AARON SWARTZ, PLEA LEVERAGING & THE BORDENKIRCHER PROBLEM

As Netroots Nation 2013 begins, I want to emphasize one of the best panels (If I do say so) of the event. It is titled: *Beyond Aaron's Law: Reining in Prosecutorial Overreach*, and will be hosted by Marcy Wheeler. Joining Marcy will be Aaron Swartz's attorney, Elliot R. Peters, of Keker & Van Nest LLP in San Francisco, Shayana Kadidal of the Center for Constitutional Rights in New York, and Professor Jonathan Simon of Boalt Hall at Berkeley. The panel goes off at 3:00 pm Saturday June 22.

As a lead in to the panel discussion, I want to address a topic that struck me from the first moment of the tragic loss of Aaron Swartz, the pernicious effect of the late 70's Supreme Court case of *Bordenkircher v. Hayes*.

Paul Hayes was a defendant on a rather minor (involved $88.30), but still felonious, bad check charge in Kentucky. But Hayes had a bad prior criminal history with two felony priors. The prosecutor offered Hayes a stipulated five year plea, but flat out threatened Hayes that if he didn't accept the offer, the prosecution would charge and prosecute under Kentucky's habitual criminal (three strike) law. Hayes balked, went to trial and was subsequently convicted and sentenced to life in prison under the habitual offender enhancement charge. It was a prosecutorial blackmail threat to coerce a

plea, and the prosecutor delivered on his threat.

Hayes appealed to every court imaginable on the theory of "vindictive prosecution" with the prosecutorial blackmail as the underlying premise. Effectively, the argument was if overly harsh charging and punishment is the penalty for a defendant exercising his right to trial, then such constitutes prosecutorial vindictiveness and degrades, if not guts, the defendant's constitutionally protected right to trial.

Every appellate court along the way declined Hayes' appeal until the 6th Circuit. The 6th, however, came up with a surprising decision, granting Hayes relief, but under a slightly different theory. The 6th held that if the prosecutor had originally charged Hayes with the habitual offender charge, and then offered to drop it if Hayes pled guilty, that would have been perfectly acceptable; but using it like a bludgeon in plea negotiations once the case was charged was impermissibly vindictive, and therefore unconstitutional.

Then, from the 6th Circuit, the case finally made its way to the Supreme Court of the United States. By that time, Hayes had long been in prison and the prison warden, Bordenkircher, was the nominal appellee in the caption of the case. The Supreme Court, distinguishing another seminal vindictive prosecution case, *Blackledge v. Perry*, reversed the 6th Circuit and reinstated Hayes' life sentence.

Blackledge v. Perry is a famous case known in criminal defense circles as the "upping the ante case". Blackledge was convicted of a misdemeanor and appealed, which in North Carolina at the time meant he would get a new trial in a higher court. The state retaliated by filing the charge as a felony in the higher court, thus "upping the ante". The Supreme Court in *Blackledge* held that to be impermissibly vindictive.

> A prosecutor clearly has a considerable stake in discouraging convicted

> misdemeanants from appealing and thus obtaining a [new trial] in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources. . . . And, if the prosecutor has the means readily at hand to discourage such appeals – by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy – the State can insure that only the most hardy defendants will brave the hazards of a [new] trial.
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> . . . A person convicted of an offense is entitled to pursue his statutory right to a trial . . ., without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

Alas, the Supreme Court in *Bordenkircher v. Hayes* did not think the same logic in *Blackledge* controlled the day. In a 5-4 decision, Potter Stewart held that the practice engaged in by the Hayes prosecutor was just fine. In distinguishing *Blackledge*, Justice Stewart wrote:

> In those cases the Court was dealing with the State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction – a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power."

By now, it should go without saying that Justice Stewart's view of a criminal defendant having "relatively equal bargaining power" with the

prosecution is a sick and demented joke. Nothing could be further from the truth. But, from that time on, the power of prosecutors to add charges as a bludgeon against criminal defendants has been unfettered and increasingly problematic.

And so we come to the unfortunate case of Aaron Swartz. You can probably already see the *Bordenkircher* problem in the Swartz case. There is, however, another related problem in Swartz – overcharging. Overcharging is the initial charging by a prosecutor of multiple counts where only one charge is called for, or tacking on extra charges that are beyond what the evidence calls for, all in an effort to coerce the defendant to quickly accept a plea. It is a corollary, but distinct, practice that goes hand in hand with *Bordenkircher* leveraging of charges. Both are excessive and vindictive leveraging of criminal defendants to force a plea (or cooperation as a snitch), and both are present in spades in the prosecution of Aaron Swartz by Carmen Ortiz and the US Attorney's Office for the District of Massachusetts.

Initially, upon arrest at MIT, Aaron Swartz was first charged in the local Middlesex/Cambridge state court. Which was somewhat notable and interesting since the arresting officer was actually Special Agent Michael Pickett of the United States Secret Service, who was working with the Boston area located New England Electronic Crimes Task Force. The Task Force had a well established reputation for working with the D-Mass US Attorney's Office and FBI. So, despite an arrest by a federal agent, working a federal task force, the charge was in local court. That was January 7, 2011.

Then came the first significant upping of the ante against Aaron Swartz with the filing of the initial federal indictment on four counts with a request for forfeiture of property on July 14, 2011, over six months after his arrest and filing of local charges. What did Aaron Swartz do in the time between his arrest and initial charges to the federal indictment to earn the

increase in seriousness of the charges against him? Nothing, he simply failed to roll over.

You would think the United States Department of Justice might have exercised enough vindictiveness against the 26 year old Swartz. But, no, there was more in the offing. Much more. Again, Aaron Swartz did not roll over. Swartz had a benefit than very few caught up in the American justice system do, he had money and he had powerful friends and supporters. He wouldn't roll.

Aaron Swartz and his lawyers relentlessly tried to negotiate a fair plea – probation and no incarceration – for the piddly level of conduct that was actually involved, and they were relentlessly rebuffed by the DOJ. What happened next? The US Attorney's Office for the District of Massachusetts, led by Carmen Ortiz (with undoubtedly some help from DOJ Main), decided to really put the thumb on Mr. Swartz.

A superseding indictment to further terrify Swartz was filed on September 12, 2012 charging an outrageously puffed up thirteen felony counts, along with the forfeiture demand. Four months later Aaron Swartz was gone.

Aaron Swartz was overcharged right out of the gate in the first federal indictment, which also constituted upping the ante from the state charges. Then the overcharging and upping of the ante went nuclear in the superseding indictment. It was unnecessary, oppressive and unreasonable. It was, and is, the mark of a Department of Justice, and justice system, run amok. Both a *Bordenkircher* and an overcharging nightmare writ large and public.

Aaron Swartz is tragically gone far too young, but he left us so much in his time. And one of those things is the public exposure this case has brought, and the manner in which it has exposed the ugly underbelly of the American criminal justice system and its reliance on an oppressive and unbalanced system of plea negotiation.

Kevin Cullen, in a Boston Globe op-ed, in quoting Mr. Swartz's lawyer Elliot Peters, put it succinctly:

> Elliot Peters, the San Francisco lawyer who took the case over from Weinberg last fall, could not persuade prosecutors to drop their demand that Swartz plead guilty to 13 felonies and spend six months in prison. Peters was preparing to go to trial and was confident of prevailing.
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> But the prospects weighed heavily on Swartz.
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> "There was such rigidity with the people we were dealing with," Peters said. "I couldn't find anyone in that office to talk about proportionality and humanity. It was driven by a desire to turn this into a significant case, so that some prosecutor could put it in his portfolio."

Proportionality and humanity are excellent words that are part and parcel of what is supposed to be "prosecutorial discretion". As the courts in *Bordenkircher* and *Blackledge* noted, the criminal justice system, from local to federal, runs on plea bargaining. But contrary to what Potter Stewart said in *Bordenkircher*, the power of the defendant is NOT "relatively equal" to that of the prosecution.

The system, and the wielding of power by the government is out of balance, and out of control, as even prominent former federal judges are noting. There are any number of reasons prosecutors so abuse their power. Sometimes it is the desire to notch the big win, always it is a self desire to maintain their personal "conviction record" necessary for promotion, and sometimes it is to force a defendant into cooperation and snitching on other potential defendants and cases. All can be appropriate concerns for a prosecutor, but not without

proportionality, humanity and discretion.

Radley Balko penned an excellent discussion of many of the different facets of the immense power, and abuse of power, of the prosecutor:

> Prosecutors have enormous power. Even investigations that don't result in any charges can ruin lives, ruin reputations, and drive their targets into bankruptcy. It has become an overtly political position — in general, but particularly at the federal level. If a prosecutor wants to ruin your life, he or she can. Even if you've done nothing wrong, there isn't a whole lot you can do about it.

I highly recommend reading Balko's piece in full as there is much depth there that goes beyond what there is space for in the instant post.

High profile cases like that of Aaron Swartz have brought a new light on abuse of prosecutorial power. Another example I feel compelled to mention is that of famed Hollywood director John McTiernan that was put on display last month in one of the last big articles by a friend to this blog, the late Michael Hastings. But while the famous cases like Swartz and McTiernan bring needed exposure, the root problem plagues and rots the entire system. Most defendants are at a far greater disadvantage than those who are wealthy and well known.

Former federal prosecutor and current criminal defense attorney Kenneth White, on his Popehat blog, gave a passionate and troubling description of the bigger picture in our criminal justice system:

> People think the system failed or abused or singled out Aaron Swartz. This is the system, dammit, and if you think that Aaron Swartz faced what he did because he's a hacker and the government has it out for hackers, then I'm here to tell you that you're full of shit. Aaron

> Swartz had a great, well-funded defense team and a healthy support system. Most people don't. If you read this blog, you know the types of things the system does to people, including people with far less ability to fight back. The system sends sick people to their death in a system that can't care for them because they smoked weed. The system denies its prisoners medical care until they have to have their genitals amputated in a fruitless effort to delay an early death from cancer. The system sticks people into cells and very literally forgets them until they've spent a few days drinking their own urine. The system strives and strains to execute people based solely on the word of serial perjurers – serial perjurers whose record of perjury they have concealed from the defense. The system prizes junk science so long as that junk science supports its allegations. The system treats invocation of constitutional rights as evidence of guilt. The system reacts with petulant fury to being questioned. The system detects and punishes law enforcement and prosecutorial misconduct so rarely that bad actors are hardly ever subjected to real consequences.
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> These things happen every day to people less photogenic, talented, and charismatic than Aaron Swartz.

If the Aaron Swartz case has taught us anything, it is that as a nation we desperately need to have a discussion and recalibration on prosecutorial discretion, proportionality and humanity in our criminal justice system. The "system" is not about "them", it is about us and who we are as a people. It is long past time to fix the system.