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Due Process Protection After *United States v. Goodwin*

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Erratum

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I know it is usually the courts procedure to give a larger sentence when a new trial is granted. I guess this is to discourage petitioners. Your Honor, I don’t want a new trial I am afraid of more time. . . .

Your Honor, I know you have tried to help me and God knows I appreciate this but please sir don’t let the state re-try me if there is any way you can prevent it.¹

While the sixth amendment guarantees all criminal defendants the right to a fair trial,² tradition guarantees prosecutors almost unbridled discretion in deciding how to try cases.³ Often these compen-


³. Some degree of flexibility is essential if prosecutors are to be able to function effectively. Courts have regularly acknowledged the need for prosecutorial discretion. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976); Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967) (Burger, J.) (“Few subjects are less adapted to judicial review than the exercise by the executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charges shall be made, or whether to dismiss a proceeding once brought.”).

Prosecutors legitimately have substantial discretion over the allocation of investigative resources. Cf. ABA Project on Standards for Criminal Justice, Advisory Committee on the Prosecution and Defense Functions, Standards Relating to the Prosecution Function and the Defense Function, § 3.1(a), commentary, at 77 (Approved draft 1971) (prosecutors should be able to investigate suspected criminal acts on their own initiative in some circumstances). In addition, prosecutors are free to bring charges selectively, indicting some who commit a crime while permitting others to go free. For a comprehensive list of selective prosecution cases, see cases cited in Vorenberg, Decent Restraint of Prosecutorial Power, 94 Harv. L. Rev. 1521, 1540 n.11 (1981). Generally, these selective prosecution cases involve equal protection, rather than due process rights. However, courts have recognized the similarity between vindictive and selective prosecution. See, e.g., United States v. Wilson, 639 F.2d 500, 502 (9th Cir. 1981). In the post trial context, the two doctrines are almost indistinguishable. See Washington v. United States, 434 A.2d 394, 396 (D.C. 1980) (en banc); State v. Uebberheim, 263 N.W.2d 710, 712 (Iowa 1978).

Having picked a defendant, the prosecutor is then free to select what offenses he will charge, see, e.g., Necochea v. Superior Court, 23 Cal. App. 3d 1012, 100 Cal. Rptr. 693 (1972), whether he will employ penalty-enhancing statutes, see, e.g., 18 U.S.C. §§ 3575-3577 (1976), and whether or not to plea bargain, see Bordenkircher v. Hayes, 434 U.S. 357 (1978).

The extent of prosecutorial discretion has been extensively analyzed by commentators. See, e.g., K. Davis, Discretionary Justice (1969); Frase, The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion, 47 U. Chi. L. Rev. 246 (1980); Gifford, Equal Protection and the Prosecutor’s Charging Decision: Enforcing an Ideal, 49 Geo.
ing guarantees conflict: when a desire to deter or punish the exercise of basic rights motivates a prosecutor to bring more serious charges against a defendant, fundamental notions of fairness embodied


4. See Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); Jackson v. Walker, 585 F.2d 139, 143 (5th Cir. 1978); Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977).

5. The case law is replete with horror stories. For example, in the case of Clayborne Jamison, Jr., Jamison's counsel successfully moved for a mistrial on the ground of ineffective assistance of counsel based on his own error during the opening statements at trial. The prosecutor, in apparent retaliation for this inconvenience, substituted a first degree murder charge for what had previously been a second degree murder charge. Accordingly, all those who follow in Jamison's footsteps have to presume that they must either permit erroneous convictions to stand or face the possibility of increased charges at retrial. See United States v. Jamison, 505 F.2d 407 (D.C. Cir. 1974). See also United States v. Motley, 655 F.2d 186, 188-89 (9th Cir. 1981) (increasing severity of charges following defendant's successful motion for mistrial); United States v. Andrews, 633 F.2d 449, 452 (6th Cir. 1980) (en banc) (filing additional charge following defendant's motion for release on bail), cert. denied, 450 U.S. 931 (1981); Lovett v. Butterworth, 610 F.2d 1002, 1004 (1st Cir. 1979) (increasing severity of charge following defendant's motion for trial de novo with jury), cert. denied, 447 U.S. 935 (1980); United States v. Thomas, 593 F.2d 615, 624 (filing additional charges following defendant's demand to be sufficiently apprised of the nature of the charges), modified on other grounds, 604 F.2d 450 (5th Cir. 1979), cert. denied, 449 U.S. 841 (1980); Jackson v. Walker, 585 F.2d 139, 142 n.3 (5th Cir. 1978) (filing additional charges following defendant's successful appeal); United States v. Groves, 571 F.2d 450, 452 (9th Cir. 1978) (increasing severity of charges following defendant's motion to dismiss under Speedy Trial Act); Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) (increasing severity of charges following defendant's petition for removal to federal court and special plea of insanity), cert. denied, 434 U.S. 1049 (1978); James v. Rodriguez, 553 F.2d 59, 62 (10th Cir.) (filing additional charge following defendant's appeal), cert. denied, 434 U.S. 889 (1977); United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.) (increasing number of charges following defendant's motion for change of venue), cert. denied, 434 U.S. 827 (1977); United States v. Johnson, 537 F.2d 1170, 1173 (4th Cir. 1976) (increasing number of charges following defendant's appeal); Colon v. Hendry, 408 F.2d 864, 866 (5th Cir. 1969) (increasing severity of charge following defendant's successful petition for writ of habeas corpus); United States v. Veliscol Chem. Corp., 498 F. Supp. 1255, 1266 (D.D.C. 1980) (increasing number and severity of charges following defendant's plea of nolo contendere); State v. Hinton, 123 Ariz. 575, 578, 601 P.2d 338, 341 (1979) (increasing severity of charge following defendant's successful motion to suppress inadmissible evidence); Johnson v. State, 396 A.2d 163, 165 (Del. 1978) (increasing severity of charge following defendant's motion for mistrial); Wynn v. United States, 386 A.2d 695, 697 (D.C. App. 1978) (increasing number of charges following defendant's successful motion to dismiss); Cherry v. State, 414 N.E.2d 301, 306 (Ind.) (refiling of charges formerly dismissed following defendant's successful appeal), cert. dismissed, 453 U.S. 946 (1981); Ronk v. State, 578 S.W.2d 120, 121 (Tex. 1979) (increasing severity of charge following defendant's successful appeal). Cf. Longval v. Meachum, 651 F.2d 818, 820 (1st Cir. 1981) (more severe prison sentence than co-felon for defendant demanding right to jury trial), vacated and remanded for reconsideration in light of United States v. Goodwin, 50 U.S.L.W. 3998 (U.S. June 28, 1982); Jacobs v. Redman, 616 F.2d 1251, 1258 (3d. Cir. 1980) (more severe prison sentence in second trial for defendant demanding right to testify
within the concept of due process are violated. The doctrine of prosecutorial vindictiveness then takes effect and bars prosecutors from taking such impermissibly motivated actions.

In *United States v. Goodwin*, the Supreme Court held that the pretrial substitution of felony for misdemeanor charges following a defendant's insistence on trial by jury does not give rise to a presumption of prosecutorial vindictiveness. Writing for the Court, Justice Stevens explicitly distinguished pretrial and posttrial charging decisions, limiting the presumption of vindictiveness established by *Blackledge v. Perry* to the posttrial period. Initially, this result appears to signal further retrenchment of the due process protections afforded criminal defendants. More careful analysis, however, reveals that *Goodwin* may lay the foundation for a reaffirmation of the *Blackledge* prophylactic rule in the posttrial context where defendants need it most, and where lower courts, both state and federal, have consistently failed to enforce it.

This Note reformulates the doctrine of prosecutorial vindictiveness in light of the distinction drawn in *Goodwin* between pretrial and posttrial charging decisions. Part I recounts the development of the vindictiveness concept, and argues that in extending the doctrine beyond the factual settings which moved the Supreme Court to fashion its original prophylactic rule, the circuit courts have seriously eroded an essential due process safeguard. Part II critically exam-
ines the distinction between pretrial and posttrial charging decisions relied upon in Goodwin. Developing the logical corollary of the Goodwin holding, this Part argues that just as the pretrial situation does not warrant "an inflexible presumption of vindictiveness" when prosecutors substitute more serious charges, such a presumption is fully warranted after an initial trial. During this posttrial period, defendants' interests reach their apex and the government's interest in more serious charges significantly declines. Part III sets forth a revitalized prophylactic rule which reflects this balance, and responds to the possible objections to such an approach.

I. JUDICIAL DEVELOPMENT OF THE PROSECUTORIAL VINDICTIVENESS CONCEPT

This Part traces the checkered history of the vindictiveness doctrine, which the Supreme Court first set forth in North Carolina v. Pearce\(^1\) and Blackledge v. Perry.\(^2\) The realities of American criminal justice, however, compelled the Court to exempt plea bargaining from the prophylactic effects of the Blackledge presumption of vindictiveness.\(^3\) The lower courts, meanwhile, developed a wide variety of standards, none of which provides the degree of posttrial protection against vindictiveness required by Blackledge. The Court's recent opinion in Goodwin calls these approaches into serious question, and suggests the need for a uniform vindictiveness standard based on Blackledge, Bordenkircher, and the differences between pretrial and posttrial charging decisions which Goodwin now indicates distinguish those cases.

A. Emergence of the Prophylactic Rule

The Supreme Court first articulated the concept of vindictiveness in North Carolina v. Pearce,\(^4\) where the defendant challenged the
constitutionality of a judge's imposition of a harsher sentence at re-trial after the defendant had successfully attacked his first conviction. While the Court held that no constitutional standard — double jeopardy,\(^{18}\) equal protection,\(^{19}\) or due process\(^{20}\) — prohibits an increased sentence \textit{per se}, the Court did hold that due process prohibits increasing a sentence on re-trial solely because of vindictiveness against the defendant.\(^{21}\)

The Court reasoned that punishing defendants who exercise their constitutional rights, by vindictively increasing their sentences at re-trial, would be "patently unconstitutional."\(^{22}\) A court is " 'without right to put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered.' "\(^{23}\) Moreover, the Court emphasized that because such practices create an inherent threat to the exercise of constitutional rights, they may deter other defendants from exercising their rights.\(^{24}\)

To free defendants from this apprehension of judicial vindictiveness, the Court prescribed a prophylactic rule. Whenever judges increase the severity of a sentence after re-trial, their reasons for doing so must affirmatively appear and "must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."\(^{25}\) Additionally, the judge must include in the record the factual data upon which he bases the increase.\(^{26}\)

\textit{Blackledge v. Perry} extended the concept of vindictiveness to prosecutors.\(^{27}\) There, a prosecutor increased the charge against the defendant from a misdemeanor to a felony\(^{28}\) after the defendant'ex-

\begin{itemize}
  \item \textit{improper use of an involuntary confession,} Pearce was retried and given a sentence that would have increased his term in prison by almost three years.
  \item 18. 395 U.S. at 719-21.
  \item 19. 395 U.S. at 722-23.
  \item 20. 395 U.S. at 723-25.
  \item 21. 395 U.S. at 725.
  \item 22. 395 U.S. at 724 (quoting United States v. Jackson, 390 U.S. 570, 581 (1968)).
  \item 23. 395 U.S. at 724 (quoting Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966)).
  \item 24. 395 U.S. at 724-25.
  \item 25. 395 U.S. at 726.
  \item 26. 395 U.S. at 726.
  \item 27. 417 U.S. 21 (1974). Defendant Perry, an inmate of a North Carolina prison, was charged with assault with a deadly weapon, a misdemeanor, after an altercation with another prisoner. After conviction, Perry exercised his statutory right to a trial \textit{de novo} in a higher court on the misdemeanor charge. The prosecutor then increased the charge against Perry to a felony, assault with a deadly weapon with intent to kill.
\end{itemize}
ercised his statutory right to a trial de novo. In holding that the due process protection against judicial vindictiveness also extends to prosecutorial vindictiveness, the Court declared:

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant’s conviction becomes final, and may even result in a formerly convicted defendant's going free. 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 de novo trial. 29

Such language speaks to the interest in freedom from fear of vindictive recharging as well as to particular incidents of vindictiveness.

As in Pearce, the Court emphasized the need to protect defendants from this fear of vindictiveness. 30 Because such a fear can exist even in the absence of an actual retaliatory motive, the Court held that defendants need not demonstrate the existence of such a motive. 31 The Court did not, however, make it entirely clear what defendants do need to demonstrate. The Court indicated that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " 32 The opinion strongly suggests that the Court believes that when a defendant asserts the right to a trial de novo, and the prosecutor subsequently seeks and obtains a more serious indictment based on the same conduct as the original indictment, the situation inherently poses a "realistic likelihood of vindictiveness." The Court spoke without qualification of the defendant's right not to be reindicted in such a manner, 33 and did not remand the case to permit the prosecutor to justify the increased charge. 34 As a result, contemporary commentators interpreted the

30. 417 U.S. at 28.
31. 417 U.S. at 28.
32. 417 U.S. at 27. At least one author interprets the elements of vindictiveness to be three-fold: "1) a penalty or burden — the increased charge — resulted from the defendant's exercise of his right of appeal; 2) a motive for retaliation was present since the prosecutor has a desire to conserve state resources; and 3) the same state representative, the prosecutor, was involved throughout the appellate procedure." Note, Criminal Procedure — Protection of Defendants Against Prosecutorial Vindictiveness, 54 N.C. L. Rev. 108, 112-13 (1975) (emphasis in original) (footnotes omitted).
33. The Court indicated that a person convicted of an offense must be able to pursue a trial de novo "without apprehension" of retaliation. 417 U.S. at 28. The Court also said that due process "requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process." 417 U.S. at 28.
34. 417 U.S. at 31 n.8. The Court did indicate, however, that charges might be increased when the prosecutor demonstrates "that it was impossible to proceed on the more serious charge at the outset. . . ." 417 U.S. at 29 n.7.
decision as absolutely prohibiting increased charges at retrial.\textsuperscript{35}

**B. Decline of the Prophylactic Rule**

Although \textit{Pearce} adopted a prophylactic rule regarding judicial vindictiveness, and \textit{Blackledge} suggested an even stronger prophylactic rule to control prosecutors,\textsuperscript{36} these cases dealt expressly only with posttrial vindictiveness.\textsuperscript{37} In \textit{Bordenkircher v. Hayes},\textsuperscript{38} a prosecutor, while engaged in plea bargaining, threatened to increase the charges if the accused, Hayes, insisted on exercising his constitutional right to plead not guilty.\textsuperscript{39} The majority did not discuss the


\textsuperscript{36} See \textit{United States v. Goodwin}, 637 F.2d 250, 255 (4th Cir. 1981) ("Blackledge suggests no balancing test. It adopts a prophylactic rule designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness.").

\textsuperscript{37} See \textit{United States v. Jamison}, 505 F.2d 407, 416 (D.C. Cir. 1974) ("Pearce makes it clear that the exercise of post-conviction rights generally are [sic] not to be burdened by the possibility of retaliation.").

On its face, \textit{Pearce} cannot be applied to pretrial activities, since resentencing cannot occur until retrial. Since reindictments can issue before trial, however, \textit{Blackledge} can be read to constrain pretrial prosecutorial actions.

There are two other cases in which the Supreme Court has made clear that vindictiveness can be found at retrial, but has refused to do so on the facts before it. \textit{Chaffin v. Stynchcombe}, 412 U.S. 17 (1973), held that a higher sentence imposed by a jury at a second trial could not be vindictive where the jury was unaware of the length of the prior sentence and could not be retaliating for the earlier result. 412 U.S. at 26-27. The Court held that "[t]he first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." 412 U.S. at 26. Similarly, in \textit{Colten v. Kentucky}, 407 U.S. 104 (1972), the Court held that a higher sentence imposed by a new court in a trial de novo was not the result of impermissible vindictiveness. Again, the Court emphasized that when a sentence is imposed by a different authority — a new judge — who is "not even informed of the sentence imposed in the inferior court," there is little risk of vindictiveness. 407 U.S. at 116-18.

The Supreme Court has addressed the vindictiveness issue, indirectly, in one other instance. \textit{Ceritorari in Moon v. Maryland}, 398 U.S. 319 (1970), was dismissed as improvidently granted when it became "clear that there was no claim that the higher sentence received on retrial was a product of vindictiveness." \textit{Chaffin}, 412 U.S. at 25-26. Absent such an allegation, there was no claim that "the due process standard of \textit{Pearce}" had been violated. 398 U.S. at 320. \textit{Cf. United States v. Gambert}, 433 F.2d 321, 323 n.5 (4th Cir. 1970) ("\textit{Moon stands for the proposition that an issue does not arise as to the retroactive application of the constitutional standards of \textit{Pearce} where there is no claim of vindictiveness on the part of the resentencing judge.}"). (emphasis in original).

\textsuperscript{38} 434 U.S. 357 (1978). Hayes was found guilty of forging a check for $88.30, an offense punishable by a term of two to ten years in prison. Before trial, the prosecutor had offered to recommend a five-year sentence if Hayes would plead guilty, but indicated that he would seek an indictment under a habitual offender provision if Hayes insisted on pleading not guilty. Hayes pleaded not guilty, was found guilty, and was sentenced to a term of life imprisonment.

\textsuperscript{39} 434 U.S. at 358 n.1. For authority establishing the constitutional basis of the right to
issue in terms of vindictiveness, concluding instead that retaliation could not occur in the plea bargaining context: "[I]n 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." 

While Bordenkircher clearly reaffirms the legitimacy of plea bargaining, the precise scope of its holding was not immediately apparent. Although some courts held that Bordenkircher applies only to vindictiveness in plea negotiations, it has been suggested that its


40. Justice Blackmun dissenting, did frame the issue as one of vindictiveness: "[I]n this case vindictiveness is present to the same extent as it was thought to be in Pearce and in [Blackledge]; the prosecutor here admitted . . . that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial." 434 U.S. at 367 (Blackmun, J., dissenting) (footnote omitted). In addition, several lower courts found Bordenkircher to permit actual vindictiveness: "Bordenkircher holds that actual retaliatory behavior is acceptable, at least in the plea bargaining context." United States v. Andrews, 633 F.2d 449, 456 (6th Cir. 1980); cert. denied, 450 U.S. 927 (1981). See also State v. Stevens, 96 N.M. 627, 629, 633 P.2d 1225, 1227 (1981) ("Bordenkircher was the only case presenting pretrial activity, and there, despite clearly vindictive conduct, the Court declined to apply the doctrine.") (emphasis added); Holderman, supra note 3, at 30 ("As a result of the [Bordenkircher] decision, most federal courts have applied a more permissive standard approving seemingly vindictive conduct in the plea bargaining setting.") (footnote omitted).


43. Different interpretations of Bordenkircher have been offered. Compare United States v. Walker, 514 F. Supp. 294, 315-16, 319 (E.D. La. 1981) (Bordenkircher limits vindictiveness to instances in which government's action traced solely to defendant's exercise of rights), with McCoy & Mirra, Plea Bargaining as Due Process in Determining Guilt, 32 STAN. L. Rev. 887, 920-21 (1980) (Bordenkircher establishes that the right to trial is not absolute; it is counterbalanced by the efficiency of plea bargaining). One court has held that bringing state, rather than federal, charges against a defendant who refuses to cooperate with the prosecutor comes within the Bordenkircher analysis. Miller v. Superintendent, Otisville Correctional Facility, 480 F. Supp. 858, 861 (S.D.N.Y. 1979).

44. Bordenkircher appears to be a very narrow opinion. The Court limited its holding to "the course of conduct engaged in by the prosecutor in this case . . . ." 434 U.S. at 365. In addition, the Court's rationale applies solely to the plea bargaining process: "[T]here is no such element of punishment or retaliation [in plea bargaining] so long as the accused is free to accept or reject the prosecution's offer." 434 U.S. at 363. Accordingly, many courts have limited Bordenkircher to the plea bargaining context. See, e.g., United States v. Andrews, 633 F.2d 449, 456 (6th Cir. 1980), cert. denied, 450 U.S. 927 (1981). See Pizzi, supra note 3, at 291; Smaltz, Due Process Limitations on Prosecutorial Discretion in Re-Charging Defendants, 36 Wash. & Lee L. Rev. 347, 376 (1979). More generally, the Court tends to view plea bargaining as a particularly important part of the criminal justice system. E.g., Blackledge v. Allison,
rationale applies to any pretrial action by the prosecutor. While the latter approach seems too broad, under either of these analyses *Bordenkircher* does not apply to a posttrial situation. Unfortunately, the circuit courts — perhaps responding to a perceived transition in the broader perspective of the Court — heeded the holding, and even in some cases the rationale, of the *Bordenkircher* decision, but blurred the distinction between pretrial and posttrial vindictiveness standards. This led to the development of various approaches to vindictiveness, all of which derogated the *posttrial* presumption of vindictiveness the Court had unambiguously established in *Blackledge*.

Thus, as the circuit courts have considered the application of the

431 U.S. 63, 71 (1977). *See generally* Davidson & Kraus, *Criminal Procedure*, 1979 ANN. SURV. AM. L. 27, 27-52 (1979). Thus, it is hardly surprising that *Bordenkircher* carves a narrow exception to grant prosecutors more flexibility when they are engaged in plea negotiations.

It is clear, conversely, that *Pearce* and *Blackledge* do not apply to plea bargaining. *See* Ehl v. Estelle, 656 F.2d 165, 169 (5th Cir. 1981), cert. denied, 102 S. Ct. 1459 (1982); Frank v. Blackburn, 646 F.2d 873, 885 (5th Cir. 1980) (en banc), modified on other grounds on rehg., 646 F.2d 902 (per curiam), cert. denied, 102 S. Ct. 148 (1981) ("We find the rule of *North Carolina v. Pearce* to be completely inapplicable to post-plea sentencing proceedings."); Martin v. Blackburn, 606 F.2d 92, 93 (5th Cir. 1979), cert. denied, 446 U.S. 911 (1980) ("It is highly questionable whether *Pearce* applies to plea bargaining situations.").


46. Such an approach would permit a prosecutor to increase charges should a defendant seek a jury trial, a change of venue, or the exercise of other rights. *See* sources cited in note 5 supra. To permit actual retaliation for the assertion of these rights seems, on its face, manifestly unjust.

47. Several suggestions have been made as to how to limit the scope of the doctrine. The Fifth Circuit applies one standard when the reindictment is for the same criminal activity as the original indictment and a separate standard when the reindictment is for distinct criminal activity. *See* note 55 infra. *See also* United States v. Mallah, 503 F.2d 971, 988 (2d Cir. 1974). Judge Engel has suggested distinguishing rights that go to innocence or guilt from "purely collateral" rights. United States v. Andrews, 633 F.2d 449, 463 (6th Cir. 1980) (en banc) (Engel, J., dissenting), cert. denied, 450 U.S. 927 (1981).

An alternative approach might distinguish between statutory and constitutional rights. *See* Note, *Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis*, 34 VAND. L. REV. 431 (1981). In this view, denial of a statutory right merely requires the state to show a rational basis for its action. Denial of a constitutional right, in contrast, requires the showing of a compelling state interest. The courts, however, have flatly rejected such a statutory/constitutional distinction. *See* e.g., United States v. Burt, 619 F.2d 831, 836 (1980); United States v. Ruesga-Martinez, 534 F.2d 1367, 1370 (9th Cir. 1976). *But see* United States v. Andrews, 633 F.2d 449, 460 (6th Cir. 1980) (en banc) (Kennedy, J., dissenting), cert. denied, 450 U.S. 927 (1981). The essential repugnance of vindictiveness, the punishment of legally protected behavior, remains identical whether a statute or the constitution protects the rights whose exercise is punished.

Such an analysis would also result in the application of the "unconstitutional conditions" doctrine to vindictiveness claims relating to a constitutional right. *See* Note, supra, at 459-60. The courts have consistently rejected this possibility. *See* Chaffin v. Synchcombe, 412 U.S. 17 (1977). Finally, this analysis hinges on the existence of a compelling state interest in plea bargaining. Such an interest, however, exists only in the minds of those possessing "considerable imagination." *McCoy & Mirra*, supra note 43, at 905 n.2.
vindictiveness concept to pretrial situations, they have also taken a more lenient attitude toward prosecutorial practices. A number of courts have expressed concern about unjustified and harmful judicial encroachment on prosecutorial discretion, particularly at early stages in criminal proceedings. Some courts have refused to apply the vindictiveness doctrine to the pretrial context. Many courts have tried to reconcile the need for some control of vindictiveness before trial with the need for greater prosecutorial discretion during this period. To do so, these courts have retreated from the prophylactic rule that the Blackledge decision suggested. Although Goodwin requires such a retreat in the pretrial situation, the circuit courts' failure to recognize expressly a pretrial/posttrial distinction has undercut the constitutional protection that Blackledge mandated in the posttrial context.

The approaches taken by the circuit courts can be divided into

48. See, e.g., United States v. Gerard, 491 F.2d 1300, 1305 (9th Cir. 1974) (Pearce not limited solely to sentencing after retrial).

49. See United States v. Andrews, 633 F.2d 449, 461 (6th Cir. 1980) (en banc) (Kennedy, J., dissenting), cert. denied, 450 U.S. 927 (1981) ("A test for prosecutorial retaliation that too easily lets a defendant challenge prosecutorial conduct will have the undesirable effect of curtailing prosecutorial discretion to a significant degree. . . . I would find very few cases in the pretrial stage in which the prosecutor's conduct appeared impermissibly to retaliate for the defendant's exercise of a constitutional right, such that the prosecutor should be called upon to explain his action."); State v. Stevens, 96 N.M. 627, 631, 633 P.2d 1225, 1228 (1981) ("Imposition of a pretrial presumption of vindictiveness would interfere with proper prosecutorial discretion.").

50. See United States v. Herrera, 640 F.2d 958, 961 (9th Cir. 1981) (finding Pearce and Blackledge inapplicable when the defendant is neither resentenced nor reindicted); Frank v. Blackburn, 646 F.2d 873, 885 (5th Cir. 1980) (en banc) ("The Pearce rule applies only to sentencing after retrial . . . ") (emphasis in original), modified on other grounds on rehg., 646 F.2d 902 (per curiam), cert. denied, 102 S. Ct. 148 (1981); United States v. Andrews, 633 F.2d 449, 457 (6th Cir. 1980) (en banc) (Merritt, J., dissenting), cert. denied, 450 U.S. 927 (1981) ("The Supreme Court has never applied the concept of 'vindictiveness' announced in Pearce and Blackledge to a prosecutor's actions during the trial and pretrial stages of a criminal case."); State v. Moritz, 293 N.W.2d 235, 241-42 (Iowa 1980); State v. Stevens, 96 N.M. 627, 629, 633 P.2d 1225, 1227 (1981) ("To the U.S. Supreme Court has never applied the vindictiveness notion to a prosecutor's actions in the pretrial and trial stages of a criminal case."). In addition, the Sixth Circuit has cited the fact that a case involves pretrial conduct as the basis for distinguishing it from Blackledge. United States v. Andrews, 633 F.2d at 452.

51. Some judgess have expressly recognized the need for laxer standards during the pretrial period. See cases cited in note 49 supra; United States v. Andrews, 612 F.2d 235, 253 (6th Cir. 1979) (Keith, J., dissenting), vacated, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981); United States v. Schiller, 424 A.2d 51, 56 (D.C. App. 1981). Many courts have tacitly recognized this need, by adopting a more relaxed standard when the prosecutorial vindictiveness concept is expanded to cover both pretrial and posttrial situations. See generally notes 55-56 & 58-64 infra and accompanying text.

52. Commentators have made the same error. By failing to recognize the need for a pretrial/posttrial distinction, they, too, have retreated from the prophylactic rule needed in posttrial situations. See, e.g., Note, Prosecutorial Vindictiveness: Divergent Lower Court Applications of the Due Process Prohibition, 50 GEO. WASH. L. REV. 324 (1982); Note, Prosecutorial Vindictiveness: Expanding the Scope of Protection to Increased Sentence Recommendations, 70 GEO. L.J. 1051 (1982); Note, A 'Realistic Likelihood of Vindictiveness': Due Process Limitations on Prosecutorial Charging Discretion, 1981 U. ILL. L. REV. 693. In the light of Goodwin, such approaches have become academic.
three categories.\textsuperscript{53} First, a number of circuits have adopted a balancing test that requires courts to consider all the facts of a particular case to determine whether there is a realistic likelihood of vindictiveness.\textsuperscript{54} Second, at least one circuit has come very close to requiring

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\item Given the inconsistencies among the circuits, any such classification will be somewhat arbitrary. \textit{See}, e.g., Note, 70 Geo. L.J. 1051, 1068-70, \textit{supra} note 52 (four different standards); Recent Developments, \textit{Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis}, 34 Vand. L. Rev. 431 (1981) (three different standards). In one sense, all of the circuits have a similar standard; none will tolerate prosecutorial conduct that presents a "realistic likelihood of vindictiveness." \textit{See} Note, 1981 U. Ill. L. Rev. 693, \textit{supra} note 52. But this phrase does no more than describe a result. The classification presented here characterizes circuit court standards according to the showing required of defendants before a court will invoke this description. Indeed, it may be that the categories discussed by this Note partake of more analytical rigor than those actually relied on by the lower courts, which frequently appear to base their decision on a Gestalt impression of the particular facts before them. What is clear is that none of the circuits adequately protect defendants' due process rights in the posttrial period.
\item A balancing test was clearly adopted by the Sixth Circuit in United States \textit{v.} Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), \textit{cert. denied}, 450 U.S. 927 (1981). The court held that a trial court must decide whether "a reasonable person would think there existed a realistic likelihood of vindictiveness." 633 F.2d at 454. "In order to make this assessment, a court must weigh two factors. First, there is the prosecutor's 'stake' in deterring the exercise of the right. . . Second, there is the prosecutor's conduct." 633 F.2d at 454. In adopting this test, the court expressly rejected the contention that "the mere appearance of vindictiveness" is impermissible; instead, it indicated that due process concerns are raised only where there is a substantial possibility of vindictiveness (633 F.2d at 455) or a probability of vindictiveness. 633 F.2d at 455.

The First Circuit also appears to employ a balancing approach. In Love\textit{t}t \textit{v. Butterworth}, 610 F.2d 1002 (1st Cir. 1979), \textit{cert. denied}, 447 U.S. 935 (1980), the court carefully examined the defendant's interests in a trial \textit{de novo} and the prosecutor's interest in reindictment and concluded: "We thus have before us a significant due process interest to weigh against a minor or nonexistent prosecutorial interest. Therefore, apprehension of vindictiveness by the Commonwealth in the form of an indictment is sufficient to contravene due process." 610 F.2d at 1007. Although the court did not indicate the test that would govern other cases, the method used in \textit{Love\textit{t}t} strongly suggests that the court would look at the circumstances of the case and balance the competing interests to determine what standard to require. The court's decision in \textit{Koski v. Samaha}, 648 F.2d 790 (1st Cir. 1981), confirms this impression. In that case, the prosecutor had informed the defendant that he would seek a higher sentence if defendant exercised her statutory right to a trial \textit{de novo} in superior court, but did not bring or threaten to bring a more serious charge. Emphasizing that the prosecutor's sentence recommendation does not control the judge's decision, that offering a lenient sentence at the first stage of a two-tier system is "in no way discreditable," and that a more sweeping rule would amount to a boundless "invitation to after-the-fact fly-specking," the court rejected defendant's vindictiveness claim in a federal habeas corpus appeal. In so holding, the court explicitly approved a factual balancing approach: "[f]or the [\textit{Pearce}] Court to have ended all apprehension would have required a rule disallowing any increase in sentence at all. It did not follow this path, but rather undertook to strike a practical balance between actions deemed to chill appeals excessively and those that do not." 648 F.2d 790, 798. The \textit{Koski} decision is extensively analyzed in \textit{Comment, Prosecutorial Vindictiveness: Expanding the Scope of Protection to Increased Sentence Recommendations}, 70 Geo. L.J. 1051 (1982).

Finally, the Second Circuit Court of Appeal's opinion in United States \textit{v. Ricard}, 563 F.2d 45 (2d Cir.), \textit{cert. denied}, 435 U.S. 916 (1977), suggests that that circuit may also use a balancing test. In \textit{Ricard} the prosecutor increased the charges after the defendant decided to go to trial and also attempted to have certain evidence suppressed. Although the court's decision was primarily based on the prosecutor's non-vindictive motive (\textit{i.e.}, the fact that the case had been assigned to a new prosecutor after the original indictment) for the increase in charges, the court also examined the facts of the case to determine whether there was a sufficient likelihood of vindictiveness to apply the \textit{Blackledge} principles. The court pointed out that there was no
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the defendant to prove the existence of actual vindictiveness.\textsuperscript{55} Finally, several circuits have held that an increase in the severity of charges following the assertion\textsuperscript{56} of a procedural right creates a pre-

evidence that the prosecutor wished to avoid a trial and concluded that "given the lack of any substantial evidence of vindictiveness on the part of the prosecution, the increase in the charges brought against appellant cannot be said to entrench upon defendant's due process rights." 563 F.2d at 48. At least in a non-\textit{Blackledge} situation, this decision appears to require lower courts to examine the facts of a particular case to determine if a realistic likelihood of vindictiveness exists.

Hence the Second and Sixth Circuits appear to require courts to balance the circumstances to determine the likelihood of vindictiveness, while the First Circuit requires courts to balance the competing interests. Either approach suffers similar deficiencies since each requires a case-by-case adjudication. \textit{See} note 60 \textit{infra}.

\textit{Hardwick v. Doolittle}, 558 F.2d 292, 302 (5th Cir.). If the new charge involved the same conduct as the original charge, an "appearance of vindictiveness" standard would be used. The court proceeded, however, to take a very broad view of the "different and distinct" concept. The court held that where the new charges concerned a robbery of a bank customer, and an assault on a probation officer who was seized and used as a shield in a gun battle with the police, the charges concerned events that were different and distinct from the bank robbery that was the basis for the original charge. 558 F.2d at 302. Hence, the prosecutor was permitted to add charges even though the conduct alleged in the new charges arose out of the events alleged in the original charges. Additionally, there was no indication that the prosecutor had been unaware of this conduct at the time of the original charges. Under such a broad interpretation of the "different and distinct" events test a prosecutor who carefully frames the new charges will usually be governed by the actual vindictiveness standard. \textit{See generally} U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 16 (July 1980) ("Typically, however, a defendant will have committed more than one criminal act and his conduct may be prosecuted under more than one statute."). This approach has been criticized elsewhere. \textit{See} Gifford, supra note 3, at 357 n.58 ("By creating an artificial and unrealistic label for superseding indictments and by focusing on the prosecutor's actual intentions, the Fifth Circuit has abandoned the defendant's due process right to pursue his procedural retaliation. This decision is contrary to the majority of lower court applications of the \textit{Pearce/Blackledge} rule.")

The \textit{Hardwick} test was modified in \textit{Jackson v. Walker}, 585 F.2d 139, 145 (5th Cir. 1978), where the court specified that "in deciding whether to require a showing of reasonable apprehension of vindictiveness, a court must weigh the extent to which allowing the second indictment will chill the exercise of the defendants' appeal rights against the extent to which forbidding the second indictment will infringe on the exercise of the prosecutor's independent discretion." \textit{See also} \textit{Miracle v. Estelle}, 592 F.2d 1269 (5th Cir. 1979) (applying the reasonable apprehension of vindictiveness standard to a case involving harsher charges brought after the defendant successfully moved for a new trial).

One recent Fifth Circuit case, however, suggests that the actual vindictiveness test will continue to be employed frequently in the Fifth Circuit. In \textit{United States v. Thomas}, 617 F.2d 436 (5th Cir. 1980), the court applied the actual vindictiveness test to a claim that the prosecutor vindictively increased the charges after the defendants successfully had a number of charges dismissed. In applying this test, the court said that:

The authority of our decision in \textit{Jackson v. Walker}, 585 F.2d 129 (5th Cir. 1978) . . . may be substantially undermined by the Supreme Court decision in \textit{Bordenkircher v. Hayes}, 434 U.S. 357, 98 S. Ct. 663, 54 L.Ed.2d 604 (1978), an authority which our cases on this subject do not appear to have taken into account. The dissent in \textit{Bordenkircher} views that decision as signaling a general retreat from \textit{Blackledge} v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974); see 434 U.S. at 365-66, 98 S.Ct. at 669-70; and this may be so. 617 F.2d at 438 n.1. The \textit{Thomas} decision has been viewed as a reaffirmation of the Fifth Circuit's "position that a defendant must show actual prosecutorial vindictiveness to establish a due process violation." \textit{Recent Developments, Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework for Analysis}, 34 \textit{VAND. L. REV.} 431, 448 (1981). \textit{Thomas} has been cited by the Eighth Circuit, which has not yet adopted a vindictiveness test. \textit{See} \textit{United States v. Gillis}, 645 F.2d 1269, 1282 n.30 (8th Cir. 1981).

\textit{Note—Prosecutorial Vindictiveness}
sumption of vindictiveness. Under any of these standards the prosecutor may rebut the defendant's proof by demonstrating an appropriate nonvindictive justification for the increased charges.

Each of these approaches provides a less restrictive, or at least a more discretionary, test for prosecutorial vindictiveness than Blackledge's prophylactic approach. The balancing test, by its very nature, replaces the prophylactic approach with a case-by-case analysis. The actual vindictiveness test, by imposing an extremely heavy burden on the defendant, greatly reduces the defendant's protection from vindictiveness. Even those courts that will presume vindictiveness in certain circumstances may undercut the effective-

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57. This approach has been adopted in the Fourth Circuit, United States v. Goodwin, 637 F.2d 250, 253 (4th Cir. 1981), rev'd, 102 S. Ct. 2485 (1982); the Ninth Circuit, United States v. Motley, 655 F.2d 186, 188 (9th Cir. 1981); and the D.C. Circuit, United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974). It was also adopted in United States v. Lippi, 435 F. Supp. 808, 814 (D.N.J. 1977), which is the only case within the Third Circuit that addresses the issue.

58. The Seventh, Eighth, Tenth, and Eleventh Circuits have not expressly adopted a standard yet. The Eighth Circuit has, however, suggested that it favors either a balancing test or the Fifth Circuit's approach, since it cited Andrews and Thomas in United States v. Gillis, 645 F.2d 1269, 1282 n.30 (8th Cir. 1981). See also United States v. Stacey, 571 F.2d 440 (8th Cir. 1978).

59. As the majority opinion in Andrews acknowledges, in analyzing the prosecutor's stake in deterring the assertion of a right "[e]ach situation will necessarily turn on its own facts." United States v. Andrews, 633 F.2d 449, 454 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981). Under the Fifth Circuit's actual vindictiveness approach, defendants presumably would need to show that the prosecutor was in fact motivated by vindictiveness rather than these non-vindictive considerations.

60. The defendant's burden is particularly onerous in view of the fact that courts are likely to be very reluctant to find that prosecutors have acted in bad faith. See United States v. Andrews, 633 F.2d 449, 455, 455 n.8 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981).
ness of this presumption by freely accepting the prosecutor's non-vindicitive justifications. 62

By moving away from the prophylactic approach suggested by Blackledge, courts have seriously eroded the due process protection afforded by a prophylactic rule. A primary justification for a prophylactic rule controlling prosecutorial vindictiveness is that it can either eliminate the risk of vindictiveness, or at least render that risk so minimal that a defendant will not be discouraged from asserting important rights. 63 A more lenient or flexible rule reduces the confi-

62. The nonvindicitive justifications that have been accepted by the courts to overcome a finding of vindictiveness are too numerous and ill-defined to control vindictiveness adequately. Justifications accepted by some courts include: prosecutorial zeal, United States v. Thurnhuber, 572 F.2d 1307, 1311 (9th Cir. 1977); a changed approach to prosecutorial duty, Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978); public demand for prosecution of additional offenses, Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978); mistake or oversight, Hardwick, 558 F.2d at 301; Cherry v. State, 414 N.E.2d 301, 305-06 (Ind. 1981); prosecutorial inexperience, United States v. Andrews, 633 F.2d 449, 456 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981); protection of an informant, United States v. Partyka, 561 F.2d 118 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978); reassessment by a second prosecutor, United States v. Ricard, 563 F.2d 45 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978); desire to retain option to bring less serious charges later, Jackson v. Walker, 585 F.2d 139, 149 n.20 (5th Cir. 1978); continuation of an investigation, United States v. Nell, 570 F.2d 1251, 1254-55 (5th Cir. 1978); discovery of new evidence, United States v. Andrews, 633 F.2d at 456 n.10; and intervening events, United States v. Jamison, 505 F.2d 407, 416-17 (D.C. Cir. 1974).

While retention of some of these justifications is warranted, see notes 109-11 infra, it is clear that many courts have too readily accepted the justifications asserted by prosecutors. See Recent Developments, supra note 55, at 455. ("These courts have accepted as legitimate many proffered state justifications for increased criminal charges; few of these justifications, however, should satisfy the compelling interest test when the exercise of a fundamental right is involved."). Acceptance of many of these justifications does not dispel the appearance of vindictiveness, and hence defendants will continue to be deterred from asserting their rights. See United States v. Andrews, 444 F. Supp. 1238, 1243 (E.D. Mich. 1978), rev'd., 612 F.2d 252 (6th Cir. 1979), vacated, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981). Hence, in some circuits, Judge Keith's concern that "ready acceptance of glib prosecutorial explanations for the seeking of heavier charges could make a mockery of Blackledge," United States v. Andrews, 612 F.2d at 252 (Keith, J., dissenting), may already have become a reality.

For example, requiring a defendant to try to disprove the "nonvindicitive" justification of prosecutorial zeal imposes a burden similar to that under the actual vindictiveness standard — i.e., the defendant must prove the prosecutor's state of mind. See note 61 supra. It would also be extremely difficult for a defendant to refute a prosecutor's assertion that a mistake was made in selecting the original charge. Moreover, it is manifestly unjust that a prosecutor blundering an investigation should later be able to undermine a defendant's right to appeal. Hence, a number of courts have properly rejected this justification. See, e.g., United States v. Moltry, 655 F.2d 186, 189-90 (9th Cir. 1981). Similarly, a defendant should not bear the costs of prosecutorial inexperience. See United States v. Ruesga-Martinez, 534 F.2d 1367, 1370 (9th Cir. 1976) ("That the matter was handled by an inexperienced prosecutor . . . is, of course, no acceptable excuse whatsoever.")

63. In United States v. DeMarco, 550 F.2d 1224, 1227 (9th Cir.), cert. denied, 434 U.S. 827 (1977), the court observed that "[t]he prophylactic rule 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." See Lovett v. Butterworth, 610 F.2d 1002, 1007 (1st Cir. 1979), cert. denied, 447 U.S. 935 (1982); United States v. Lippi, 435 F. Supp. 808, 812 (D.N.J. 1977).
idence of defendants that vindictiveness will be controlled.\textsuperscript{64} The Court fashioned the \textit{Blackledge} rule to eradicate this uncertainty, and the apprehension of vindictiveness which attends it.

\textbf{C. Prosecutorial Vindictiveness After Goodwin}

The circuit courts must reevaluate their conflicting approaches to vindictiveness in the light of \textit{United States v. Goodwin}.\textsuperscript{65} The case involved an incident in which a United States Park Policeman stopped Goodwin’s car, and noticed a clear plastic bag beneath the driver’s side armrest. The officer asked Goodwin to reenter his automobile and raise the armrest. Goodwin indeed returned to his car, but then put it in gear and drove off, striking the officer with his vehicle in the process. Goodwin was later arrested, but fled the jurisdiction before trial. Three years later he was apprehended. The government initially assigned his prosecution to an attorney authorized to try only misdemeanors before a magistrate. Goodwin initiated plea bargaining, but later advised the government that he had decided to plead not guilty and would insist upon a jury trial in district court. This required reassigning the case to an Assistant United States Attorney, who sought and received a felony indictment for assaulting a federal officer. The jury returned a verdict of guilty on one felony and one misdemeanor count.

The Court held that this course of prosecutorial conduct did not give rise to a presumption of vindictiveness.\textsuperscript{66} Justice Stevens, relying on \textit{Bordenkircher}, reasoned that the substitution of more serious charges before trial involved both a diminished risk of retaliatory motivation and a much keener interest in prosecutorial discretion than such conduct would present after trial.\textsuperscript{67} The opinion points out that initial mistake, new information, or the tactics of plea bargaining may justify more serious charges before trial, but that these same factors become implausible as justifications for “upping the ante” after the reversal of a conviction.\textsuperscript{68} Thus, the Court concluded, “the \textit{timing} of the prosecutor’s action in this case suggests that a presumption of vindictiveness is not warranted.”\textsuperscript{69} The Court of course held out the possibility that a showing of actual vindictiveness, even before trial, would establish grounds for overturning a conviction for more serious offenses.\textsuperscript{70}

If \textit{Bordenkircher} and \textit{Goodwin} do no more than limit \textit{Blackledge}

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  \item \textsuperscript{64} See the criticisms of the three approaches discussed in notes 60-62 supra.
  \item \textsuperscript{65} 102 S. Ct. 2485 (1982).
  \item \textsuperscript{66} 102 S. Ct. at 2494.
  \item \textsuperscript{67} 102 S. Ct. at 2492-94.
  \item \textsuperscript{68} 102 S. Ct. at 2492-93.
  \item \textsuperscript{69} 102 S. Ct. at 2493 (emphasis added).
  \item \textsuperscript{70} 102 S. Ct. at 2494.
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to the posttrial setting, it would seem that the circuit courts must explicitly recognize the pretrial/posttrial distinction drawn in Goodwin, and enforce a presumption of vindictiveness whenever the government brings more serious charges on retrial. But Goodwin does not discuss circuit court approaches to the vindictiveness doctrine, and its treatment of Blackledge is ambiguous. Indeed, Goodwin itself says nothing about posttrial prosecutorial conduct. Part II, therefore, analyzes the pretrial/posttrial distinction relied upon in Goodwin, and concludes that due process requires greater posttrial protection against vindictiveness than any standard currently applied by the circuit courts.

II. THE NEED FOR GREATER PROTECTION IN THE POSTTRIAL CONTEXT

Goodwin distinguished pretrial from posttrial charging decisions, holding that due process does not require presuming vindictiveness from the substitution of more serious charges in the former context. This Part develops the logical corollary of that distinction, and concludes that due process does indeed require such a presumption in the posttrial setting. In the posttrial period the defendant's interest reaches its peak, a significant threat to this interest exists, and the State's competing interest in prosecutorial discretion is minimal.

The defendant's posttrial interest in the right to appeal demands the utmost protection. The Supreme Court has recognized the "fun-
The paramount function of the right to appeal is "to safeguard against miscarriages of justice." If an innocent defendant is wrongly convicted, the right to appeal provides an essential opportunity to obtain relief. Moreover, the right to appeal helps prevent the injustices that occur every time a defendant's rights are violated at trial, by providing an appellate court an opportunity to remedy trial court errors, and by deterring prosecutorial misconduct at trial.

The important law-making function of appellate review also compels the vigorous protection of the right to appeal. Because appellate decisions have more general application than trial court decisions, they provide a means for the development of "progressive, workable, and humane rules of criminal law" and for assuring that these rules are applied consistently by trial courts.

The importance of the right to appeal makes it essential that courts minimize the risk of prosecutorial vindictiveness in the posttrial period. Even before the Pearce and Blackledge decisions, the First Circuit Court of Appeals emphatically recognized that a defendant "should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a penalty for so doing."

In addition to deterring defendants from appealing, posttrial prosecutorial vindictiveness contravenes double jeopardy values. Although the double jeopardy clause does not mandate the rule pro-

74. See, e.g., Douglas v. California, 372 U.S. 353 (1963) (state must provide indigents with appointed counsel on their first appeal granted by state law as a matter of right); Griffin v. Illinois, 351 U.S. 12 (1956) (when transcript is required for appeal, state must provide the cost of the transcript to indigent seeking review). It has been suggested that the right to appeal may eventually be recognized as a federal constitutional right. See Eades, Appellate and Post Conviction Relief in Tennessee, 5 MEM. ST. U. L. REV. 1, 3 (1974).

As the law now stands, the Constitution does not require the states to grant appeals from criminal convictions. See, e.g., United States v. MacCollom, 426 U.S. 317, 323 (1976). Once avenues of review are established, however, the due process clause of the fourteenth amendment protects the defendant's free exercise of his statutory right. See, e.g., Blackledge v. Perry, 417 U.S. 17, 25 n.4 (1974). This right is one that is legitimately protected from prosecutorial vindictiveness. Blackledge v. Perry, 417 U.S. 17 (1974); Jackson v. Walker, 585 F.2d 139, 142 n.3 (5th Cir. 1978).

75. Margolis, Criminal Appeals in Motion, 45 CONN. B.J. 114, 117 (1971).
76. Margolis, supra note 75, at 117.
77. See generally Margolis, supra note 75, at 117-18. Prosecutorial misconduct is likely to be deterred since the prosecutor knows that such misconduct may result in a reversal on appeal.

78. See Margolis, supra note 75, at 117.
79. See Margolis, supra note 75, at 117.
80. Marano v. United States, 374 F.2d 583, 585 (1st Cir. 1967).
posed in this Note, the values underlying the clause should be considered in evaluating the defendant’s interest in being free from vindictiveness. Prosecutorial vindictiveness following a successful appeal thwarts the defendant’s interest in the finality of his prior sentence. As this consideration is irrelevant prior to the defendant’s conviction, the recognition of double jeopardy values argues for different constraints on prosecutors before and after trial.

While the defendant’s interest in freedom from prosecutorial vindictiveness reaches its height in the posttrial period, this is also the period in which vindictiveness is most likely to occur. Before investing their efforts in a full trial, prosecutors have “less at stake and less motive to act vindictively.” After obtaining a conviction, however, prosecutors have powerful incentives to try to deter appeals. Accordingly, defendants asserting their rights face the greatest risk of vindictiveness during the posttrial period.

The likelihood that an increase in the severity of charges follow-


82. See *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). See also *Brown v. Ohio*, 432 U.S. 161, 165-67 (1977); Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1051 (1980) (“*Pearce* was thus relegated to the . . . last of the double jeopardy values, viz., the [defendant’s interest] in finality.”). Although Westen suggests that the defendant has less of a finality interest in the length of sentence than in a determination of guilt or innocence, he acknowledges some interest in length of sentence. *Id*. Additionally, the finality interest in charging seems akin to the interest in guilt or innocence, since a defendant cannot be found guilty of a charge that was never brought.

83. This was the prevailing view before *Pearce* was decided. See, e.g., Honigsberg, *Limitations Upon Increasing A Defendant’s Sentence Following A Successful Appeal and Reconviction*, 4 CRIM. L. BULL. 329, 341 (1968); Van Alstyne, In *Gideon’s Wake: Harsher Penalties and the “Successful” Criminal Appellant*, 74 YALE L.J. 606, 634-35 (1965). It has, in fact, been suggested that *Pearce* was actually grounded in double jeopardy values. *See United States v. Andrews*, 633 F.2d 449, 458 (6th Cir. 1980) (en banc) (Merritt, J., dissenting) (“*Pearce* and *Blackledge* fit much better the double jeopardy mold . . . .”), cert. denied, 450 U.S. 927 (1981).

84. The prosecutor’s incentive to act vindictively is substantially less at the pretrial stage than it is during the posttrial period. *See note 29 supra* and accompanying text; *United States v. Goodwin*, 102 S. Ct 2485, 2493 (1982) (“[A] change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.”); *United States v. Schiller*, 424 A.2d 51 (D.C. 1980) (request for joint trial less likely to result in vindictiveness than request for retrial, since less prosecutorial effort exacted); *Note*, Bordenkircher v. Hayes: *The Relationship Between Prosecutorial Discretion and Vindictiveness in Plea Bargaining*, 33 ARK. L. REV. 211, 221 (1979) (“[T]he effort expended by the state in obtaining a conviction requires sufficient involvement to foster a desire to protect the result obtained.”).


86. Since a conviction requires a substantial investment of the prosecutor’s limited time and resources, the prosecutor has a strong interest in retaining the result obtained and in avoiding the costs of an appeal and possible retrial. *See Vorenberg*, supra note 3, at 1533 (“In many jurisdictions, available resources permit prosecutors to bring to trial only a small portion of the cases of intermediate severity that they could win easily, and a still smaller portion of minor crimes.”).
ing a successful appeal results from vindictiveness is magnified by the limited number of nonvindictive reasons for such action. Except when the prosecutor discovers substantial new evidence after the original trial, there is simply no compelling reason for the prosecutor to increase charges. Consequently, in the absence of substantial new evidence, such action by the prosecutor should be considered "inherently suspect.”

Against the defendant's very strong interest in freedom from the apprehension of posttrial prosecutorial vindictiveness, and the very real threat of such vindictiveness, weighs the State's interest in having the opportunity to increase charges at retrial. This State interest is, as many courts have recognized, minimal. Absent substantial new evidence, the increased charge simply reflects the prosecutor's reconsideration of "a previously completed exercise of discretion": the prosecutor has evaluated the evidence previously, has had the entire pretrial period to determine what charges are merited, and has made a charging decision. Denying the prosecutor the opportunity to reconsider this decision following the defendant's assertion of an essential right still allows the State to pursue the same charges that the prosecutor considered appropriate at the original trial. Hence, such a restriction "entails only a minor infringement on the exercise of a previously completed exercise of discretion": the prosecutor has a responsibility to see that the charge selected at the original trial “adequately describes the offense or offenses committed and provides for an adequate sentence for the offense or offenses.” National District Attorneys Association, NATIONAL PROSECUTION STANDARDS 131 (1977). See Department of Justice, PRINCIPLES OF FEDERAL PROSECUTION 16 (1980) (“Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.”).
The State's interest in preserving this recharging discretion is plainly less in the posttrial period than in the pretrial period. A number of courts have recognized — both explicitly and implicitly — the need to allow prosecutors some flexibility in framing, and reframing, charges before the first trial. Moreover, other pragmatic considerations, such as fear of undue delay and the difficulty of establishing a general standard, have led courts to relax the prosecutorial vindictiveness standard in the pretrial period but have little application to the posttrial period.

The defendant's essential due process interest in the right to appeal clearly outweighs the government's minimal interest in posttrial prosecutorial discretion. Because defendants must enjoy a high de-

91. Jackson v. Walker, 585 F.2d 139, 144 (5th Cir. 1978).
92. See, e.g., United States v. Goodwin, 102 S. Ct. 2485, 2493 (1982) ("In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution, or he simply may come to realize that information possessed by the State has a broader significance."); United States v. Schiller, 424 A.2d 51, 56 (D.C. 1980) ("A prosecutor should have broader leeway to add charges before an initial trial than in a case where a defendant is to be tried a second time."), cert. denied, 451 U.S. 964 (1981).
93. See note 51 supra.
94. Before trial, defendants might raise spurious allegations of vindictiveness to delay the proceedings every time a prosecutor brought a superseding indictment. See, e.g., United States v. Andrews, 633 F.2d 449, 467 (6th Cir. 1980) (en banc) (Engel, J., dissenting) ("Defense counsel, to avoid a charge of ineffective assistance, will be induced to challenge every superseding indictment for fear of waiving any claim that it was procured because of vindictiveness. Where not raised by the defense, the trial court, fearful of the plain error rule or of later collateral attack, may raise an issue sua sponte."); cert. denied, 450 U.S. 927 (1981). While defendants might do the same thing in a retrial situation, this possibility presents a much less serious problem since the number of retrials is only a fraction of the number of trials. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 415 (1980) (indicating that in the lower federal courts, during the twelve month period ending June 30, 1980, 27,725 original criminal proceedings were commenced. During the same period, only 243 criminal cases were remanded or reopened); Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 24-25 (5th ed. 1980) (suggesting that approximately one percent of all criminal cases are reversed on appeal).
95. See United States v. Andrews, 612 F.2d 235, 247 (6th Cir. 1979) (Merritt, J., concurring) ("The following questions demonstrate, in my mind, the unmanageability of the vindictiveness concept in the trial context: Once a defendant has successfully asserted a particular legal right in the course of the criminal process, is a prosecutor guilty of unconstitutional vindictive conduct, which "chills" the exercise of the legal right asserted, each time the prosecutor thereafter takes a position contrary to the interest of the defendant? If not, why not, and what is the standard of measurement?"); rev'd, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981). The concern that it is impossible adequately to identify and control all potential vindictiveness is not, however, a compelling reason not to control vindictive indictments before either trial or retrial. Unlike some potential vindictive behavior, an objective judgment can be made about whether a reindictment has adversely affected a defendant. Moreover, focusing on reindictments is justified because of the severe consequences they can cause for defendants. Finally, to the extent that other vindictive conduct is equally identifiable and deleterious, this argues for expanding the concept of vindictiveness, not retracting it.
96. See Jackson v. Walker, 585 F.2d 139, 144 (5th Cir. 1978) ("In Blackledge the defendant's appeal interest clearly outweighed the government's interest in unfettered prosecutorial discretion, which in that case involved only the prosecutor's right to reopen a previously com-
greet of confidence that their decision to appeal will not redound to their punishment,\(^{97}\) only a presumptive bar to more serious charges on retrial can protect this due process interest. Part III advocates a revitalized presumption of vindictiveness in the posttrial period, and rebuts the potential objections to such an approach.

III. A PROPOSED RULE TO CONTROL POSTTRIAL PROSECUTORIAL VINDICTIVENESS

The importance of preserving the defendant's posttrial rights compels a return to the prophylactic approach suggested by Blackledge. To minimize the defendant's fear of posttrial vindictiveness, increased charges\(^ {98}\) at retrial\(^ {99}\) should be deemed presumptively vindictive.\(^ {100}\) Only the presentation of clear and convincing

\(^{97}\) See notes 60-64 supra and accompanying text.

\(^{98}\) Increased charges, under this rule, would be charges that resulted in a combined potential sentence greater than the combined potential sentence at the original trial. As the Ninth Circuit has noted, "[the key to chilling defendant's rights] is the maximum prison term the defendant faces under the indictment . . . ." United States v. Motley, 655 F.2d 186, 189 (9th Cir. 1981).

\(^{99}\) It is probably necessary to apply the proposed rule to mistrials as well as retrials after reversals. See Johnson v. State, 396 A.2d 163, 165 (Del. 1978) (applying Pearce to mistrials). To do otherwise would be to encourage defendants to wait until after trial before alleging errors. (If prosecutors are only restricted by reversals, defendants will prefer reversals. Were a defendant to seek a mistrial during trial, he would not gain this benefit.). Such a result would waste judicial resources, since cases that should have been declared mistrials will instead continue to a verdict and then be reversed. See United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974).

Moreover, the likelihood of vindictiveness after mistrials is significant, so prosecutors should be required to justify any subsequent increase in charges. See United States v. Jamison, 505 F.2d at 416 n.15.

\(^{100}\) One might argue that an optimal rule for prosecutors would be the same as the rule set down for judges in Pearce — that the prosecutor's reasons for increasing the charges upon retrial must "affirmatively appear." North Carolina v. Pearce, 395 U.S. 711, 726 (1969). See United States v. Jamison, 505 F.2d 407, 416 (D.C. Cir. 1974); United States v. Lee, 435 F. Supp. 974, 977 (E.D. Tenn. 1976). See also TEX. PENAL CODE ANN. § 3.02(c) (Vernon 1974) (adopting a similar approach as state law).

At the very least, Pearce establishes a minimum standard, below which the standard for prosecutors should not fall. There are only two possible justifications for setting a lower standard for prosecutors than for judges. First, since prosecutors have traditionally had vast discretion, they should continue to have it. Such analysis, however, puts the cart before the horse: since prosecutors have vast discretion, new rules ought to grant them vast discretion. A more reasonable approach is to assess whether or not discretion constitutes sound policy in any
proof that the prosecutor has subsequently discovered substantial new evidence relating to the defendant should suffice to overcome this presumption. Additionally, prosecutors should continue to be prohibited, as they are under current case law, from giving case. Indeed, the greater discretion enjoyed by prosecutors may justify an opposite inference. Insofar as prosecutors exercise wider discretion than judges, this extra margin of discretion justifies stricter restraints upon its exercise. See Note, A 'Realistic Likelihood of Vindictiveness': Due Process Limitations on Prosecutorial Charging Discretion, 1981 U. ILL. L. Rev. 693, 713 (prosecutorial discretion exceeds judicial discretion, mandating more stringent regulation of prosecutorial conduct).

Second, one could argue that since the Pearce rule controls what sentence the defendant can receive, it obviates the need for a control on charging decisions. The prosecutor, however, can effectively change sentences by choosing to charge a crime with a higher minimum sentence at the retrial. To prevent this abuse, charging decisions must be restrained.

Simply imposing the Pearce rule on prosecutors would not, in itself, adequately protect defendants' rights. It is far too easy for a prosecutor to set forth nonvindictive justifications for his actions. See note 62 supra. Cf. Honigsberg, Limitations Upon Increasing a Defendant's Sentence Following a Successful Appeal and Reconviction, 4 CRIM. L. Bull. 329, 342 (1968) (commenting on ease with which judge can provide nonvindictive justifications).

One could argue that if the Pearce rule is adequate to control judges, it should also be adequate to control prosecutors. The distinction between the position of the judge and the prosecutor is, however, substantial: prosecutors have more discretion than judges, are more likely to act vindictively because of their role as an adversary, and operate less openly than the courts. See generally Alschuler, Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing, 126 U. PA. L. Rev. 550, 564 (1978). Hence, applying a more stringent standard to prosecutors, as proposed in this Note, is justified.

101. The new evidence would have to be unearthed after the last indictment before trial was issued. Since the discovery of new evidence would substantially alter the circumstances surrounding the prosecution, the presumption that the original charge was correct could then be overcome. In all circumstances, a determination by a grand jury that there exists probable cause that another crime was committed by the defendant after the original trial should be held to satisfy the proposed rule.

102. "Substantial" evidence is evidence that would make a reasonable prosecutor reevaluate his charging decision.

103. "New" evidence is evidence that the prosecutor did not know about, and could not reasonably have known about, before the indictment was issued. "New evidence" should be read to encompass the "legal necessity" exception mandated by the Supreme Court.

This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in Diaz v. United States, 223 U.S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in Diaz to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.


104. One could argue that the Supreme Court has mandated the rule proposed in this Note. Blackledge relies on an analogy to Pearce. See Blackledge v. Perry, 417 U.S. 21, 27-28 (1974). This Note merely extends the Pearce rule, by analogy, to the prosecutor's posttrial conduct. It then takes into account the judicially recognized incentive for prosecutors to retaliate during the posttrial period, see notes 84-88 supra and accompanying text, and accordingly places a higher burden of proof on prosecutors than is imposed on judges.

105. See, e.g., United States v. Goodwin, 102 S. Ct. 2485, 2494 (1982) ("In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.") (footnote omitted); United States v. Andrews, 612 F.2d 235, 251 (6th Cir. 1979),
being actually vindictive\textsuperscript{106} at any point during criminal proceedings.

Properly understood, the Supreme Court precedents defining the doctrine of prosecutorial vindictiveness require such a presumption. Admittedly, the rule defended here goes beyond \textit{Pearce}, for it restricts the justifications for more serious charges on retrial to the discovery of new evidence. But \textit{Blackledge} plainly imposes such a restraint on prosecutors after the reversal of a defendant's original conviction.\textsuperscript{107} \textit{Pearce} and \textit{Blackledge}, then, mandate a prophylactic presumption; \textit{Goodwin} suggests that this presumption applies most strongly on retrial. Giving effect to these decisions would require significant modifications in the approaches taken by the circuit courts, which have seriously weakened the \textit{Blackledge} rule. But surely it is more faithful to the principle of stare decisis to reject spurious justifications for more serious charges\textsuperscript{108} than to permit the erosion of a due process protection the Supreme Court intended to establish.

This approach recognizes the need to preserve prosecutorial discretion where substantial new evidence has been discovered. Prosecutors could still increase charges based on new evidence relating to either the activity covered by the previous indictment\textsuperscript{109} or to intervening criminal activity.\textsuperscript{110} The State's interest in increasing charges in these circumstances necessitates this exception.\textsuperscript{111} However, because a vindictive prosecutor may find new evidence "easy to generate" artificially,\textsuperscript{112} courts should carefully evaluate prosecutorial

\begin{itemize}
\item \textsuperscript{106} It is possible, for instance, that a prosecutor could decrease charges at retrial, yet still be acting vindictively. If, absent vindictiveness, the charges would have been dropped altogether, vindictiveness has still been impermissibly present in the charging process. In such a case, any defendant who can establish actual vindictiveness should have legal redress.
\item \textsuperscript{107} \textit{See} note 35 supra and accompanying text.
\item \textsuperscript{108} \textit{See} notes 60-64 supra and accompanying text.
\item \textsuperscript{109} If substantial new evidence is discovered the State may have a strong interest in increasing the charges. For example, if new evidence indicates that a convicted misdemeanant has actually committed a murder, the murder charge should not be barred at retrial. \textit{See} United States v. Andrews, 633 F.2d 449, 456 n.10 (6th Cir. 1980) (en banc), \textit{cert. denied}, 450 U.S. 927 (1981). \textit{See also} United States v. Nell, 570 F.2d 1251, 1254-55 (5th Cir. 1978).
\item \textsuperscript{110} \textit{Cf.} United States v. Jamison, 305 F.2d 407, 417 (D.C. Cir. 1974) (intervening event may justify increase in charges). Society's interest in punishing lawbreakers requires that defendants who commit additional crimes be prosecuted for those offenses. \textit{See generally} J. SMITH & B. HOGAN, CRIMINAL LAW 3 (3d ed. 1978).
\item \textsuperscript{111} \textit{See} Blackledge v. Perry, 417 U.S. 21, 29 n.7 (1974) (recognizing exception where the State could not proceed on the more serious charge at the original trial).
\item \textsuperscript{112} \textit{Note}, The Unconstitutionality of Plea Bargaining, 83 HARV. L. REV. 1387, 1409 (1972). This is particularly true given that police have been known to perjure themselves to secure advantages for the prosecutor. \textit{See} Younger, The Perjury Routine, \textit{Nation}, May 8, 1967, at 596-97.
\end{itemize}
claims that there is new evidence. To limit this exception, the courts should require the government to demonstrate that the new evidence upon which it bases its more serious charges could not have been gathered with due diligence prior to the original trial. This requirement would permit more serious charges whenever genuinely new information justifies them, without permitting a vindictive prosecutor to circumvent the rule.

Several objections to the rule proposed here could be raised. The most obvious concern is that preventing a prosecutor from freely selecting charges at retrial would limit the prosecutor's ability to act effectively. This objection is, however, unfounded. Because of the dearth of legitimate nonvindictive reasons for increasing charges at retrials, prosecutorial interests are not unduly impaired by requiring prosecutors to rely on the charging decisions made at the first trial. Additionally, since less than one percent of criminal cases result in retrials, any infringement on prosecutorial discretion is minimal. Ample precedent justifies imposing such a minor limitation on prosecutorial discretion.

113. The proposed rule attempts to reach a suitable compromise by requiring "clear and convincing proof" of substantial new evidence. These requirements should be rigidly enforced, as this exception could potentially emasculate the rule. See United States v. Tucker, 581 F.2d 602, 606 n.8 (7th Cir. 1978) ("In the natural course of events upon the retrial of a case, one might normally expect the Government to have available additional testimony and evidence of a defendant's guilt if for no other reason than that the Government has had additional time to prepare and refine its presentation.").

114. See, e.g., United States v. Jamison, 505 F.2d 407, 417 (D.C. Cir. 1974) ("[A] charge increase might in some circumstances be justified by intervening events or by new evidence of which the government was excusably unaware at the time of the first indictment.") (emphasis added).

115. While the proposed rule places restraints on the charges a prosecutor could bring, the prosecutor would still be free to substitute charges in the new indictment, as long as this does not expose the defendant to the risk of a longer sentence. Several courts agree that mere substitution of charges to increase the chance of conviction does not constitute vindictiveness. See United States v. Motley, 655 F.2d 186, 190-91 (9th Cir. 1981); United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1139 (E.D. Va. 1981); Sefcheck v. Brewer, 301 F. Supp. 793, 795 (S.D. Iowa 1969). But see United States v. D'Alo, 486 F. Supp. 754, 759-60 (D.R.I. 1980).

116. See notes 62, 87 supra.

117. See notes 89-91 supra.

118. See note 80 supra.

119. See, e.g., United States v. Agurs, 427 U.S. 97, 107 (1976) (prosecutor must turn over to defendant exculpatory evidence whether or not he is requested to do so); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (right to trial by jury limits manner in which prosecutor can try case); Washington v. Texas, 388 U.S. 14, 19 (1967) (compulsory process for obtaining favorable witnesses); Pointer v. Texas, 380 U.S. 400, 405 (1965) (defendant has right to confront his accusers); Malloy v. Hogan, 378 U.S. 1, 8 (1964) (privilege against self-incrimination); Napue v. Illinois, 360 U.S. 264, 269 (1959) (prosecutor must correct testimony that he knows to be false); Green v. United States, 355 U.S. 184, 191 (1957) (double jeopardy limits prosecutorial discretion in charging at retrial). See also Hardwick v. Doolittle, 558 F.2d 292, 301 (5th Cir. 1977) ("If Blackledge teaches any lesson, it is that a prosecutor's discretion to reindict a defendant is constrained by the due process clause."). cert. denied, 434 U.S. 1049 (1978).

120. It might be argued that prosecutorial resources invested in the first trial represent a fixed cost, and that when prosecutors increase charges at retrial they are making a reasonable
A second possible objection to the proposed rule is that prosecutorial gamesmanship will thwart the intent of the rule. Prosecutors, denied the opportunity to increase charges at retrial, could simply request increased sentences at retrial. This argument depends on the questionable assumption that prosecutors will have both the desire and the opportunity to take such action effectively. Moreover, even should a prosecutor make such a request, it is unlikely to have an effect on the sentence imposed by the judge, particularly since Pearce requires a judge to justify affirmatively an increased sentence. Finally, the suggestion that prosecutors might

effort to recover on both these fixed costs and the additional costs incurred during the second trial. See generally P. SAMUELSON, ECONOMICS 445 (11th ed. 1980).

This fixed cost argument should be rejected for several reasons. First, it assumes that a prosecutor's "payback" comes exclusively in the form of prison sentences. Theoretically, at least, the prosecutor's payback comes in the form of "justice" which ought not to be affected by the defendant's request for a new trial.

Moreover, given that prison capacity, rather than the charging decision, imposes the ultimate constraint on imprisoning any individual defendant, this fixed cost approach would necessarily result in injustice. See generally N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL 111-12 (1970); Blumstein & Cohen, A Theory of the Stability of Punishment, 64 J. CRIM. L. & CRIMINOLOGY 198, 200-02 (1973). If the particular defendant receives a longer sentence as a result of the prosecutor's fixed cost analysis, some other convict must be freed. If, however, the particular defendant does not receive an increased prison sentence, the prosecutor has not received his payback. Thus, prison time cannot be the currency of prosecutorial charging decisions.

Finally, if the State commits error at the first trial — which was necessarily found if the defendant's appeal is successful — it is manifestly unjust that the "cost" of this error be imposed on the defendant. Rather, the State, which erred, ought to bear the cost of its mistake. See United States v. Andrews, 612 F.2d 235, 256 (6th Cir. 1979) (Keith, J., dissenting) ("The only reason why prosecutorial vindictiveness problems exist in the first place is that the prosecutor's office bungled things."), revd, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981).

121. Because a multitude of factors, such as the strength of testimony of opposing witnesses and the emotional appeal of the prosecution's case, affect a prosecutor's sentencing requests, the independent influence of vindictiveness may be negligible. See Chaffin v. Stynchcombe, 412 U.S. 17, 27 n.13 (1973).

122. In any case where the prosecutor requested the highest possible sentence at the original trial, it will be impossible for him to retaliate by requesting a higher sentence at retrial. Other constraints may also limit the prosecutor's ability to effectively seek an increased sentence. See Chaffin v. Stynchcombe, 412 U.S. 17, 27 n.13 (1973) ("Given these practical considerations, and constrained by the bar against his informing the jury of the facts of the prior conviction and sentence, the possibility that a harsher sentence will be obtained through prosecutorial malice seems remote.").

123. Since prosecutors routinely seek higher sentences than they expect to receive, the sentencing authority can be expected to discount a prosecutor's vindictive requests. See Chaffin v. Stynchcombe, 412 U.S. 17, 27 n.13 (1973). See also Schulhofer, Due Process of Sentencing, 128 U. PA. L. REV. 733, 757 (1980) (arguing that prosecutors' charging discretion has little impact on sentencing).

124. See notes 25-26 supra. The lower courts have consistently enforced the Pearce limitation on judicial vindictiveness. See, e.g., United States v. Williams, 651 F.2d 644, 648 (9th Cir. 1981) (post-sentence conviction on state charges does not justify increase); Jacobs v. Redman, 616 F.2d 1251, 1258-59 (3d Cir. 1980) (purported justification for more severe sentence insufficient), cert. denied, 446 U.S. 944 (1980)); United States v. Marcus, 603 F.2d 409, 414 (2d Cir. 1979) (increased sentence predicated on presentencing conduct disallowed). For an explanation of why this rule would adequately control judges, but not prosecutors, see note 100 supra.
resort to such tactics hardly argues against controlling posttrial prosecutorial discretion. Instead, if this argument has any validity, the appropriate response should be to reinforce controls over such prosecutorial requests and, if necessary, to strengthen the *Pearce* standard. 125

Finally, 126 one might object to the proposed rule on the basis of a different sort of prosecutorial gamesmanship. Prosecutors might overcharge at the original trial to assure flexibility in case of reversal. 127 As with the preceding argument, however, it is nonsensical to suggest that this possibility of abuse requires courts not to control abuses at later stages in the proceedings. 128 In addition, there is good reason to believe that this possibility is remote. The objection assumes an unrealistic degree of rationality in charging decisions. 129 Prosecutors do not consider the possibility of reversal when they make the initial charging decision, 130 so they are unlikely to increase

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125. Prosecutors do, of course, have numerous opportunities to take vindictive actions. Hence, prosecutors theoretically can respond to limitations on any particular opportunity by acting vindictively at a different point in the proceedings. If, however, a prosecutor is this committed to vindictive action, it certainly does not mean that it is pointless to try to control such abuses. To the contrary, it points to the need for even greater control over prosecutorial discretion.

126. There is one other possible objection to the proposed rule, but it is utterly without substance. One could argue that a rule restricting charges at retrial will encourage “frivolous appeals.” This is not compelling, however, for several reasons. First, by authorizing appeals of right, legislatures have agreed to pay the cost of any appeals that are taken. Second, there is no reason to think that a greater percentage of the “new” appeals under the proposed rule will be frivolous than are frivolous under the existing format. The threat of vindictiveness undoubtedly deters genuine, as well as frivolous, potential appeals. Finally, even under the proposed rule, appeals are costly to defendants. They must still expend time and money in exercising their right to appeal, and perhaps most importantly will continue to face the possibility of an increased sentence on retrial. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 719 (1969); United States v. Johnson, 537 F.2d 1170, 1174-75 (4th Cir. 1976).


128. *See* note 125 *supra* and accompanying text.


130. *See*, e.g., J. Jacoby, *The Prosecutor’s Charging Decision* 7 (1977); Comment, *supra* note 3, at 491-98. These analyses of charging decisions nowhere suggest that the possibility of reversal is considered by prosecutors. If this factor is not considered by abstract analysis, it seems even less likely that prosecutors take it into account in their daily decision-making. *See generally* Abrams, *Prosecutorial Charge Decision Systems*, 23 UCLA L. REV. 1 (1975).

One might argue that although prosecutors do not currently consider the possibility of reversal in making their charging decisions, they will start to consider it after the proposed rule is adopted. Obviously, empirical data on this issue is not available. Logically, however, it seems unlikely that a prosecutor faced with such basic considerations as the defendant's actual guilt or innocence, the effort involved in preparing the case, and the influence of public opinion on
charges on the basis of this consideration. Finally, because prosecu-
tors who overcharge face the risk that juries will acquit against the
weight of the evidence,\footnote{See Beck v. Alabama, 447 U.S. 625, 640 (1980) (when juries acquit against the evidence, they create their own sentencing discretion); Westen, \textit{supra} note 82, at 1012-23.} and that judges will adjust the sentence to compensate for overcharging,\footnote{See note 123 \textit{supra}.} it is unlikely that prosecutors will take such action as a safeguard against the remote possibility that a defendant's conviction may be appealed and reversed.\footnote{See note 94 \textit{supra}.}

\section*{CONCLUSION}

The concept of prosecutorial vindictiveness potentially encom-
passes all prosecutorial action at every stage of a criminal proceed-
ing. Because the balance of interests between the defendant and the
State is shifting throughout the proceeding, it is hardly surprising
that no satisfactory standard for assessing allegations of vindictive-
ness has been devised. Instead of attempting to develop a single stan-
dard to control vindictiveness, courts should, following \textit{Goodwin},
recognize the critical differences between pretrial and posttrial
prosecutorial vindictiveness. If courts take account of this distinc-
tion, and adopt a prophylactic rule to protect the defendants' over-
riding interests during the posttrial period, they will spare
defendants the "grisly choice" imposed by the risk of posttrial
vindictiveness.\footnote{\textit{Cf.} Patton v. North Carolina, 381 F.2d 636, 639 (4th Cir. 1967) (discussing the "grisly choice" defendants face when forced to choose between not appealing their convictions or appealing at the risk of a harsher sentence at retrial).}