

3-1981

Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework For Analysis

John J. Cross, III

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Fourteenth Amendment Commons](#)

Recommended Citation

John J. Cross, III, *Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework For Analysis*, 34 *Vanderbilt Law Review* 431 (1981)
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol34/iss2/6>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Law Review* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

RECENT DEVELOPMENTS

Prosecutorial Vindictiveness: An Examination of Divergent Lower Court Standards and a Proposed Framework For Analysis

I. INTRODUCTION

The due process clause of the fourteenth amendment prohibits states from interfering with the exercise of fundamental constitutional rights—substantive and procedural—absent a showing that the interference is the least restrictive means available for the effectuation of a compelling state interest.¹ Additionally, the “unconstitutional conditions doctrine”² dictates that, absent a compelling justification, a state violates substantive due process when it indirectly burdens the exercise of fundamental rights by conditioning the receipt of governmental benefits upon an individual’s waiver of fundamental constitutional rights. The unconstitutional conditions doctrine further provides that, absent a compelling justification, a state cannot withhold or cancel a state-created benefit as a penalty for the assertion of fundamental rights.³ As states have become in-

1. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

2. See generally French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Merrill, *Unconstitutional Conditions*, 77 U. PA. L. REV. 879 (1929); O’Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968). For a discussion of the unconstitutional conditions doctrine as it applies to the rights of a criminal appellant, see Van Alstyne, *In Gideon’s Wake: Harsher Penalties and the “Successful” Criminal Appellant*, 74 YALE L.J. 606 (1965). For discussions of the constitutionality of plea bargaining under the unconstitutional conditions doctrine, compare Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) (plea bargaining is unconstitutional under the constitutional conditions doctrine) with McCoy & Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887 (1980) (plea bargaining is reconcilable with the unconstitutional conditions doctrine as a constitutionally adequate substitute for trial).

3. Recent cases have focused on the penalty aspect of the doctrine. See, e.g., *Elrod v. Burns*, 427 U.S. 347 (1976) (penalty on the fundamental right of political association); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (penalty on the fundamental right to travel); *Shapiro v.*

creasingly involved in the distribution of benefits in the form of jobs, housing, and welfare, courts have invoked the unconstitutional conditions doctrine regularly to strike down state schemes that condition the availability of various benefits on the individual's waiver or nonassertion of fundamental rights.⁴

Social program funding represents a classic area in which courts have used the unconstitutional conditions doctrine to invalidate state plans conditioning receipt of a benefit upon an individual's waiver of a fundamental right. For example, in *Sherbert v. Verner*⁵ the Supreme Court used the doctrine to invalidate a South Carolina unemployment compensation plan that conditioned the grant of unemployment benefits upon an applicant's availability for work.⁶ The state denied unemployment benefits to the Sabbatarian plaintiff in *Sherbert* because she refused, for religious reasons, to work on Saturdays.⁷ In effect, the South Carolina plan conditioned receipt of its unemployment benefits on plaintiff's waiver of her fundamental right to assert her religious beliefs. The Court applied the unconstitutional conditions doctrine and held that the unemployment benefits plan placed an unconstitutional penalty on plaintiff's right to freedom of religion.⁸

State-created benefits are sometimes less direct than the distribution of public monies. For example, judges and prosecutors can grant criminal defendants leniency in criminal charging, sentencing, and bail setting decisions.⁹ In several recent decisions, the Supreme Court has employed the unconstitutional conditions doctrine to prohibit the withdrawal of leniency when it effectively penalizes criminal defendants for exercising their fundamental rights.¹⁰ In *North Carolina v. Pearce*¹¹ a criminal defendant ob-

Thompson, 394 U.S. 618 (1969) (penalty on the fundamental right to interstate travel); *United States v. Jackson*, 390 U.S. 570 (1968) (penalty on the fundamental right to jury trial); *Sherbert v. Verner*, 374 U.S. 398 (1963) (penalty on the free exercise of religion).

4. See generally Comment, *supra* note 2, at 144.

5. 374 U.S. 398 (1963).

6. *Id.* at 400. The South Carolina Unemployment Compensation Act provided that, to be eligible for benefits, a claimant must be "able to work . . . and available for work." Further, the Act provided that a claimant was ineligible for benefits "[i]f . . . he . . . failed, without good cause . . . to accept available suitable work when offered him by the employment office. . . ." *Id.* When appellant refused to work on Saturdays, the state deemed her unavailable for work and terminated her benefits.

7. *Id.* at 401.

8. *Id.* at 406.

9. Whenever a stato official exercises his discretion to seek less than the maximum criminal sanction allowed by statute for a particular crime, he, in effect, grants a positive benefit of leniency to the individual defendant. See Comment, *supra* note 2, at 174.

10. See *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S.

tained reversal of his original conviction, but upon retrial and reconviction the trial judge imposed a harsher sentence than had been imposed after the first conviction. The Supreme Court held that the imposition of this harsher sentence violated defendant's substantive due process rights because it penalized him for successfully asserting his fifth amendment right to be free from self-incrimination.¹² The *Pearce* Court coined the term "vindictiveness" to characterize the judge's retaliatory action of penalizing defendant's exercise of a fundamental right with a harsher sentence.¹³ Thus, whether a state penalizes an individual's exercise of a fundamental right by cancelling welfare benefits or by withholding lenient criminal sanction benefits, the unconstitutional conditions doctrine applies.

Since *Pearce* and its progeny,¹⁴ lower federal courts have developed conflicting standards for determining whether prosecutors violate substantive due process by imposing penalties upon defendants who exercise either statutory or constitutional rights. Recently, the Sixth Circuit adopted an overall balancing test: due process is violated when a reasonable person would think there exists a realistic likelihood of vindictiveness, unless the state can rebut this likelihood with objective, on-the-record explanations of the prosecutor's conduct.¹⁵ Other circuits have employed standards that focus on "actual vindictiveness"¹⁶ or "appearance of vindictiveness"¹⁷ to assess the due process implications of prosecutorial actions that follow a defendant's exercise of rights.

The purposes of this Recent Development are to trace the Supreme Court's development of the unconstitutional conditions doc-

711 (1969). Cf. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (affirming the unconstitutional conditions principle, but finding it inapplicable to prosecutorial penalties in connection with the give-and-take of plea bargaining).

11. 395 U.S. 711 (1969).

12. *Id.* at 725.

13. *Id.*

14. The Supreme Court extended the *Pearce* rule to place due process constraints upon the conduct of prosecutors in *Blackledge v. Perry*, 417 U.S. 21 (1974).

15. *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980).

16. See, e.g., *United States v. Thomas*, 617 F.2d 436 (5th Cir. 1980); *United States v. Jones*, 587 F.2d 802 (5th Cir. 1979); *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977).

17. See, e.g., *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980); *Lovett v. Butterworth*, 610 F.2d 1002 (1st Cir. 1979); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978); *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977); *United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976); *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *Koski v. Samaha*, 491 F. Supp. 432 (D.N.H. 1980).

trine in the "vindictiveness" cases to analyze the divergent tests currently applied in prosecutorial vindictiveness cases, and to propose a proper framework for analysis in this area. This Recent Development submits that absent a compelling state justification, the unconstitutional conditions doctrine should apply when increased prosecutorial charges effectively penalize criminal defendants for the exercise of fundamental constitutional rights.¹⁸ When statutory or other nonfundamental rights of the accused are involved, the unconstitutional conditions doctrine should not apply;¹⁹ instead, courts should invoke their supervisory powers over the administration of criminal justice in order to protect criminal defendants against prosecutorial abuses.²⁰

II. SUPREME COURT DEVELOPMENT OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

A. *Origins and Policy*

The unconstitutional conditions doctrine discredited the superficial logic of the proposition that the state's power to withhold absolutely certain privileges or benefits necessarily included the power to condition the grant of benefits in any manner the state chose.²¹ In support of this position, states often asserted that such conditions did not deprive individuals of their rights since, by a simple rejection of the proffered benefit, the right could be retained.²² For a time, the courts accepted this rationale.²³ For in-

18. See text accompanying notes 150-71 *infra*.

19. See text accompanying notes 172-88 *infra*.

20. The Supreme Court recently observed that the supervisory power "serves the 'two-fold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, 100 S. Ct. 2439, 2446 n.8 (1980). The supervisory powers should serve as an appropriate mechanism for controlling prosecutorial misconduct when a defendant's nonfundamental rights are involved.

21. State legislatures often urged this position. See, e.g., *Davis v. Massachusetts*, 167 U.S. 43 (1897) (upholding an ordinance prohibiting public speaking in the Boston Common). In *Davis* the state successfully argued that its power to withhold access to municipal property altogether included the lesser power to permit access with restrictions on free speech. *Id.* at 48.

22. See, e.g., *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding the constitutionality of New York's Feinberg Law, which made membership in the Communist Party a prima facie ground for dismissal of a public school teacher). According to the Court in *Adler*,

It is clear that such persons have the right under our law to assemble, speak, think, and believe as they will. . . . It is equally clear that they have no right to work for the State . . . on their own terms. . . . If they do not choose to work on [the State's terms], they are at liberty to retain their beliefs and associations and go elsewhere.

Id. at 492.

stance, in *McAuliffe v. Mayor of New Bedford*²⁴ Justice Holmes invoked this theory in rejecting the claim of a policeman fired for violating a regulation that restricted political speech. Holmes concluded that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."²⁵

The untenable constitutional implications of Justice Holmes' position soon became apparent. With the twentieth century came the state's expansion as an economic unit and its increasing involvement in housing, education, and welfare. As a result, the total number of benefits at the state's disposal increased enormously.²⁶ This development led to the recognition that, by allowing a state to condition the receipt of benefits on the waiver of individual rights, there existed a potential for tremendous erosion of fundamental constitutional liberties.²⁷ Consequently, courts rejected the earlier view, which had given the states carte blanche power to condition the availability of state-created benefits on the surrender of fundamental rights; in its place, they adopted the unconstitutional conditions doctrine.²⁸ Basically, this doctrine places two substantive due process restrictions on a state. First, a state cannot condition the receipt of its benefits upon the forfeiture or nonassertion of fundamental constitutional rights.²⁹ Second, absent a

23. *E.g.*, *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (upholding summary dismissal of a federal civil servant on grounds of suspected disloyalty); *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934) (state may condition the benefit of attending a public university upon mandatory R.O.T.C. participation, even if the nonparticipation is religiously motivated).

24. 155 Mass. 216, 29 N.E. 517 (1892).

25. *Id.* at 220, 29 N.E. at 517.

26. For an examination of the increasing scope and extent of government largesse, see Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

27. See Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Comment, *supra* note 2.

28. The Supreme Court first explicitly formulated the unconstitutional conditions doctrine in *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876). The doctrine, however, did not gain widespread judicial acceptance until the Warren Era. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (prohibiting state of New York from conditioning the availability of public teaching jobs on nonmembership in the Communist Party); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960) (prohibiting the state from penalizing the fundamental right to associational freedom by conditioning the availability of public teaching jobs on full disclosure of organizational memberships).

29. Under the due process clauses of the fifth and fourteenth amendments, the unconstitutional conditions doctrine applies equally to both federal and state governments. The fifth amendment states in part that "[n]o person shall . . . be deprived of life, liberty, or property without due process of law." U.S. CONST. amend V. The fourteenth amendment

compelling state interest, a state cannot withhold or cancel its benefits in order to penalize the recipient for exercising his fundamental rights.³⁰ In short, the unconstitutional conditions doctrine is grounded in the assumption that to permit a state to condition the receipt of benefits upon the surrender of fundamental rights deters individuals from exercising these rights. This possibility requires the prophylactic unconstitutional conditions doctrine, which treats such conditions as tantamount to direct infringement of the fundamental right in question.³¹

As early as 1926, in *Frost & Frost Trucking Co. v. Railroad Commission*,³² Justice Sutherland emphatically stated the policy behind the unconstitutional conditions doctrine: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence."³³ Over the past quarter century the Supreme Court has regularly invoked this policy to hold unconstitutional state actions that effectively penalize fundamental rights.³⁴ Most frequently, the Court has invalidated conditions in connection with the following four areas of

states in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV.

Today almost all of the guarantees specifically enumerated in the Bill of Rights are applicable to the states through the fourteenth amendment. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 541-42 (9th ed. 1975 & Supp. 1979). The only unincorporated provisions in the original Bill of Rights (the first eight amendments) are the grand jury indictment requirement of the fifth amendment and the civil jury trial guarantee of the seventh amendment. *Id.* at 542. For a general explanation of the unconstitutional conditions doctrine, see Comment, *supra* note 2.

30. See note 3 *supra*.

31. See *e.g.*, *Speiser v. Randall*, 357 U.S. 513 (1958), in which the Court stated that "[t]o deny [a tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." *Id.* at 518. See generally Note, *Unconstitutional Conditions*, *supra* note 2.

32. 271 U.S. 583 (1926).

33. *Id.* at 594. In *Frost* the Court invalidated a state law that imposed common carrier liability on private trucking companies as a condition to highway access. The Court held that the state could not condition this benefit upon plaintiff's surrendering of its fifth amendment right to receive just compensation for private property taken for public use. *Id.* at 599.

34. *Elrod v. Burns*, 427 U.S. 347 (1976) (fundamental right of political association); *United States v. Jackson*, 390 U.S. 570 (1968) (fundamental right to refrain from self-incrimination and to a jury trial); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (freedom of speech and association); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (fundamental right to refrain from self-incrimination); *Sherbert v. Verner*, 374 U.S. 398 (1963) (freedom of religion); *Jamison v. Texas*, 318 U.S. 413 (1943) (freedom of religion and press).

state benefits: first, the privilege of foreign corporations to engage in local business;³⁵ second, the use of public property;³⁶ third, the receipt of public funds;³⁷ and last, public employment.³⁸

In addition to these categories, the Court has applied the unconstitutional conditions doctrine in the area of state benefits relating to criminal sanctions. In *United States v. Jackson*³⁹ the Court applied the unconstitutional conditions doctrine to invalidate a provision of the Federal Kidnapping Act.⁴⁰ Under that statute, the death penalty could be imposed only "if the verdict of the jury [should] so recommend."⁴¹ The statute, however, provided no procedure for imposing the death sentence when a defendant pleaded not guilty or was tried before a judge. The *Jackson* Court held that this scheme created an unconstitutional condition that needlessly penalized defendant's fifth amendment right to plead not guilty and sixth amendment right to demand a jury trial because it conditioned receipt of the more lenient sentence on waiver of these rights.⁴² The Court declared that if the statute had "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."⁴³

35. *E.g.*, *Terral v. Burke Construction Co.*, 257 U.S. 529 (1922) (state may not condition entry on a foreign corporation's waiver of the right to remove actions to federal court). See generally G. HENDERSON, *THE POSITION OF FOREIGN CORPORATIONS IN AMERICAN CONSTITUTIONAL LAW* 178-87 (1918).

36. *E.g.*, *Jamison v. Texas*, 318 U.S. 413 (1943) (State cannot prohibit the use of public streets for distribution of handbills that constitutes first amendment religious activities).

37. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398 (1963) (state may not withhold unemployment benefits from otherwise eligible applicant for asserting her fundamental right to freedom of religion).

38. *E.g.*, *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (state may not deny employment to an individual for asserting his first amendment rights by refusing to sign a loyalty oath).

39. 390 U.S. 570 (1968).

40. The Federal Kidnapping Act, 18 U.S.C. § 1201 (a) (1964) (current version at 18 U.S.C. § 1201 (a) (1976 & Supp. III 1979), provided in part that interstate kidnapers "shall be punished (1) by death if the kidnapped person has not been liberated unharmed and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

41. *Id.*

42. 390 U.S. at 583.

43. *Id.* at 581. The *Jackson* Court further noted that the evil in the federal statute was not that it necessarily coerced guilty pleas, but rather that it needlessly encouraged guilty pleas. *Id.* at 583.

B. *From Pearce to Bordenkircher: Application of the Doctrine to Prosecutorial Vindictiveness*

Only three Supreme Court decisions bear directly on the unconstitutional conditions doctrine in the context of prosecutorial vindictiveness. The Supreme Court first dealt with the concept of "vindictive" penalties in *North Carolina v. Pearce*.⁴⁴ In *Pearce* a criminal defendant had his original conviction set aside because of a fifth amendment violation.⁴⁵ Defendant was retried before the same judge and received a harsher sentence upon reconviction.⁴⁶ The Supreme Court found a due process violation, stating that

[d]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.⁴⁷

The scope of the *Pearce* holding is unclear. Some language in the opinion suggests that the Court intended to fashion a sweeping due process rule prohibiting the state from acting with even the appearance of vindictiveness in response to a criminal defendant's assertion of any rights—statutory or constitutional.⁴⁸ Nevertheless, the Court's central purpose was to prohibit the state from penalizing those defendants who choose to exercise fundamental constitutional rights.⁴⁹ In effect, *Pearce* taught that substantive due process prevents the state from penalizing a defendant with a harsher sentence after his successful assertion of a fundamental fifth amendment right.⁵⁰

44. 395 U.S. 711 (1969).

45. The original conviction was reversed on the ground that an involuntary confession had been admitted into evidence in violation of defendant's fifth amendment right to refrain from self-incrimination.

46. 395 U.S. at 713.

47. *Id.* at 725.

48. *Id.* The Court admonished in dicta that "even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law." *Id.* at 724.

49. The Court stressed that "'penalizing those who choose to exercise' constitutional rights 'would be patently unconstitutional.'" *Id.*

50. The conclusion that *Pearce* is an unconstitutional conditions case is buttressed by the Court's recognition that to allow harsher sentences upon reconviction after an original conviction is set aside for constitutional error would serve to "chill the exercise of basic constitutional rights." *Id.* See also McCoy & Mirra, *supra* note 2, at 90.

In *Blackledge v. Perry*⁵¹ the Supreme Court extended the *Pearce* due process rule to limit prosecutorial discretion in bringing criminal charges.⁵² In *Blackledge*, when defendant exercised his statutory right to a trial *de novo*, the prosecutor increased the charge from a misdemeanor to a felony. The Court held that the prosecutor's actions violated defendant's substantive due process rights.⁵³ Stating that *Pearce* controlled, the Court declared that a finding of an "actual retaliatory motivation" was unnecessary for a due process violation under *Pearce*,⁵⁴ and that "[a] person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one."⁵⁵

In *Blackledge* the Court failed to address the nature of the right asserted by defendant. Although the Court spoke of defendant's "statutory right to appeal" for a *de novo* trial⁵⁶ the circumstances suggest that the prosecutor penalized defendant for asserting his constitutional right to a jury trial.⁵⁷ Since *Duncan v.*

51. 417 U.S. 21 (1974).

52. *Id.* at 27. Between the time of the *Pearce* and the *Blackledge* decisions, the Supreme Court declined to apply the *Pearce* rule in two decisions. In *Colten v. Kentucky*, 407 U.S. 104 (1972), defendant appealed from a misdemeanor conviction and received a trial *de novo* before a different judge. The Supreme Court upheld the imposition of a stiffer sentence by the second judge because the possibility of vindictiveness, found to exist in *Pearce*, was not present in the Kentucky two-tier system. *Id.* at 116. The Court reaffirmed the *Pearce* prophylactic rule against penalties vindictively imposed on the exercise of fundamental rights, but distinguished *Pearce* factually, since in *Colten* a different judge presided over the second trial, and there was no record of the earlier proceedings. *Id.* at 116-17. In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), the Court considered a situation in which the petitioner received a harsher sentence upon reconviction by a different jury. While reaffirming the underlying *Pearce* rationale that vindictive penalties against an accused for having successfully overturned his conviction have no place in the resentencing process, the Court held that due process did not require extending the *Pearce* restrictions to jury sentencing. *Id.* at 18.

53. 417 U.S. at 28-29.

54. *Id.* at 28.

55. *Id.*

56. *Id.* at 29.

57. It is a misnomer to characterize an application for a trial *de novo* as an "appeal" because the right to a *de novo* trial is unconditional and exists without regard to error in the original proceeding. The Supreme Court has recognized this distinction in discussing two-tiered criminal trial systems generally. See *Colten v. Kentucky*, 407 U.S. 104, 113-15 (1972). Moreover, under North Carolina's two-tiered criminal trial system, the lower courts provided no jury trials, even in instances in which the authorized punishment would entitle the accused to a jury trial under the sixth amendment. See *Duncan v. Louisiana*, 391 U.S. 145 (1968). Therefore, the defendant's appeal for a trial *de novo* with its available jury option may be characterized more accurately as an assertion of a fundamental right to a constitutionally adequate jury trial. Commentators have argued that in *Blackledge* defendant's demand for a trial *de novo* was nothing more than a demand for a constitutionally adequate

*Louisiana*⁵⁸ and *Baldwin v. New York*,⁵⁹ criminal defendants in state courts possess a fundamental right to a jury trial in all cases in which the potential prison sentence exceeds six months. By contrast, under North Carolina's two-tiered criminal system, applicable in *Blackledge*, the district courts have exclusive jurisdiction over misdemeanors and never provide jury trials, even though misdemeanor violations carry a potential two-year term of incarceration.⁶⁰ Taken alone, North Carolina's district court procedure deprives accused misdemeanants of the fundamental right to a jury trial as defined by the *Duncan v. Louisiana* mandate. Under the system, however, a convicted misdemeanant has an absolute statutory right to seek a trial de novo in superior court, in which jury trials are available.⁶¹ In short, the *Blackledge* defendant's assertion of his "statutory" right to a trial de novo was, in effect, an assertion of his fundamental sixth amendment right to a constitutionally adequate jury trial. Hence, like the *Pearce* decision, *Blackledge* may be read as an unconstitutional conditions case holding that due process prohibits a prosecutor—absent a compelling justification—from penalizing a criminal defendant with a harsher charge for the assertion of a fundamental constitutional right.

While reaffirming the *Pearce-Blackledge* unconstitutional conditions doctrine, the Supreme Court in *Bordenkircher v. Hayes*⁶² declined to apply the rationale of those cases to prosecutorial plea bargaining. In *Bordenkircher* defendant initially was indicted for a felony punishable by a ten-year maximum sentence.⁶³ During plea negotiations, the prosecutor offered to recommend a lenient five-year sentence in return for defendant's guilty plea, but threatened to reindict on habitual criminal charges carrying a mandatory life sentence if defendant refused to forgo his fifth amendment right to

trial, since the proceeding in the lower court was procedurally deficient. See generally *McCoy & Mirra*, *supra* note 2, at 907-08.

58. 391 U.S. 145, 149 (1968) (defendant charged with a crime punishable by a two year prison sentence has a fundamental sixth amendment right to a jury trial).

59. 399 U.S. 66 (1970) (defendant charged with a crime punishable by a six month prison sentence has a fundamental sixth amendment right to a jury trial). See generally C. WHITEBREAD, *CRIMINAL PROCEDURE* 430-71 (1980).

60. In North Carolina, the maximum penalty for a misdemeanor is two years imprisonment. N.C. GEN. STAT. § 14-33(c) (1969). The district courts in North Carolina have exclusive jurisdiction to try misdemeanors. N.C. GEN. STAT. § 7A-272 (1969). Finally, these district courts provide no jury trials. N.C. GEN. STAT. § 7A-196(b) (1969).

61. N.C. GEN. STAT. § 7A-290 (1969).

62. 434 U.S. 357 (1978).

63. *Id.* at 358.

plead not guilty and his sixth amendment right to a jury trial.⁶⁴ Despite the apparent violation of due process under the *Pearce-Blackledge* rationale, the *Bordenkircher* Court refused to find an unconstitutional condition. Instead, the Court held that the prosecutor complied with due process even though he reindicted defendant on the more serious recidivist charge solely because defendant refused to plead guilty to the original charge.⁶⁵ The Court even conceded "as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty."⁶⁶ The Court in *Bordenkircher* distinguished *Pearce* and *Blackledge* as cases that dealt with the state's "unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction — a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'"⁶⁷

Theoretically, the prosecutor's reindictment of the defendant in *Bordenkircher* on more serious charges in retaliation for defendant's assertion of fundamental rights is indistinguishable from the penalty theory of *Pearce* in terms of coercive impact and deterrent effect on the assertion of fundamental rights. Nevertheless, *Bordenkircher* is reconcilable with the Court's long-standing commitment to the unconstitutional conditions doctrine when the decision is viewed as implicitly holding that the state demonstrated a sufficiently compelling justification for the prosecutor's actions. Specifically, Justice Stewart's majority opinion appears to accept the proposition that plea bargaining is an essential element of this country's criminal justice system.⁶⁸ On other occasions, the Court

64. *Id.*

65. *Id.* at 365.

66. *Id.* at 364. *Contra*, *United States v. Jackson*, 390 U.S. 570, 581 (1968) (if state action "has no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional").

67. 434 U.S. at 362. Commentators have criticized the *Bordenkircher* decision on the ground that it conflicts with the unconstitutional conditions principles enunciated in *Pearce* and *Blackledge*. See, e.g., Rubin, *The Resurrection of the Right-Privilege Distinction? A Critical Look at Maher v. Roe and Bordenkircher v. Hayes*, 7 HASTINGS CONST. L.Q. 165 (1979); Note, *Prosecutorial Vindictiveness and Plea Bargaining: What are the Limits?—Bordenkircher v. Hayes*, 27 DE PAUL L. REV. 1241 (1978). But see McCoy & Mirra, *supra* note 2.

68. Justice Stewart's majority opinion in *Bordenkircher* urged that "the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." 434 U.S. at 361-62. Justice Stewart further reasoned that, while a

also has emphasized that plea bargaining is an "essential component of the administration of justice,"⁶⁹ relying on one telling statistic—that guilty pleas dispose of over ninety percent of all criminal cases, the bulk of which are the product of plea negotiations.⁷⁰ Concededly, the *Bordenkircher* Court engaged in no careful analysis to determine whether plea bargaining is the least restrictive means of preserving the criminal justice system. Nevertheless, to view the *Bordenkircher* Court as implicitly finding a compelling interest accounts for the emphasis on the essentiality of plea bargaining in our criminal justice system and, at the same time, reconciles the decision with *Pearce* and *Blackledge*. In sum, the *Pearce-Blackledge* unconstitutional conditions doctrine remains viable after *Bordenkircher* outside the plea bargaining context.

III. LOWER FEDERAL COURT TREATMENT OF PROSECUTORIAL VINDICTIVENESS

Lower federal courts have applied the *Pearce-Blackledge* rationale to a wide variety of situations evidencing prosecutorial vindictiveness,⁷¹ and they, generally, have confined the *Bordenkircher* restriction to the plea bargaining context.⁷² The *Pearce-Blackledge* rationale has been used to protect criminal defendants when they assert such fundamental rights as the sixth amendment right to

prosecutorial threat may have a deterrent effect upon a defendant's assertion of fundamental rights, this chilling effect nevertheless "is 'an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Id.* at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)).

69. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *See also* *Brady v. United States*, 397 U.S. 742, 752 (1970).

70. It has been estimated that at least 90%, and perhaps 95%, of all criminal convictions are based upon guilty pleas; between 70% and 85% of all felony convictions are estimated to be by guilty pleas. D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966). The Supreme Court relied on Newman's statistics in *Brady v. United States*, 397 U.S. 742, 752 (1970).

71. *See, e.g.,* *Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979) (prosecutor cannot increase the charge when defendant motions for mistrial based upon jury misconduct); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978) (prosecutor cannot reindict defendant because of a motion to dismiss an earlier charge under the Speedy Trial Act); *United States v. Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (prosecutor cannot increase the charge when defendant inquires of magistrata about possibly challenging a search); *United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976) (prosecutor cannot substitute a 41-count indictment for original four-count indictment when defendant asserts statutory right to appeal conviction); *United States v. D'Alo*, 486 F. Supp. 954 (D. R.I. 1980) (prosecutor cannot bring harsher charge in indictment to penalize defendant for seeking a mistrial).

72. *See, e.g.,* *United States v. Andrews*, 633 F.2d 449, 456-57 (6th Cir. 1980); *United States v. Allsup*, 573 F.2d 1141 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978); *Watkins v. Solem*, 571 F.2d 435 (8th Cir. 1978).

effective assistance of counsel,⁷³ the eighth amendment right to reasonable bail,⁷⁴ the sixth amendment right to a jury trial,⁷⁵ and the fifth amendment privilege against self-incrimination.⁷⁶ The rationale also has been extended to the exercise of statutory rights⁷⁷ as well as the informal assertion of rights.⁷⁸ In applying the *Pearce-Blackledge* rule, lower courts have focused on the motivations of the prosecutor rather than on the resulting interference with the defendant's rights. Thus, the division among these courts centers on the question of whether a defendant must show the appearance of prosecutorial vindictiveness, actual prosecutorial vindictiveness, or some intermediary standard of prosecutorial culpability to establish a due process violation under the *Pearce-Blackledge* mandate.

A. *Establishing a Prima Facie Case of Prosecutorial Vindictiveness*

1. Appearance of Vindictiveness

Many lower federal courts have found that prosecutorial conduct evincing the "mere appearance of vindictiveness" is sufficient to establish a prima facie violation of due process under the *Pearce-Blackledge* rule.⁷⁹ An appearance of vindictiveness generally is established when a prosecutor reindicts a defendant and increases the severity of the charge after the defendant has exercised a statutory or constitutional right.⁸⁰ For example, in *United States*

73. See, e.g., *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974).

74. See, e.g., *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980).

75. See, e.g., *Lovett v. Butterworth*, 610 F.2d 1002 (1st Cir. 1979) (right to trial de novo with jury); *Koski v. Samaha*, 491 F. Supp. 432 (D. N.H. 1980) (right to trial de novo with jury).

76. See, e.g., *State v. Hinton*, 123 Ariz. 575, 601 P.2d 338 (1979).

77. See, e.g., *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255 (D.D.C. 1980) (statutory right to plead nolo contendere); *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978) (statutory right to dismiss action under the Speedy Trial Act); *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977) (statutory right to motion for change of venue); *United States v. Johnson*, 537 F.2d 1170 (4th Cir. 1976) (statutory right to appeal conviction for alleged violation of Federal Rules of Criminal Procedure); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976) (statutory right to be tried before a district judge on misdemeanor).

78. See *United States v. Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (defense counsel approached magistrate because he wished to investigate the possibility of challenging a search).

79. See cases cited in note 17 *supra*.

80. See, e.g., *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980); *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977).

*v. Demarco*⁸¹ the Ninth Circuit found an appearance of vindictiveness when the prosecutor responded to defendant's motion to change venue by bringing additional charges based upon "substantially the same facts as the first indictment."⁸² Similarly, in *United States v. Ruesga-Martinez*⁸³ the Ninth Circuit applied the appearance of vindictiveness standard to prohibit a prosecutor from re-indicting defendant on a felony charge after defendant asserted his statutory right to a trial before a district judge on the original misdemeanor charge. The court noted that the *Pearce-Blackledge* rule applied whether the accused asserted a constitutional right, a statutory right, or a common-law right.⁸⁴

The District of Columbia Circuit also employs an appearance of vindictiveness standard to review prosecutorial actions that result in increased charges against the defendant.⁸⁵ In *United States v. Jamison*⁸⁶ the circuit court held that the prosecutor violated due process by reindicting defendant on a first degree murder charge after defendant, who was on trial for second degree murder, successfully motioned for a mistrial.⁸⁷ The *Jamison* court stated that *Pearce* granted a defendant due process protection against even the "apprehension . . . of receiving a vindictively-imposed penalty for the assertion of rights."⁸⁸

Recently, in *United States v. Velsicol Chemical Corp.*⁸⁹ a District of Columbia district court, relying on *Jamison*, also used the appearance of vindictiveness standard to prohibit a prosecutor from reindicting defendants on a harsher charge.⁹⁰ The *Velsicol* court dismissed the second indictment, holding that the prosecutor violated defendants' due process rights by filing a felony indictment, in addition to the original misdemeanor charge, solely because defendants chose to exercise their statutory right to plead

81. 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

82. *Id.* at 1226.

83. 534 F.2d 1367 (9th Cir. 1976).

84. *Id.* at 1370.

85. See *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974); *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255 (D.D.C. 1980).

86. 505 F.2d 407 (D.C. Cir. 1974).

87. *Id.* at 410. Defendant's motion for a mistrial alleged a denial of his sixth amendment right to effective counsel.

88. *Id.* at 415.

89. 498 F. Supp. 1255 (D.D.C. 1980).

90. *Id.* at 1265. Although the *Velsicol* court relied on the *Jamison* appearance of vindictiveness standard, it went on to find actual vindictiveness, characterizing the prosecutor's conduct as "an explicit threat, the gravamen of which is an intent to retaliate for the exercise of a right." *Id.* at 1266.

nolo contendere.⁹¹ The district court stressed that a strong causal nexus existed between the prosecutor's opposition to the nolo contendere plea and the subsequent felony indictment.⁹²

On occasion, courts have expanded the appearance of vindictiveness test to find due process violations in circumstances that *Pearce* and *Blackledge* never contemplated. For example, in *United States v. Alvarado-Sandoval*⁹³ the prosecutor sought a superseding indictment subsequent to a statement by defendant's counsel to the magistrate that "he wished to investigate the possibility of raising a question" of a search's legality.⁹⁴ The court held that the prosecutor's actions violated defendant's substantive due process rights under the *Pearce-Blackledge* rationale.⁹⁵ The court reasoned that the increased prosecutorial charge created the appearance of vindictiveness, notwithstanding the fact that defendant only tentatively asserted any of his rights.⁹⁶

2. Realistic Likelihood of Vindictiveness

Recently, in *United States v. Andrews*⁹⁷ the Sixth Circuit adopted a new test to determine whether prosecutorial actions have denied a defendant due process under the *Pearce-Blackledge* mandate.⁹⁸ In *Andrews* the court utilized an objective due process standard: "whether a reasonable person would think there existed a realistic likelihood of vindictiveness."⁹⁹ The *Andrews* court enunciated three reasons for its adoption of the realistic likelihood standard. First, the standard frees defendants from apprehension con-

91. The record in *Velsicol* demonstrated that all criminal acts were completed by 1976, the original misdemeanor counts were filed in November 1977, the defendants pleaded nolo contendere in May 1978, and the harsher felony indictment was filed in April 1979. *Id.* at 1260.

92. The district court made an explicit finding that the prosecutor had made a purposeful threat to defendant that he would bring additional indictments should defendant choose to plead nolo contendere. *Id.* at 1266.

93. 557 F.2d 645 (9th Cir. 1977).

94. *Id.* at 645.

95. *Id.*

96. The court stated that "[t]he failure to interpose a formal motion before the magistrate" did not distinguish the case from *Blackledge* and *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). 557 F.2d at 645. The *Alvarado-Sandoval* decision illustrates the problem of abuse inherent in a due process standard that focuses on the appearance of some ill-defined prosecutorial motive rather than on the nature of the particular right asserted by the accused. See notes 136-49 *infra* and accompanying text.

97. 633 F.2d 449 (6th Cir. 1980).

98. *Id.* at 454.

99. *Id.* The court noted that its realistic likelihood standard was not dependent on "defendant's subjective impressions." *Id.*

cerning vindictiveness by a judge or prosecutor in retaliation for an assertion of his statutory or constitutional rights.¹⁰⁰ Second, the standard is "the only realistic way to police vindictiveness" because of the difficulty in proving actual retaliatory motivation.¹⁰¹ Finally, the standard allows the judge to avoid the "Hobson's choice," which the actual vindictiveness test presents, of either allowing the extra charge or making an explicit finding of prosecutorial bad faith.¹⁰²

The *Andrews* court next purported to distinguish its realistic likelihood standard from the more lenient appearance of vindictiveness standard. According to the court, the realistic likelihood standard requires a "substantial" possibility of prosecutorial vindictiveness whereas the appearance of vindictiveness standard requires a "mere" possibility of prosecutorial vindictiveness.¹⁰³ Although the court recognized a distinction in the two standards, it did not confront the practical problems associated with application of the realistic likelihood standard. Instead, the court remanded the case to the district court.¹⁰⁴ Thus, the parameters of the Sixth Circuit's new realistic likelihood of vindictiveness due process standard remain undefined.

100. *Id.* (quoting from *Pearce* and *Blackledge*).

101. *Id.* The court reasoned that this goal of policing vindictiveness comported with the prophylactic purpose of the *Pearce* rule. *Id.* at 454 n.7.

102. *Id.* at 455. The court cautioned that, in effect, an actual vindictiveness standard would necessitate "calling a prosecutor a liar." Thus, the court fashioned its realistic likelihood test to avoid confrontations between the judiciary and the executive branch. *Id.*

103. *Id.* The court noted that the mere appearance of vindictiveness is insufficient to trigger *Pearce-Blackledge* sanctions. By contrast, the court presented its realistic likelihood of vindictiveness standard, which, according to the court, required at least a substantial possibility or a probability of prosecutorial vindictiveness to establish a due process violation. *Id.* The dissent, however, opined that the majority's distinction of the two standards was elusive at best. *Id.* at 465 (Engel, J., dissenting). *Contra*, *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255, 1265 (D.D.C. 1980) (equating the appearance of vindictiveness test with the realistic likelihood of vindictiveness test).

104. In *Andrews* defendants originally were charged with possession of heroin with intent to distribute, 21 U.S.C. § 841(a)(1) (1976), and possession of a firearm during the commission of a felony, 18 U.S.C. § 924(b) (1976). 633 F.2d 449, 451 n.2 (6th Cir. 1980). The prosecutor requested that defendants be denied bail, and the magistrate agreed. The record is unclear on the prosecutor's reason for opposing bail; apparently a third defendant had turned state's evidence and had been threatened. Defendants successfully appealed this ruling and were released on bail. Two days later, the prosecutor obtained a superseding indictment that added a conspiracy charge. *Id.* It would seem that the prosecutor's opposition to bail, coupled with the superseding indictment obtained two days after defendants' successful appeal, would warrant a finding of a realistic likelihood of vindictiveness.

3. Actual Vindictiveness

The Fifth Circuit adheres to an actual vindictiveness standard in determining whether a prosecutor's actions violate a defendant's due process rights.¹⁰⁵ For example, in *Hardwick v. Doolittle*¹⁰⁶ the Fifth Circuit held that a defendant must prove actual prosecutorial vindictiveness to establish a due process violation when a prosecutor adds additional charges for "different" and "distinct" criminal conduct occurring within the same "spree of activity" covered by the original indictment.¹⁰⁷ The *Hardwick* court stressed that the judiciary should not interfere with the prosecutor's free exercise of discretionary power to control crime, absent motives that are in fact vindictive.¹⁰⁸

In *Jackson v. Walker*¹⁰⁹ the Fifth Circuit clarified its position by articulating a complex balancing test to be applied when a defendant alleges prosecutorial vindictiveness. The court stated that,

In deciding whether to require a showing of actual vindictiveness or merely 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.¹¹⁰

In applying this balancing test, however, the *Jackson* court held that the prosecutor need only present a nonvindictive reason to explain his conduct in order to tip the scales in his favor.¹¹¹ Thus, as applied, the *Jackson* balancing test is tantamount to an actual prosecutorial vindictiveness standard in all cases except those in which the prosecutor substitutes more serious criminal charges for the original charge based upon the same criminal act. Within this narrow exception, the defendant need only show a "realistic likelihood of vindictiveness."¹¹²

105. See cases cited in note 16 *supra*.

106. 558 F.2d 292 (5th Cir. 1977).

107. *Id.* at 302. Defendant originally was indicted for bank robbery and for the aggravated assault of three policemen during the course of the robbery. After defendant exercised his statutory right to remove the case to federal court, a successor prosecutor brought a second indictment that added two other crimes that allegedly occurred during the same bank robbery—assaulting a probation officer, who was used as a shield during the gun battle, and robbing a bank customer. *Id.*

108. *Id.*

109. 585 F.2d 139 (5th Cir. 1978).

110. *Id.* at 145.

111. *Id.* at 148.

112. *Id.* In weighing the competing interests, it seems that the Fifth Circuit gives greater weight to the value of independent prosecutorial discretion than it gives to the de-

More recently, in *United States v. Thomas*,¹¹³ the Fifth Circuit reaffirmed its position that a defendant must show actual prosecutorial vindictiveness to establish a due process violation. In *Thomas* the court upheld the prosecutor's decision to bring more severe criminal charges against defendants after defendants had successfully moved to dismiss a multi-count indictment for vagueness.¹¹⁴ In the course of its decision, the *Thomas* court noted that even the use of a balancing test as proposed in *Jackson* may not be appropriate.¹¹⁵ Thus, *Thomas* indicates that the Fifth Circuit will continue to employ an actual vindictiveness standard in determining the presence or absence of prosecutorial vindictiveness.

B. *The State's Justification*

Typically, when a state interferes with nonfundamental rights, it need only show some rational basis for the action in order to pass muster under substantive due process standards. If, however, the state interferes with fundamental rights, it must prove that it used the least restrictive means to effectuate a compelling state interest.¹¹⁶ In addressing charges of prosecutorial vindictiveness, lower federal courts have ignored the fundamental or nonfundamental nature of the asserted right when assessing the adequacy of the state's justification.¹¹⁷ Yet, these same courts purport to follow the Supreme Court precedents of *Pearce* and *Blackledge*, which held that a state, absent a compelling interest, violates a defendant's due process rights when it imposes a harsher criminal penalty in response to a defendant's assertion of a fundamental right. Thus, it appears that in the prosecutorial vindictiveness context lower federal courts have taken an artificial approach by focusing on the burden of proof to resolve the due process question. Specifi-

defendant's due process rights. *Id.* at 145-48.

113. 617 F.2d 436 (5th Cir. 1980).

114. *Id.* at 438.

115. The *Thomas* court suggested that *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), may have undermined the *Jackson* balancing test and signalled a general retreat from *Blackledge v. Perry*, 417 U.S. 21 (1974). *Id.* at 438 n.1. There seem to be no other cases suggesting that *Bordenkircher* undermines *Blackledge* outside of the plea bargaining context.

116. See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (fundamental right of privacy); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (fundamental right to travel). See generally Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

117. See, e.g., *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1370 (9th Cir. 1976) ("*Pearce* and *Blackledge* apply regardless of whether the accused asserts a constitutional right, a common law right, or a statutory right . . .").

cally, these decisions indicate that, once the defendant has made a prima facie showing of a due process violation, the state need only prove a nonvindictive reason for the prosecutor's actions to rebut the defendant's case.

In jurisdictions employing the appearance of vindictiveness standard, the prosecutor must justify increased criminal charges with reasons sufficient to dispel the appearance of prosecutorial vindictiveness.¹¹⁸ For example, in *United States v. Jamison*¹¹⁹ the court stated that "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."¹²⁰ In *United States v. Ricard*¹²¹ the court upheld the prosecutor's decision to increase charges after defendant asserted his right to trial simply because a second prosecutor had taken over the file, reviewed it, and concluded that the facts warranted increased charges.¹²² In *United States v. Partyka*¹²³ the court held that the government had rebutted the appearance of vindictiveness when the prosecutor, who originally had refrained from bringing a felony indictment to protect the identity of the government's informant, brought a harsher charge after the informant's identity had been revealed at the first trial and defendant had obtained a reversal of the first conviction.¹²⁴

In the Sixth Circuit, a prosecutor must justify increased criminal charges with evidence that dispels the realistic likelihood of vindictiveness.¹²⁵ To rebut a prima facie case under this standard, the government must show an "objective explanation" of the prosecutor's actions.¹²⁶ In *United States v. Andrews*¹²⁷ the court stated that there were two adequate explanations for increased charges: prior legal impossibility and governmental discovery of previously

118. See, e.g., *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980); *United States v. Griffin*, 617 F.2d 1342, 1346-47 (9th Cir. 1980).

119. 505 F.2d 407 (D.C. Cir. 1974).

120. *Id.* at 417. The *Jamison* court illustrated this point by the hypothetical posed in *Blackledge*—if an assault victim later dies, the prosecution could properly increase the charge from assault to homicide. *Id.* at 416.

121. 563 F.2d 45 (2d Cir. 1977).

122. *Id.* at 48.

123. 561 F.2d 118 (8th Cir. 1977).

124. *Id.* at 124. The court grounded its holding in the policy of preserving the prosecutor's discretion to decide "which of multiple possible charges against a defendant are to be prosecuted or whether they are all to be prosecuted at the same time." *Id.*

125. *United States v. Andrews*, 633 F.2d 449, 456 (6th Cir. 1980).

126. *Id.*

127. 633 F.2d 449 (6th Cir. 1980).

unknown evidence.¹²⁸ The *Andrews* court cautioned that a prosecutorial "mistake" in charging would be insufficient to rebut the realistic likelihood of vindictiveness, but that prosecutorial inexperience might be a sufficient justification.¹²⁹

Under the Fifth Circuit's actual vindictiveness standard, a prosecutor need only show a nonvindictive motive to justify increased criminal charges in response to a defendant's assertion of rights.¹³⁰ Thus, in *Hardwick v. Doolittle*¹³¹ the Fifth Circuit stated that a prosecutor could negate a showing of vindictiveness by presenting evidence that defendant had withdrawn a guilty plea, that the public had demanded prosecution of the additional crimes, that the successor prosecutor had a different attitude toward prosecutorial duty than the original prosecutor, or even that the initial action was due to mistake or oversight.¹³² The *Hardwick* court further stated that a prosecutor could carry his burden of proof by showing that the charges were added for reasons "other than to punish a pesky defendant for exercising his legal rights."¹³³ Presumably, a prosecutor in the Fifth Circuit could justify his actions by testifying that he had acted in good faith.¹³⁴ Thus, it is not surprising that the Fifth Circuit has rarely sustained a defendant's challenge to increased charges based upon prosecutorial vindictiveness.¹³⁵

128. *Id.* at 456. The *Andrews* court further noted that other "objective" explanations would include prosecutorial inexperience and the unavailability of a grand jury. *Id.*

129. *Id.* In determining the validity of the prosecutor's actions, the *Andrews* court ignored the nature of the right (i.e. constitutional, statutory or common-law) exercised by defendant.

130. *See, e.g.,* *United States v. Thomas*, 617 F.2d 436, 438 (5th Cir. 1980) (nonvindictive motives satisfying due process include situations in which a witness changes his testimony and those in which the prosecutor has a proper concern for a "second bowstring" should the original indictment be dismissed); *United States v. Jones*, 587 F.2d 802, 805 n.1 (5th Cir. 1979) (both defendant's own admission that there was no actual vindictiveness and the prosecutor's discovery of new evidence rebut the claim of actual vindictiveness).

131. 558 F.2d 292 (5th Cir. 1977).

132. *Id.* at 301.

133. *Id.*

134. The *Hardwick* opinion supports the conclusion that a prosecutor's testimony concerning his good faith motives would suffice to rebut actual vindictiveness. *See id.* at 302. The *Hardwick* version of the *Pearce* due process test focuses on the prosecutor's motivations and "actions rather than the defendant's reactions." *Id.*

135. *See, e.g.,* *United States v. Thomas*, 617 F.2d 436 (5th Cir. 1980); *United States v. Jones*, 587 F.2d 802 (5th Cir. 1979); *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977). *But see* *Miracle v. Estelle*, 592 F.2d 1269 (5th Cir. 1979). In *Miracle* the court held that defendant's due process rights were violated under the *Pearce-Blackledge* standard when the prosecutor increased the charges after defendant appealed his conviction based upon jury misconduct. *Id.* at 1276.

IV. ANALYSIS AND PROPOSALS

A. *Criticisms of Lower Court Tests*

Because vindictiveness is a conclusionary term rather than an analytical tool, the concept remains vague and subject to easy manipulation.¹³⁶ Thus, the term should be discarded from substantive due process analysis. The implementation problems inherent in each test strengthen this conclusion and emphasize the need for a new legal approach.

In the Fifth Circuit, the actual vindictiveness standard seems to connote prosecutorial bad faith or subjective retaliatory motivation.¹³⁷ This test, however, provides insufficient due process protection to criminal defendants¹³⁸ because proof of actual vindictive motivation is difficult to establish. Consequently, the Fifth Circuit rarely sustains due process challenges based upon prosecutorial penalties.¹³⁹ Moreover, the Fifth Circuit's actual vindictiveness standard runs contrary to the Supreme Court's express mandate in *Pearce* and *Blackledge* that "actual retaliatory motivation" need not be present to find a due process violation.¹⁴⁰

The appearance of vindictiveness standard also contains inherent defects because of its reliance on the term "vindictiveness." This standard allows a defendant to establish due process violations too easily, especially in the pretrial context. Theoretically, an appearance of vindictiveness arises every time a defendant asserts a right and a prosecutor subsequently takes a position contrary to the defendant's interests. As the dissent observed in *Andrews*, the fact that a prosecutor "appears" to be vindictive every time he

136. See, e.g., *United States v. Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977) (due process violation found based upon the appearance of vindictiveness, notwithstanding defendant's failure to assert formally any rights).

137. In *Pearce* the Court equated "vindictiveness" with a subjective "retaliatory motivation" on the part of the sentencing judge. 395 U.S. 711, 725 (1969). The dictionary defines vindictive as "intended for or involving revenge" or "characterized by an intent to cause unpleasantness, damage, or pain." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2553 (unabridged ed. 1961).

138. See, e.g., *Jackson v. Walker*, 585 F.2d 139 (5th Cir. 1978) (upholding increased charge by prosecutor in response to defendant's assertion of fundamental right to effective counsel); *United States v. Nell*, 570 F.2d 1251 (5th Cir. 1978) (upholding increased charge by prosecutor in response to defendant's assertion of fundamental right to an impartial jury).

139. See cases cited in note 135 *supra*.

140. In *Blackledge* the Court stated that "[t]he rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist." 417 U.S. 21, 28 (1974); *Accord*, *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

takes an adverse stance on "an endless variety of procedural, evidentiary, substantive, and tactical questions" renders the standard unworkable.¹⁴¹ *United States v. Alvarado-Sandoval*¹⁴² highlights the problems with this standard. In that case the court found a due process violation based upon the appearance of vindictiveness, even though the alleged abuses of prosecutorial power followed only a tentative assertion by defendant of a possible constitutional challenge to his arrest.

In some respects *Pearce* and *Blackledge* lend support to the appearance of vindictiveness standard. Specifically, the Court in *Blackledge* stated that due process entitles an individual to seek a trial de novo without "apprehension that the State will retaliate by substituting a more serious charge for the original one."¹⁴³ A more complete interpretation of *Pearce* and *Blackledge*, however, treats those decisions as falling within unconstitutional conditions doctrine—in both cases defendants exercised fundamental constitutional rights and the state responded with harsher criminal sanctions.¹⁴⁴ Viewed as unconstitutional conditions cases, *Pearce* and *Blackledge* stand for the proposition that substantive due process prohibits a prosecutor from withdrawing or cancelling leniency to penalize an individual's exercise of fundamental rights.

The realistic likelihood of vindictiveness standard, recently adopted by the Sixth Circuit,¹⁴⁵ purportedly strikes a balance between the apparent vindictiveness and actual vindictiveness standards.¹⁴⁶ Because the Sixth Circuit failed to apply its new test to the facts of the case, however, this standard is still undefined and may be as unworkable as the other due process standards.¹⁴⁷ In addition, as one dissenter properly stated, the application of the realistic likelihood standard renders it indistinguishable from the appearance standard.¹⁴⁸

141. *United States v. Andrews*, 633 F.2d 449, 459 (6th Cir. 1980) (Merritt, J., dissenting). In his dissent Judge Merritt urged that the *Pearce-Blackledge* rationale be confined to the postconviction setting, since these cases retain a "double jeopardy flavor," even though the Supreme Court expressly rejected the applicability of the double jeopardy clause. *Id.* at 458.

142. See notes 93-96 *supra* and accompanying text.

143. 417 U.S. 21, 28 (1974).

144. See notes 44-63 *supra* and accompanying text.

145. *Andrews v. United States*, 633 F.2d 449 (6th Cir. 1980).

146. *Id.* at 454-55. See notes 97-104 *supra* and accompanying text.

147. The *Andrews* court remanded the case to the district court to apply the new test. *Id.* at 457.

148. *Id.* at 467 (Engel, J., dissenting). Judge Engel's contention that the two tests are indistinguishable is aptly illustrated in *United States v. Velsicol Chem. Corp.*, 498 F. Supp.

B. Proposals

By blind reliance on the elusive term "vindictiveness" when dealing with challenges to prosecutorial actions, lower federal courts have failed to address important issues inherent in the American scheme of constitutional liberties. That scheme ranks individual liberties in terms of their relative value and accords more constitutional due process protection to those rights deemed fundamental.¹⁴⁹ This Recent Development submits that any intelligent standard in this context must focus more clearly on both the nature of the right asserted by the defendant and the nature of the reason for the prosecutor's action. Specifically, under this approach courts must distinguish between a defendant's assertion of a fundamental right and his exercise of a nonfundamental or statutory right.

1. The Exercise of Fundamental Rights

Courts should apply the unconstitutional conditions doctrine when defendants allege prosecutorial vindictiveness. Thus, absent a compelling interest, a prosecutor should not be permitted to condition leniency on the defendant's waiver of a fundamental right or to withdraw leniency as a penalty for defendant's assertion of a fundamental right.¹⁵⁰ Both precedent and policy favor application of the unconstitutional conditions doctrine to prosecutorial charging decisions. *Pearce* and *Blackledge*, the leading cases in this area, support the use of the doctrine as a substantive due process protection available to criminal defendants.¹⁵¹

1255 (D.D.C. 1980), which was decided on the same day as *Andrews*. In *Velsicol* the court held that the prosecutor violated defendants' due process rights under the *Pearce-Blackledge* rule by creating an "appearance of vindictiveness," but the court used this phrase synonymously with "realistic likelihood of vindictiveness." *Id.* at 1263-64.

149. See note 116 *supra* and accompanying text.

150. A prosecutor's decision to increase the charges against a defendant for exercising a fundamental right may be characterized most accurately as an instance in which a state benefit—leniency—is conditioned upon the nonassertion of fundamental rights. See generally Van Alstyne, *supra* note 2; Comment, *supra* note 2. Thus, in such situations, a court should find an unconstitutional condition violative of due process unless the state can demonstrate a compelling interest. See notes 26-31 *supra* and accompanying text.

151. Both *Pearce* and *Blackledge* may be interpreted as holding that the unconstitutional conditions doctrine prohibits the state from penalizing a defendant for exercising his fundamental rights by withdrawing the benefit of leniency. See McCoy & Mirra, *supra* note 2, at 904-08. In *Pearce* the Court held that the prosecutor withdrew leniency to penalize defendant for exercising his fundamental fifth amendment right to refrain from self-incrimination. 395 U.S. at 713. In *Blackledge* the Court held that the prosecutor brought harsher charges to penalize defendant for exercising his fundamental sixth amendment right to a

Additionally, as a matter of federal constitutional policy, the state should be required to distribute the benefit of criminal leniency in a constitutionally benign way.¹⁵² Otherwise, because of the vital nature of this state benefit there is a tremendous potential for the erosion of fundamental rights.¹⁵³ When a prosecutor conditions leniency on a criminal defendant's nonassertion of fundamental rights, he places that defendant under strong pressure to forego those rights and to accept the benefit of a shorter period of incarceration.¹⁵⁴

The element of forced participation endemic to the criminal justice system provides another sound reason for the application of the unconstitutional conditions doctrine to prosecutorial actions. Unlike other state schemes in which the individual, theoretically, may preserve his full range of constitutional rights by choosing to forego participation in the scheme, the criminal justice system compels the individual to participate. As Justice Powell stated, the state must enable criminal defendants to exercise their full range of constitutional rights because of their limited choices.¹⁵⁵

*United States v. Andrews*¹⁵⁶ presents a clear situation in which the court should have found an unconstitutional condition. In that case the prosecutor added conspiracy charges to the origi-

constitutionally adequate jury trial. 417 U.S. at 22-23. See notes 44-62 *supra* and accompanying text.

152. See notes 21-43 *supra* and accompanying text. With the erosion of the right-privilege distinction, the unconstitutional conditions doctrine emerged to force the government to distribute state benefits in a manner that did not penalize individuals for exercising their constitutional rights. The unconstitutional conditions doctrine requires that the state choose between constitutionally benign distribution of benefits or no distribution. See generally Rubin, *supra* note 72; Van Alstyne, *supra* note 27.

153. Many of the Supreme Court decisions that have found unconstitutional conditions have emphasized that the particular condition discourages the exercise of the fundamental right. See, e.g., *United States v. Jackson*, 390 U.S. 570, 581-83 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 604, 609 (1967); *Sherbert v. Verner*, 374 U.S. 398, 404-05 (1963). Thus, the unconstitutional conditions doctrine sets up a prophylactic rule to stay the erosion of fundamental rights. See generally French, *supra* note 2; Van Alstyne, *supra* note 27; Comment, *supra* note 2. To find an unconstitutional condition, however, there need not be actual deterrence of the exercise of the fundamental right. See *Dunn v. Blumstein*, 405 U.S. 330, 339-40 (1972).

154. See, e.g., *Smartt v. Avery*, 370 F.2d 788 (6th Cir. 1967), in which the court invalidated a Tennessee statute that provided that unsuccessful habeas corpus applicants would not be eligible for probation consideration until a year beyond the usual time. Striking down the statute for imposing an unconstitutional condition, the court observed that "[o]nly a prisoner with an inclination to play Russian roulette with a year of his life would be likely to file a petition for writ of habeas corpus under this regulation." *Id.* at 790.

155. *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977).

156. 633 F.2d 449 (6th Cir. 1980).

nal indictment just two days after defendants exercised their eighth amendment right to reasonable bail.¹⁵⁷ Although the Sixth Circuit focused its analysis on whether there existed a realistic likelihood of vindictiveness,¹⁵⁸ it should have employed an unconstitutional conditions analysis. The strong causal nexus between the harsher reindictment and defendants' assertion of their eighth amendment rights, as evidenced by the prosecutor's original opposition to bail and the timing of the reindictment, indicates that the prosecutor's actions effectively penalized defendants.¹⁵⁹ Although the state in *Andrews* had a legitimate interest in prosecuting defendants for the highest offense that their conduct warranted, the prosecutor served that state interest by bringing the initial charge.¹⁶⁰ Thereafter, the state had no compelling interest in reindicting the defendants on harsher charges based upon essentially the same conduct as the original indictments.¹⁶¹ Thus, the prosecutor's action in penalizing defendants' exercise of a fundamental right clearly constituted an unconstitutional condition.

As the analysis in *Andrews* indicates, lower courts also have failed to differentiate between a defendant's assertion of fundamental rights and the assertion of nonfundamental rights when determining the sufficiency of the state's justifications for the actions of its prosecutor.¹⁶² 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.

The state has a compelling interest in charging an individual for the highest crime that his conduct warrants under prevailing

157. *Id.* at 451.

158. *Id.* at 453.

159. *Id.* at 451.

160. It must be presumed that the prosecutor effectuates the state's interest in punishing a particular defendant for a particular crime by exercising his discretion in the initial charge based upon a knowledgeable assessment of the facts. See Note, *Criminal Procedure—Protection of Defendants Against Prosecutorial Vindictiveness*, 54 N.C. L. Rev. 108, 115 (1975); note 161 *infra*.

161. The National District Attorneys Association has stated that the prosecutor has a special responsibility to make an appropriate and accurate charge at the outset and must take into account both the offender and the offense. The Association has further stated that "[o]ver-charging, for coercive purposes or lack of judgment is an affront to the essence of justice." NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS 130 (1977).

162. See, e.g., *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1370 (9th Cir. 1976) (*Pearce* and *Blackledge* apply regardless of whether the accused asserts a constitutional right, a common-law right, or a statutory right).

penal theory,¹⁶³ and that interest may justify increased charges under certain circumstances. For example, a prosecutor clearly has a compelling interest in reindicting a defendant for criminal acts committed subsequent to the first indictment.¹⁶⁴ Similarly, the compelling interest test is met when the prosecutor shows previous legal impossibility—for example, when an assault victim later dies.¹⁶⁵ In this situation, the state's compelling interest in charging the defendant for the highest crime his conduct warrants permits the prosecutor to bring a superseding homicide indictment.

Increased criminal charges based upon the government's discovery of previously unknown evidence may withstand strict scrutiny due process review under certain circumstances. Under these circumstances, a close causal nexus between the increased charges and the defendant's assertion of fundamental rights may mitigate against finding a compelling state interest.¹⁶⁶ For example, if a prosecutor does not reindict until after the defendant has had his conviction overturned based upon constitutional error, then the state's interest may no longer be compelling.

Courts should deem noncompelling the following justifications when fundamental rights are penalized: mistake or oversight in the initial action,¹⁶⁷ reassessment of the facts by succeeding prosecutors,¹⁶⁸ protection of government informers,¹⁶⁹ and prosecutorial inexperience.¹⁷⁰ As a matter of policy, courts also should presume that the prosecutor serves the state's interest in prosecution by the original exercise of discretion in bringing the charge.¹⁷¹ The uncon-

163. The state has a strong interest in protecting the safety and welfare of its citizens from the unrestrained liberty of some individuals. See E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 88 (1948).

164. *Pearce* recognized the state interest in a harsher criminal sanction, specifically a harsher resentencing upon retrial, based upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S. at 726.

165. The *Blackledge* Court gave this example, which allowed a prosecutor to bring a homicide charge if an assault victim died, despite any deterrent effect on defendant's rights. 417 U.S. at 29 n.7.

166. For example, in *United States v. Velsicol Chem. Corp.*, 498 F. Supp. 1255 (D.D.C. 1980), the court stressed that the causal nexus between defendant's assertion of rights and increased prosecutorial charges is probative concerning whether due process is violated. *Id.* at 1261-66.

167. See, e.g., *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977).

168. See, e.g., *United States v. Ricard*, 563 F.2d 45, 48 (2d Cir. 1977); *Hardwick v. Doolittle*, 558 F.2d 292, 301 (5th Cir. 1977).

169. See, e.g., *United States v. Partyka*, 561 F.2d 118, 123 (8th Cir. 1977).

170. See, e.g., *United States v. Andrews*, 633 F.2d at 456 (6th Cir. 1980).

171. Some courts have permitted prosecutors to reindict when the new charges do not address the precise criminal act addressed in the original indictment. See, e.g., *Jackson v.*

stitutional conditions doctrine should prohibit the prosecutor from reserving the power to charge for more crimes based upon the same criminal activity when he later invokes that power to penalize or to deter the defendant's exercise of fundamental rights.

2. The Exercise of Statutory or Other Nonfundamental Rights

The unconstitutional conditions doctrine should not apply when the state penalizes an individual for exercising statutory or other nonfundamental rights.¹⁷² Generally, when a prosecutor penalizes a criminal defendant for asserting a statutory or other nonfundamental right, the prosecutor must show that the state action bears a reasonable relation to a legitimate government purpose.¹⁷³ Under this rational basis standard, courts traditionally uphold the state action.¹⁷⁴ Thus, in practical effect, substantive due process places few constraints on the state's ability to impose conditions or penalties following a defendant's exercise of statutory or other nonfundamental rights.

Some statutory or nonfundamental rights may nevertheless deserve a due process review more significant than the rational basis test. In these situations, courts should apply an intermediate level of review. For example, although the right of appeal has never been considered fundamental,¹⁷⁵ the Supreme Court has stressed

Walker, 585 F.2d 139 (5th Cir. 1978); *Hardwick v. Doolittle*, 558 F.2d 292 (5th Cir. 1977).

172. Substantive due process requires that individuals be afforded more due process protection for the exercise of fundamental rights than for the exercise of statutory and other nonfundamental rights. See *Roe v. Wade*, 410 U.S. 113, 155 (1976). This author found no cases applying the unconstitutional conditions doctrine to protect rights other than those deemed fundamental. For examples of recent applications of the doctrine to fundamental rights, see cases cited in note 3 *supra*.

173. *Bell v. Wolfish*, 441 U.S. 520, 540-41 n.23, 560-62 (1979) (holding that various prison regulations that infringe the nonfundamental liberty interests of inmates are rationally related to the government's interest in maintaining prison security).

174. *Id.* at 1886. For a case upholding a similar standard in the economic substantive due process area, see *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

175. The Supreme Court has long recognized that there is no fundamental constitutional right of appeal. In *McKane v. Durston*, 153 U.S. 684, 687-88 (1894), the Court first held that the federal constitution does not require that a state provide appellate courts or a right of appellate review. In recent decisions, the Court has consistently reaffirmed this principle. See *United States v. MacCollom*, 426 U.S. 317, 323 (1976); *Estelle v. Dorough*, 420 U.S. 534, 536 (1975) (per curiam); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (per curiam); *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Currently, state constitutions or statutes control the right of appeal. See *McKane v. Durston*, 153 U.S. 684, 687-88 (1894); *Gardella v. Field*, 291 F. Supp. 107, 111 (C.D. Cal. 1968).

The Supreme Court, however, has recognized the importance of the right of appeal. Thus, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in

that once state-created avenues of appellate review are established, "it is . . . fundamental that . . . these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."¹⁷⁶ Therefore, an intermediate level of due process scrutiny such as that used by the Court in *Griswold v. Connecticut*¹⁷⁷ may be an appropriate way to recognize the important, but not fundamental, right of appellate review.

When reviewing prosecutorial actions that penalize a defendant's exercise of nonfundamental rights, courts should confront separately the question whether a prosecutor has carried out the *ethical duties* that are concomitant with his extensive authority.¹⁷⁸ Although the rational basis test will almost always protect the prosecutor from due process challenges, courts should still invoke their supervisory powers over the administration of criminal justice to control overreaching that constitutes an abuse of discretion.¹⁷⁹ An effective judicial sanction would be dismissal of the additional charge.¹⁸⁰

The Code of Professional Responsibility (Code) provides general support for the sanctioning of a prosecutor in appropriate circumstances.¹⁸¹ Ethical Consideration 7-13 of the Code states that "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."¹⁸² Also, Disciplinary Rule 7-103 prohibits a prosecutor from instituting criminal charges "when he knows or it is obvious that

the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In addition, in *Douglas v. California*, 372 U.S. 353 (1963), the Court held that the state must provide indigents with appointed counsel on their first appeal granted by state law as a matter of right. See also *Griffin v. Illinois*, 351 U.S. 12 (1956) (when states require a trial transcript for appeals, the state must provide the cost of the transcript to indigents seeking review). For the assertion that a right of 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).

176. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

177. 381 U.S. 479 (1965).

178. See generally ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 71-99 (1974) [hereinafter cited as ABA PROSECUTION STANDARDS].

179. See note 20 *supra* and accompanying text; *McNabb v. United States*, 318 U.S. 332, 340-41 (1943). See also ABA PROSECUTION STANDARDS, *supra* note 178, at 79-81.

180. The ABA recommends that, at the appellate level, the sanction of reversal be employed as "the ultimate penalty against prosecutors, but, short of this, appellate courts can also enunciate standards for both prosecutors and defense counsel." *Id.* at 81.

181. ABA CODE OF PROFESSIONAL RESPONSIBILITY.

182. *Id.*, EC 7-13.

the charges are not supported by probable cause."¹⁸³ Unfortunately, however, the Code's standards provide inadequate rules for governing prosecutorial misconduct.¹⁸⁴ Commentators have criticized the probable cause limitation because it allows prosecutors too much leeway.¹⁸⁵ A proposed alternative to the Code¹⁸⁶ offers some promise with its proposed ethical obligation on prosecutors to refrain from seeking an indictment unless "a fair-minded juror could conclude beyond a reasonable doubt that the accused is guilty."¹⁸⁷ Regrettably, the conduct of prosecutors involved in the administration of criminal justice in this country is neither supervised nor disciplined adequately.¹⁸⁸ Thus, courts must exercise their supervisory powers to control prosecutorial misconduct even when due process affords a defendant no protection.

V. CONCLUSION

The judicial response to the problems posed by the conduct of a prosecutor who brings increased charges against a criminal defendant for exercising his legal rights has not been adequate. Lower federal courts have adopted divergent standards, focusing on whether there exists an appearance of prosecutorial vindictiveness, a realistic likelihood of prosecutorial vindictiveness, or actual prosecutorial vindictiveness. By couching their analyses in terms of the prosecutor's motivations, these courts have ignored the overriding principle of substantive due process, which holds that fundamental constitutional rights should be afforded greater due pro-

183. *Id.*, DR 7-103. See also ABA PROSECUTION STANDARDS, *supra* note 178, at 91 (§ 3.9 Discretion in the Charging Decision. (A) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause).

184. See Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973). Uviller criticizes the probable cause requirement, stating that "[t]he standard of probable cause does not require exacting judgment from the prosecutor, for it does not entail great certainty concerning the underlying truth of the matter; 'probable cause' may be predicated on hearsay, and, indeed, does not even import a substantial likelihood of guilt." *Id.* at 1156. Uviller asserts that the ethical imperative is to keep prosecutorial discretion free from improper motivation, but he finds the ABA standards vague in this regard. *Id.* at 1151-52.

185. See *id.*

186. COMMISSION ON PROFESSIONAL RESPONSIBILITY, THE AMERICAN LAWYER'S CODE OF CONDUCT (Public Discussion Draft, M. Freedman, Reporter) (June 1980).

187. *Id.* at § 9.3 (Responsibilities of Government Lawyers).

188. See ABA PROSECUTION STANDARDS, *supra* note 178, at 55-69, 79-81. See also Holderman, *Preindictment Prosecutorial Conduct in the Federal System*, 71 J. CRIM. L. 1 (1980); comment, *Prosecutorial Misconduct: A National Survey*, 21 DE PAUL L. REV. 422 (1971).

cess protection than nonfundamental rights. This Recent Development submits that courts must recognize that the unconstitutional conditions doctrine applies to cases alleging prosecutorial misconduct. Thus, when a prosecutor brings increased charges against a defendant for asserting a fundamental right, such action violates due process unless the state can demonstrate a compelling interest. On the other hand, when a prosecutor brings increased charges against a defendant for asserting a nonfundamental right, the action does not violate due process if the state can demonstrate a rational basis for the action. Even if there is no due process violation, however, it is incumbent upon the courts to invoke their supervisory powers to control prosecutorial abuses when nonfundamental rights are implicated. Increased judicial supervision of prosecutorial misconduct will benefit both individual defendants and the criminal justice system.

JOHN J. CROSS, III