.

welfare—particularly when the object is a criminal defendant exercising in good faith a valuable right.[124]

But the rule in *Pearce* and *Perry* cannot rest upon such a concern, because the state of mind called "vindictiveness" is largely a fiction of the law. Justice Holmes long ago explained the misleading character of the contrast so commonly drawn between a "subjective" basis for legal liability, such as "actual" intent, and an "objective" basis, such as negligence. In each case, the content of the standard derives from our own estimated probabilities, which differ only in degree, of the likelihood of bad consequences arising from the actor's conduct. The idea of malice or wrongful intent has a role in the legal evaluation of conduct, Justice Holmes concluded, not as a description of the particular actor's state of mind, but as a kind of shorthand for a community's general standards of foreseeability which define morally blameworthy behavior.[125] Holmes' theory has both a practical and a theoretical impetus. The practical aspect is of immediate relevance here. Surely it is a rare judge or prosecutor who would publicly disclose the vindictiveness in his heart, especially after the reasoning in *Pearce*.[126] And a prosecutor's plea bargaining motives can be inference-proof, because he has freedom to choose among strategies designed to disguise bad faith[127] and because plea bargaining usually escapes any publicity until after the fact.[128]

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124. For versions of this sentiment in the context of prosecutorial charging decisions, see MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *supra* note 13; ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *supra* note 13, § 1.8(b) at 37, 51-52; Westen & Westin, *supra* note 16, at 486-90.

125. Holmes explained his "general theory" of tort liability, for example, as follows: "If common experience has shown that some such consequence [as caused plaintiff's damages] was likely to follow the act under circumstances known to the actor, he is taken to have acted with notice, and is held liable . . . . The standard applied is external, and the words malice, intent, and negligence, as used in this connection, refer to an external standard. If the manifest probability of harm is very great, and the harm follows, we say that it is done maliciously or intentionally; if not so great, but still considerable, we say that the harm is done negligently; if there is no apparent danger, we call it mischance." O.W. HOLMES, *Privilege, Malice, and Intent*, in COLLECTED LEGAL PAPERS 117-18 (1920 & reprint 1952). *See also* O.W. HOLMES, THE COMMON LAW chs. 2-4 (1881).

126. The prosecutor's open-court admissions in *Hayes* are exceptional in this respect. *See* 434 U.S. at 371-72 (Powell, J., dissenting).

127. Thus, for example, a prosecutor can and frequently does inflate his initial charge so as to maximize leverage to plead guilty to a subsequent lower charge, at the same time creating an illusion of generosity. *See* D. NEWMAN, *supra* note 51, at 81; Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 33, at 85-105. On the prosecutor's broad discretion as to bargaining tactics, see generally Alschuler, *supra* note 3.

128. The current practice of judicial inspection of the negotiation record when the defendant tenders his guilty plea after a bargain has been struck, *see, e.g.*, FED. R. CRIM. P. 11, sheds little light on what took place during the negotiations. *See* D. NEWMAN, *supra* note

Of course, the government's plea bargaining involves *by definition* a conscious effort to use pressure to bring about a meeting of minds that is otherwise unattainable. This conclusion requires no epistemological leap. Ordinary bargaining behavior, however, can be considered "vindictive" only by ignoring the distinction between means and ends. The prosecutor in *Hayes*, for example, admittedly sought to inhibit the defendant from asserting his right to trial by brandishing a life term. His reason for the attempt was itself unobjectionable: to conserve the scarce judicial resources that would be spent in Hayes' trial and (insofar as Hayes became a visible example) in future trials of other defendants. This compound motivation is morally ambiguous, in contrast to the pure malevolence that was evoked by the intuitive idea of vindictiveness in *Pearce*. Awareness that a defendant's rights are being penalized or deterred through one's actions scarcely differentiates the state of mind of the prosecutor in *Hayes* from that of any other knowledgeable governmental actor within the criminal justice system. In short, even if we had a window into the minds of prosecutors, our moral calibrations of states of mind are neither so gross nor so certain as to yield the results arrived at in *Pearce* or *Perry* in any appreciable number of cases. This shortcoming illustrates the theoretical impetus behind the Holmesian position, which was to replace muddy ideas about the moral worth of states of mind with a comprehensive understanding of the social consequences of tolerating certain forms of conduct.[129]

It is not surprising, then, that the Court's attention since *Pearce* has centered on *Perry*'s clarification that the "apprehension" of vindictiveness must be based on a "realistic likelihood" of a vindictive response in order to qualify for protection. *Perry* has committed the Court to deciding the reasonableness of apprehension, by examining the outward features of the defendant's situation in order to decide whether they in fact hold the possibility of a vindictive response.[130] Some situations, as in *Perry*, are sufficiently intimidating to a reason-

51, at 218-21; Note, *supra* note 3, at 574-75; Note, *supra* note 48, at 296-97. *See also* Bordenkircher v. Hayes, 434 U.S. 357, 368 n.2 (1978) (Blackmun, J., dissenting).

129. *See, e.g.*, O.W. HOLMES, *Privilege, Malice, and Intent*, *supra* note 125, at 129-31; O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920 & reprint 1952).

130. *See* Ludwig v. Massachussetts, 427 U.S. 618, 626-29 (1976); Chaffin v. Stynchcombe, 412 U.S. 17, 24-28 (1973); Colten v. Kentucky, 407 U.S. 104, 116-18 (1972). *See also* United States v. Andrews, 633 F.2d 449, 453-57 (5th Cir. 1980); Lovett v. Butterworth, 610 F.2d 1002, 1005-07 (1st Cir. 1979); Jackson v. Walker, 585 F.2d 139, 143-44 (5th Cir. 1978); United States v. Velsicol Chem. Corp., 498 F. Supp. 1255, 1263-65 (D.D.C. 1980).

able defendant to warrant intervention, while others are not.[131] In no case is what the defendant actually did in response to the threat critical to the analysis, since the doctrine "is designed not only to relieve the defendant who has asserted his right from bearing the burden from 'upping the ante' but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future."[132] In the last analysis, the *Pearce-Perry* doctrine crystalizes into the explicitly "objective" concern with behavioral probabilities that Justice Holmes thought sound and necessary.

If the doctrine amounts to no more than this, however, it was probably rightly rejected by the Court in *Hayes*. The challenge posed in *Hayes* is whether "vindictiveness" is something uniquely objectionable, which can be condemned without implicating the criminal system as a whole. As has just been indicated, this concept must be refined to refer to a "realistic likelihood" of certain consequences following upon the defendant's use of rights. This is where the problem arises, for the Domino Theory teaches, rightly, that a realistic likelihood of harsh consequences *tout court* is endemic to choice within the criminal justice system. It can be said for the *Pearce-Perry* rule that it isolates only those specific occasions when the realistic likelihood of harmful consequences can be attributed to vindictive motive. But does this attribution *add anything* to an appreciation of the prosecutor's conduct? It is difficult to see how. First, there is no reason to suppose that the quality of a defendant's perception of vindictive burdens upon his rights differs from that of his perception of burdens imposed in complete good faith, assuming his choice to be constitutionally voluntary. Second, even if there were such a distinction, it is far from clear that it would justify the unique treatment of perceived vindictiveness required by *Pearce* and *Perry*. The perception of vindictiveness bears no strong correlation with either of the two plausible bases for intervention to protect the defendant: the prosecutor's actual state of mind, or the objective, statistical probability that the defendant's use of his rights will be successfully discouraged. In other words, if the ultimate concern in *Pearce*

131. *See, e.g.*, Chaffin v. Stynchcombe, 412 U.S. 17 (1973), where the Court denied that the requisite likelihood of vindictiveness inhered in a harsher resentencing by a jury, first, because the jury was ignorant of the defendant's prior sentence; second, because unlike a prosecutor, a jury generally has no personal stake in a prior conviction; and third, because a jury is generally insensitive to institutional concerns such as discouraging meritless appeals. *See id.* at 26-28. *But see id.* at 38-39 (Marshall, J., dissenting) (these factors go to the state of mind of the jury, not to what the defendant might reasonably have believed).

132. United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

and *Perry* is prosecutorial motive, one confronts the Holmesian critique. If the ultimate concern is the likelihood of a chilling effect, one would do well to look simply at the probabilities for a burdensome response to a defendant's use of rights, jettisoning the superfluous and arbitrary requirement that the response be attributable to vindictiveness. When this course is adopted, however, dominoes start to fall. Basically because "vindictiveness" is really a phantom, a doctrine built on it cannot stop short of the radical consequences predicted by the Court from substantive intervention in plea bargaining.

For all that, the behavior of the prosecutor in *Hayes* can readily be distinguished from that sketched in the Supreme Court's plea bargaining ideal. As we have already observed, the prosecutor's response to the defendant was grossly incommensurate with the seriousness of Hayes' known and alleged criminal history. It was not, moreover, the outcome of an attempt to tailor the state's justice to the particulars of the case as the prosecutor knew it at the time; the prosecutor simply wanted a guilty plea in order to spare the system the time and expense of a trial. Surely there is a critical difference between this kind of situation and one in which the prosecutor either reduces a justifiable charge in exchange for a plea or pursues a higher charge—as part, for example, of a multiple indictment—in light of uncertainty about the facts.

It is helpful here to distinguish, admittedly somewhat artificially, between two types of possible judgments from these observations. One concerns what might be called the moral character of the prosecutor's actions; the other concerns the proportionality or aptness of the consequences his actions produce in comparison with the nature of the defendant's alleged offense. The first type of judgment—*e.g.*, the "vindictiveness" of the prosecutor's actions—perforce reduces to an inference from what can be readily observed or calculated. Such inferences can be found in the dissents in *Hayes*. Justice Blackmun noted that "[e]ven had such an admission [by the prosecutor] not been made [namely, that his purpose was to discourage Hayes' use of his rights], when plea negotiations, conducted in the face of the less serious charge under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates 'a strong inference' of vindictiveness."[133] Justice Powell added in his dissent, "I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment."[134]

133. 434 U.S. at 367 (Blackmun, J., dissenting).

134. *Id.* at 371 (Powell, J., dissenting). Justice Powell, however, drew back from this

The basic problem with the dissents' estoppel approach is that it does not go nearly far enough,[135] for no inference as to the character of the prosecutor's acts is possible outside the type of situation presented in *Hayes*, where an enhanced charge follows a defendant's refusal to agree to plead guilty to the initial charge. In the common situation in which a defendant is simultaneously indicted on a principal charge and under an enhancement statute, for example, the prosecutor's pursuit at trial of conviction on the enhanced charge seems innocent enough if at the outset no bargaining failure provoked indictment on that charge. The chronology of the charges seems to make all the difference.[136] Equally difficult to interpret is the standard tactic of bargaining through charge reductions.[137] Studies have indicated that bargaining prosecutors will often inflate an initial charge in order to increase the leverage that can be brought to bear on the defendant to accept subsequent "generosity."[138] Yet this fact will not support an inference as to bad faith or vindictiveness *in any particular case*. For one thing, the same postulate from which the *Hayes* dissents began—good faith in the initial charging decision—leads to the conclusion that subsequent reductions are genuine concessions. Thus, to imply bad faith in situations where the charge is reduced requires a darker view of prosecutorial motive than in the *Hayes* type of situation. Even a malevolent prosecutor, moreover, might find it in his interest to so undercharge following a refusal to plead guilty to a charge which was his high card. He has less to lose by undercharging than did the prosecutor in *Hayes*, because by the time he decides to frame a lower charge he has some appreciation of the defendant's resistance. He may feel compelled to make a genuinely lenient second offer, whereas a prosecutor

conclusion later in his dissent, stating that he would agree with the majority in those cases in which a prosecutor's silence means that "a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor's motive would neither be indicated nor likely to be fruitful." *Id.* at 372.

135. Another possible problem is that these inferences may be undermined by the fact that a prosecutor often operates under enormous uncertainty at the time he first files his charges, so that he might in effect undercharge in order to "play it safe." *See* Alschuler, *The Prosecutor's Role in Plea Bargaining*, *supra* note 33, at 92-94. The prophylactic rule used in *Pearce*, however, could screen out cases where subsequent enhancement of the charge is justified by new information.

136. *See* Corbitt v. New Jersey, 439 U.S. 212 (1978). "The rationale of [*Hayes*] would *a fortiori* govern a case where the original indictment contains a habitual criminal count and conviction on that count follows the defendant's decision not to plead to a lesser charge." *Id.* at 221 n.10.

137. This is probably the most prevalent plea bargaining tactic. *See* D. NEWMAN, *supra* note 51, at 97; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 866-68 (1964).

138. *See* note 127 *supra*.

would be foolish to undercharge on the first indictment if it seemed possible that a higher charge would still produce a guilty plea. The final twist to the problem is that once the prosecutor is aware of his freedom to pursue his interests behind these plea bargaining forms, there would be little practical point to following the *Hayes* dissents' advice; banning the tactics used in *Hayes* would only increase his incentives to try the tactics that are within his legal power. Enforcing the estoppel idea would, in the long run, have the effect of subverting the presumption on which it rests.

The second and remaining issue is the proportionality or aptness of the consequences the prosecutor's behavior produces for the defendant. The basic difficulties here have been suggested in the earlier discussion of the Eighth Amendment case of *Rummel v. Estelle*.[139] The Court may have failed to persuade that Rummel's sentence was not grossly disproportionate, but, by pointing out the complexity and uniqueness of judgments of disproportionality, it effectively isolated the very small number of cases where such judgments are intuitively compelling. A conclusion that *Hayes* was wrongly decided on grounds of disproportionality, therefore, sheds little light beyond the particular circumstances of that case.[140] This limitation is particularly unfortunate considering the logic of *Pearce* and *Perry*, which invites what we have called an objective approach to burdens upon rights. Disproportionality is in theory one way of segregating certain governmental responses from others by looking at objective dimensions of the response, and these dimensions in turn are highly suggestive of the probability that the response will successfully discourage the defendant. This important realm of insight is lost, however, if proportionality is largely an unworkable criterion.

In sum, the guidance offered by our just criticism of the *Hayes* decision so far is practically negligible. The *Pearce-Perry* doctrine, if it proscribes the events in *Hayes*, will similarly proscribe much of the reciprocal pressuring that defines the criminal process. The ideas of bad faith generally and disproportionate punishment suffer from a sim-

139. *See* notes 91-109 and accompanying text *supra*.

140. Does the fact that in *Hayes* the defendant *chose* the risk of a disproportionate sentence help to justify it? It seems likely that the Court would have rejected an Eighth Amendment challenge by Hayes on this ground, just as it dismissed all other criticism of the consequences in that case because Hayes chose them freely. Surely this would be an error. A sentence found to be disproportionate is not less so because the defendant has knowingly chosen a course of action holding the possibility of such a sentence. To hold otherwise would enable the prosecutor to define the terms of Eighth Amendment analysis. *See also* note 69 *supra*.

ilar weakness: the scope of their application is either trivial or wholly problematic.

B. Unconstitutional Conditions Doctrine

It can be argued, however, that the due process treatment so far misses an important point about plea bargaining and other inhibiting practices within the criminal process: they place a price on rights. Even a threat of a proportionate sentence upon conviction, made in complete good faith, can be considered an actionable infringement of the right to trial. A good example might be *Corbitt*, where neither the sentence, life imprisonment for felony murder, seems grossly excessive, nor the state's action, institutionalized in a statutory scheme, seems vindictive. Our concern with such a case can be articulated by the doctrine of unconstitutonal conditions. The conditions approach is significantly different from the due process ideas previously encountered. It dispenses with the line drawing necessary for separating proportionate from disproportionate results, as in *Rummel*, or vindictive from nonvindictive motives, as in *Pearce* and *Perry*, or affirmative interference from failure to subsidize, as in *McRae*. At a minimum, conditions analysis does not depend at all upon whether the choice posed to the criminal defendant offers to make him better off than he could otherwise expect or threatens to make him worse off.[141] The only concern is that a prosecutor not be allowed to influence the exercise of a right by tying the defendant's fate to that exercise, thereby "produc[ing] a result which the State could not command directly."[142] Thus, even if a prosecutor were to offer a defendant several hundred thousand dollars in exchange for a guilty plea, his actions raise the possibility of an unconstitutional condition.

The doctrine of unconstitutional conditions has a long history,[143] which until recently has not included the field of criminal procedure. This history is instructive, however, because it reflects the struggle with the same unavoidable fact of deterrence of the use of constitutional rights that precipitated the Court's Domino Theory. The doctrine be-

141. On this basic distinction, see Nozick, *supra* note 37, at 447-53. *See also* Brunk, *The Problem of Coercion and Voluntariness in the Negotiated Plea*, 13 L. & SOC'Y REV. 527, 535-50 (1979).

142. Speiser v. Randall, 357 U.S. 513, 526 (1958) (a state cannot condition qualification for tax exemption on filing an oath denying advocacy of the overthrow of the government by force or other illegal means).

143. *See generally* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

gan in response to the practical consequences of the Supreme Court's view, at the turn of the century, that the government's discretion to withhold a concession or "privilege" from someone, or to impose a penalty upon him, implies its power to do these things in response to his assertion of a right.[144] This view had a certain logic, despite its rose-colored assumptions about individual freedom in the face of governmental action and its abstract philosophy of rights: "the greater [governmental] power contains the lesser."[145] But the oppressive practical consequences of this doctrine for rightful activity soon came to be appreciated. Justice Sutherland, who was no exponent of sociological jurisprudence, noted: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[146]

The watchword that emerged was that the state cannot achieve indirectly what it is prohibited from achieving directly.[147] Literally understood, however, this doctrine is no more tenable than its predecessor. When the state forbids the exercise of a right, on the one hand, and when it makes its exercise unattractive, on the other, the result in a particular case may be the same: the right is not availed of. But can the state comply with a duty not to tempt a person to forego his rights? This seems unrealistic, particularly in the criminal justice system, in which the state's chilling presence is ubiquitous and there are no constitutional guidelines to define the limits of such a duty. The other side to the ability to do without distinctions such as proportionate/disproportionate or vindictive/nonvindictive is a potentially bottomless conception of the state's legal obligations.

Thus, one critic of plea bargaining has suggested that under the doctrine of unconstitutional conditions all plea bargaining is unconstitutional.[148] The argument is that even if the alternatives given a bargaining defendant leave him indifferent as to pleading guilty, that defendant's right not to plead guilty has been violated because "the exercise of his right is chilled to the point of indifference, and the state

144. See Hale, *supra* note 143; Note, *supra* note 143, at 145-51.

145. Davis v. Massachusetts, 167 U.S. 43, 48 (1897). *See* Hale, *supra* note 143, at 321-22. *But see* Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-12 (1916).

146. Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 594 (1926).

147. *See* Hale, *supra* note 143; McCoy & Mirra, *supra* note 9, at 891-93; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968).

148. *See* Note, *supra* note 2, at 1395-1407.

effectively prevents jury trial in half of these cases [on a random basis]."[149] The state should thus be forbidden from ever "preventing" a jury trial through plea bargaining. This conclusion, though extreme, is not untenable. The same forbidden effect, however, can be ascribed to most acts taken by the state in its adversarial role within the criminal system, making such an argument a perfect foil for the Domino Theory.[150] By the same token, the argument would seem to imply that a defendant would almost never be allowed to waive his right to a jury trial, since failure to assert this right can invariably be traced to some feature of the criminal system for which the state is responsible. For all its radical implications, the commentator's position is consistent with the literal mandate of conditions doctrine, which turns on the simple fact of deterrence without differentiating permissible from impermissible kinds of influence.[151]

The most recent and most familiar version of conditions analysis attempts to solve these difficulties by "balancing" considerations, and so avoiding the rigidities involved in adherence to a simple formula. What the government "could not command directly" is no longer a self-evident premise, but shorthand for a conclusion derived from an evaluation of a host of situational variables: the importance of the right asserted; the degree of its actual or likely infringement; the weight of the government's goals that are offered to justify the condition imposed on the use of the right; and the extent to which the condition is "the least restrictive means" of advancing these goals or is "reasonably related" to them.[152] As an illustration, we can take our earlier hypothetical of a prosecutor's promise of money in exchange for relinquish-

149. *Id.* at 1402.

150. One author apparently believed it possible to set plea bargaining apart from other ways in which the state obtains guilty pleas: "Many of the values of a trial . . . are lost upon entry of any guilty plea. But at least in the absence of a bargain, a guilty plea may be a fair reflection of the defendant's own preferences unaltered by the state's ability to influence the results of his various choices." *Id.* at 1397. The Domino Theory rests in part on the assumption, which seems correct, that the state's ability to influence the results of a defendant's choices is not limited to plea bargaining.

151. It is revealing that the predominantly hostile judicial responses to plea bargaining at the beginning of this century often took such an uncompromising stance on the sanctity of the pleading decision. *See, e.g.*, Griffin v. State, 12 Ga. App. 615 (1913). "The affirmative plea of guilty is received because the prisoner is willing, voluntarily, without inducement of any sort, to confess his guilt . . . . [W]ithdrawal of the plea should be allowed whenever interposed on account of 'the flattery of hope or the torture of fear'. . . ." *Id.* at 622-23 (citation omitted). *See* Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 19-26 (1979).

152. *See* Hale, *supra* note 143, at 322, 349-52, 357; O'Neil, *supra* note 143, at 460-77; Rubin, *The Resurrection of the Right-Privilege Distinction?*, 7 HASTINGS CONST. L.Q. 165, 171-74 (1979); Note, *supra* note 143, at 151-73.

ing the right to trial. Although neither vindictive nor disproportionate punishment is an issue here, the doctrine of unconstitutional conditions would allow us to criticize the practice as follows. Obviously the government could achieve the admittedly sound goal of providing criminal defendants with money in ways both less prejudicial to the critical right to trial and more precisely focused on need. Indeed, it is arbitrary—in terms of the achievement of the supposed goal—that those targeted for relief should be limited to the class of defendants, needy or not, who have waived such a right. The gerrymandering in this instance makes clear that the government is far more concerned with preventing defendants from using their rights, which is not a proper goal in itself, than with extending to them financial support, and that the latter is at best a subterfuge. All things considered, the prosecutor's practice violates due process.[153]

Judicial balancing has been particularly prominent in the area of conditions upon rights of criminal defendants.[154] A structural feature of the criminal system and its constitutional doctrine has been explored here that might explain this prominence: the absence of persuasive, clearly defined boundaries for the respective territories of individual rights and government powers. What now must be seen is whether balancing can fill the vacuum, thereby discrediting the Domino Theory and requiring the Court to confront the problem of substantive justice in plea bargaining that it has heretofore avoided.

The most influential guilty plea case to date dealing with unconstitutional conditions is *United States v. Jackson*.[155] There the Supreme Court considered the constitutionality of a provision of the Federal Kidnapping Act[156] which allowed the imposition of the death penalty

153. This is the sort of argument used by Justices Brennan and Stevens in their respective dissents from the majority's abortion funding decision in Harris v. McRae, 448 U.S. 297 (1980). *See* notes 81-88 and accompanying text *supra*. Justice Brennan; for example, stressed that "[i]t is no answer to assert that no 'penalty' is being imposed because the State is only refusing to pay for the specific costs of the protected activity rather than withholding other Medicaid benefits to which the recipient would be entitled or taking some other action more readily characterized as 'punitive.' Surely the government could not provide free transportation to the polling booths only for those citizens who vote for Democratic candidates, even though the failure to provide the same benefits to Republicans 'represents simply a refusal to subsidize certain protected conduct,' [448 U.S. at 317 n.19]". 448 U.S. at 336 n.6 (Brennan, J., dissenting).

154. For cases involving the right to trial, see, *e.g.*, Ludwig v. Massachusetts, 427 U.S. 618 (1976); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); McGautha v. California, 402 U.S. 183 (1971); United States v. Jackson, 390 U.S. 570 (1968).

155. 390 U.S. 570 (1968).

156. Ch. 645, § 1201, 62 Stat. 760 (1948), *as amended by* ch. 971, 70 Stat. 1043 (1956) (current version at 18 U.S.C. § 1201 (1976 & Supp. 1979)).

only by verdict of a jury following a jury trial, thereby discouraging assertion of the Sixth Amendment right to a jury trial.[157] The Court declared the provision unconstitutional, not on the ground that it was somehow vindictive—indeed, this was in so many words denied[158]—but on the basis of the diseconomies of the provision in achieving its goal. "The question," said Justice Stewart, "is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[159] The Court admitted that the government had a valid interest in not requiring capital punishment for every conviction under the Act. It insisted, however, that because this interest could be satisfied in ways that do not discriminate against those who rightfully seek a jury trial, the provision was "unnecessary" and violated due process.[160] The Court also managed to avoid a *Rummel* type of issue, the excessiveness of the death penalty as a punishment for kidnapping.[161] In fact, the *Jackson* opinion stressed that it was constitutionally preferable and "less restrictive" for the states to reserve the option of imposing capital punishment to the jury in *every* case under the Act, regardless of how guilt has been determined, since to do so would eliminate the offending disparity in consequences.[162]

Jackson on its face is similar to *Corbitt*; in each case, the possibility of a more severe sentence, a risk defined by statute, placed a burden upon the defendant's assertion of a critical right. The Court in *Corbitt*, however, rejected the relevance of *Jackson* for two reasons. First, the chilling effect on the right to a jury trial in *Corbitt* was relatively insignificant, since there was no possibility of capital punishment and no

157. Under the terms of the statute, the death penalty was an option for the jury if it were proven that the kidnap victim had been harmed when liberated. This charge was in the indictment returned against Jackson, but was dismissed by the district court. *See* 390 U.S. at 570-72.

158. "If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. But, as the Government notes, limiting the death penalty to cases where the jury recommends its imposition does have another objective: It avoids the more drastic alternative of mandatory capital punishment in every case." *Id.* at 581-82.

159. *Id.* at 582.

160. *See id.* at 581-83.

161. The Court has subsequently ruled on such an issue. *See* Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult female may not be punished by the death penalty).

162. *See* 390 U.S. at 582-83. As an additional solution to the problem, the Court left open for Congress the draconian alternative of requiring federal judges to reject all attempts to waive a jury trial and to plead guilty in kidnapping cases. These attempts, noted the Court, are not constitutionally protected. However, it deemed such a program inadvisable because of its inflexibility. *See id.* at 584-85.

assurance that the trial judge would impose a term of less than life.[163] In the balance of interests, in short, the infringement of the defendant's right weighed less than it did in *Jackson*.[164] Second, in *Corbitt* the Court adduced justifications for discouraging assertion of the right to trial not found in *Jackson*. The deterrence in *Jackson* was "unnecessary," but New Jersey, the Court thought, was pursuing the same goal that theoretically legitimates plea bargaining as a whole: avoiding the time and expense of trial, which can work to the advantage of both parties.[165] The Court concluded in this vein that "there were substantial benefits to the State in providing the opportunity for lesser punishment and . . . the statutory pattern could not be deemed a needless or arbitrary burden on the defendant's constitutional rights within the meaning of *United States v. Jackson*."[166]

Remarkably, the majority in *Corbitt* failed to recognize that its two reasons for dismissing *Jackson* directly contradict each other: only to the extent that the statutory scheme in New Jersey has a chilling effect on the exercise of the right to a jury trial can the supposed advantages of plea bargaining be realized. This contradiction neatly points up the futility of evaluating plea bargainings by means of a balancing test. Balancing is persuasive only within a larger framework of settled answers. The results of a particular act of balancing are to a large extent predetermined by the selection of pivotal tradeoffs and by the general weights that are assigned to each side; yet balancing itself cannot inform these decisions. This passivity is tolerable when a consensus exists on such questions, or at least when one weight is so admittedly great that it will almost always decide the outcome of balancing—as in the case, for example, of content restrictions on First Amendment speech or classifications of certain groups under the equal protection clause. There are no such predetermined weights in the evaluation of plea bargaining, however; more accurately, whatever respective weights we might assign to the defendant's rights and to the prosecutor's interests, in the abstract, collide in the very definition of plea bargaining. The prosecutor's interest simply *is* maximum prejudice to the defendant's right to trial; that is what the "bargaining" in plea bargaining is all about. The situation is far different from *Jackson* and other success-

163. 439 U.S. at 217-18. *See also id.* at 226-28 (Stewart, J., concurring).

164. This reasoning assumes that the same right was involved in each case. In fact, the pressure in *Corbitt* was to forego not merely the right to a jury trial—as in *Jackson*, where the defendant also had the third option of a bench trial—but also the right to any formal determination of guilt. *See id.* at 231 n.6 (Stevens, J., dissenting).

165. *See id.* at 221-24.

166. *Id.* at 223.

ful conditions cases in which the goal of the condition can be defined independently of the sphere of activity sought to be protected, and hence without predetermining the balancing result.

Corbitt illustrates that there is no Archimedean point from which a court can make balancing judgments about the efficiency of the government's plea bargaining conditions. Efficiency presumes a goal, but the goal in this case is the heart of the controversy. From the outset, one is forced to one extreme side of the plea bargaining controversy or the other, the defendant's rights or the state's interests.

Although balancing under these circumstances would appear to be a question-begging exercise, the Court has come down heavily on the side of the government in its plea bargaining decisions. The Court's clear preference can only be explained by a *reductio ad absurdum* appeal to extrinsic consequences, not by a careful assessment of rights and interests in particular cases. Indeed, the Court's rhetoric of "mutuality of advantage" is particularly specious in the context of balancing. Genuine balancing is indifferent to the question of advantage, because advantage is a comparative state, while balancing is silent on the question of what the defendant's predicament should be compared to. The point of departure in cases such as *Jackson* is the existence of a material difference in consequences depending on the defendant's choice; nothing hinges on whether the more serious consequence would leave him better or worse off than he deserves to be. The *Corbitt* majority, defending at various points the "leniency" of the New Jersey arrangement, and the *Corbitt* dissent, objecting to its "onerous effect,"[167] necessarily talked past each other. In the framework of a balancing approach, advantage is not a concept that could bridge the contradiction at the heart of plea bargaining which was exposed in *Corbitt*.

If, in the case of plea bargaining, balancing produces one result if the defendant's right to trial is given due weight, and a wholly contrary result if the state's interest in conserving its resources is acknowledged, then plea bargaining cannot be reliably compared with other conditions on rights in the criminal system. In *Corbitt*, for example, New Jersey's plea bargaining scheme could have been adjudged either worse than the condition condemned in *Jackson*, because it achieves the state's conservation goals to a lesser degree, or better, because it is not as inhibitive of the defendant's assertion of his rights. Further, the fact that plea bargaining leads the balancer to rigid extremes makes conditions analysis unhelpful in discriminating internally, among types of

167. *Compare id.* at 223-24 *with id.* at 230 (Stevens, J., dissenting).

plea bargaining, as well as externally. Clearly, conditions analysis is not an alternative to the all-or-nothing logic that besets the Court's thinking on plea bargaining. The process of interest balancing may imply certitude in making fine discriminations, but it is really the consequence and not the cause of this confidence.

Conclusion

The Supreme Court, under its Domino Theory, would defend plea bargaining by association, not on its merits. The theory itself seems correct: plea bargaining generally stands or falls as a whole, and, moreover, is of a piece with other central features of the criminal justice system that inhibit the assertion of the right not to plead guilty. Theoretically consistent intervention in the name of substantive justice, therefore, would have destructive consequences for the criminal system as a whole, just as Justice White explained in *Brady*. These consequences appear to be sufficiently great to be prohibitive; we surely are not ready—economically, politically, or in terms of constitutional theory—for a system that would forbid all pleas of guilty or specify a single punishment for every defendant convicted of the same crime, even for the worthy purpose of relieving pressure on a criminal defendant's most vital right.

If the Court's position has a fatal flaw, it is probably this: the assumption that substantive intervention in plea bargaining must be consistent in the strong sense of being completely responsive to articulated principles. Once it is recognized that plea bargaining cannot guarantee compensation to a defendant for the loss of his rights, serious consideration should be given to its abolition. At a minimum, judges should be free to act on their considered sense that plea bargaining has produced an unjust result in a particular case, as in *Hayes*. Theoretical purity is not an end in itself, but a means of enforcing justice. A policy that governs plea bargaining on substantive grounds would remove at least some injustices from the criminal system, even if their selection appeared arbitrary from the vantage point of theory.

This argument is sound as far as it goes. Whether or not it is a successful rebuttal of the Court's advocacy of plea bargaining depends on the infinitely larger question of how we construe the proper demands of judicial integrity and accountability. It is disconcerting to think that a judge must act inconsistently, or simply on a case-by-case basis, yet that is what a proponent of substantive justice asks him to do in the case of plea bargaining. We would do well to consider closely what kind of justice it is that must be administered in this way and

whether or not it is preferable to the proceduralist justice espoused by the Supreme Court. A comparison of these two clashing philosophies would lead far beyond the topic of plea bargaining.