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FOURTEENTH AMENDMENT—DUE PROCESS AND PLEA BARGAINING

Bordenkircher v. Hayes, 434 U.S. 357 (1978)

In *Bordenkircher v. Hayes*,[1] the Supreme Court held that the due process clause of the fourteenth amendment is not violated when a state prosecutor carries out a threat made during plea negotiations to have the accused reindicted on more serious charges if he does not plead guilty to the offense with which he was originally charged. This holding signals the expansion of the prosecutor's legitimate leverage in the plea bargaining situation. However, the availability of such leverage may, in the long run, prove advantageous to defendants since it will encourage prosecutors to bring their initial charges at a lower level than they might otherwise have done. This shift in the prosecutor's preferred strategy will, in turn, have the effect of narrowing the defendant's uncertainty about the lower bounds of the prosecutor's offer and thus of providing the defendant with a clearer idea of the parameters of the plea bargain.

I

In January, 1973, Lewis Hayes was indicted by a Fayette County, Kentucky grand jury for forgery of a check in the amount of $88.30. He was charged with uttering a forged instrument, an offense then carrying a penalty of two to ten years in prison.[2] During a pretrial conference at which Hayes, his retained counsel and the state prosecutor were present, the issue of a possible plea agreement was discussed. The prosecutor proposed that if Hayes would plead guilty to the indictment he would recommend a five-year sentence. Alternatively, if Hayes did not plead guilty, the prosecutor announced his intention to return to the grand jury to seek further indictment based upon Hayes' two prior felony convictions.[3] These convictions made Hayes subject to prosecution under the Kentucky Habitual Criminal Act, then KY. REV. STAT. § 431.190 (repealed 1975). This is a recidivism statute with a mandatory penalty of life imprisonment for any person convicted a third time of felony.[4] Hayes refused to plead guilty and insisted on receiving a full trial. The prosecutor thereupon returned to the grand jury and obtained an indictment charging Hayes under the Habitual Criminal Act.

At trial, a jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, found that he had twice before been convicted of felonies. Hayes was therefore sentenced to a life term in the penitentiary as required by the habitual offender statute. Following his defeat in the Kentucky courts,[5] Hayes petitioned the United States District Court for the Eastern District of Kentucky for a writ of habeas

[1] 434 U.S. 357 (1978).

[2] KY. REV. STAT. § 434.130 (repealed 1974).

[3] The prosecutor's own characterization of the plea offer is informative. In cross-examining Hayes at trial he asked:

> Isn't it a fact that I told you at that time (the initial bargaining session) that if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?

434 U.S. at 358 n.1.

[4] The statute in effect at the time of Hayes' trial provided that "[a]ny person convicted a . . . third time of felony . . . shall be confined in the penitentiary during his life." KY. REV. STAT. § 431.190 (repealed 1975). In 1977, the Kentucky legislature enacted a new statute, KY. REV. STAT. § 532.080 (1977 Supp.), which was intended to limit the sweeping applicability of the earlier statute. Under the new statute, Hayes would have been subject to a maximum indeterminate term of 10 to 20 years. KY. REV. STAT. § 532.080(6)(b). Moreover, the conditions adopted in the new statute to limit its breadth would have precluded its use in Hayes' case. Under the new statute, a previous conviction cannot form the basis for a recidivist charge unless "a prison term of one year or more was imposed, the sentence or probation was completed within five years of the present offense, and the offender was over the age of 18 when the offense was committed. At least one of Hayes' prior convictions did not meet these conditions."434 U.S. 359 n. 2. Hayes' first conviction occurred in 1961 when he was 17 years old. At that time Hayes pleaded guilty to a charge of detaining a female, a lesser included offense of rape, and served five years in the state reformatory for the offense. In 1970, Hayes was convicted of robbery. He was sentenced to five years imprisonment, but was released on probation immediately. *Id.* at 359 n.3.

[5] In an unpublished opinion, the Kentucky Court of Appeals upheld the prosecutor's plea offer and his decision to indict Hayes under the habitual offender statute as a legitimate use of available leverage in the plea bargaining context. It thus rejected Hayes' objections to his increased sentence and held that given his previous felony record, there was no constitutional infirmity in imposing a life sentence with the possibility of parole. *See* Bordenkircher v. Hayes, 434 U.S. 357, 359.

corpus challenging the constitutionality of the enhanced sentence. The district court denied the writ and held that there had been no constitutional violation in the sentence or the indictment procedure.[6]

On appeal, the Court of Appeals for the Sixth Circuit reversed.[7] It held that it is a violation of due process to place a defendant in fear of retaliatory action for insisting on his constitutional right to stand trial.[8] Thus the circuit court, while recognizing the prosecutor's right to offer a defendant concessions relating to prosecution under an existing indictment, held that a prosecutor may not threaten a defendant with the consequence that more severe charges may be brought if he insists on going to trial.[9] The crux of the distinction between these two situations is the potential for impermissible prosecutorial vindictiveness which exists in the latter. It is this element of vindictiveness which the Sixth Circuit found to be offensive to principles of due process.[10]

The Supreme Court granted certiorari[11] "to consider a constitutional question of importance in the administration of criminal justice."[12] In a five to four decision, the Court reversed the Sixth Circuit and held that there is no due process violation when a prosecutor carries out a threat, made during plea negotiations, to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.[13]

Writing for the majority,[14] Justice Stewart sought to downplay the element of prosecutorial vindictiveness on which the court of appeals had relied, by emphasizing the "give-and-take negotiation" between prosecutor and defendant which is characteristic of the plea bargaining situation. Thus in a sweeping statement which suggests that *Bordenkircher* may signal the beginning of a trend toward Supreme Court tolerance of even greater prosecutorial advantage in the plea bargaining situation than has traditionally existed, the Court held that "in the 'give-and-take' of plea bargaining, there is no . . . element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."[15] While recognizing that offers such as the one made to Hayes may deter the exercise of legal trial rights, the Court argued that such a deterrent effect presents no constitutional infirmity. The Court distinguished *Bordenkircher* from situations which create some danger that the State might be retaliating against the accused for lawfully attacking his conviction, and argued that it is only in the latter that a due process violation arises.[16]

In buttressing his argument that *Bordenkircher* does not present a situation in which a prosecutor retaliates against a defendant by bringing more serious charges after plea negotiations have failed, Stewart pointed to the fact that Hayes was given "notice" of the prosecutor's intent at the plea bargaining session. Thus, he argued, the case would have been no different if the grand jury had indicted Hayes as a recidivist from the outset and the prosecutor had offered to drop that charge as part of the plea bargain.[17]

This characterization of the prosecutor's conduct as reflecting not vindictiveness, but 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,"[18] was not, however, unanimously accepted by other members of the Court. Justice Blackmun, in dissent,[19] argued that vindictiveness was present in *Bordenkircher* to the same degree as it had been in earlier cases in which constitutional violations had been found. Blackmun also rejected the majority's equation of the situation in *Bordenkircher* with one in which the recidivist charge had been brought in the original indictment. While acknowledging that the consequence of holding the prosecutor's conduct in *Bor-*

[6] The opinion of the District Court is unreported. *See* Bordenkircher v. Hayes, 434 U.S. 357, 360 n.4.

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

[8] *Id.* at 45.

[9] *Id.* at 44.

[10] *Id.*

[11] 429 U.S. 888 (1976).

[12] 434 U.S. at 360.

[13] *Id.* at 365.

[14] The majority included Chief Justice Burger and Justices White, Rehnquist, and Stevens.

[15] 434 U.S. at 363.

[16] Prosecutorial vindictiveness against a defendant for having successfully attacked his first conviction was held unconstitutional in North Carolina v. Pearce, 395 U.S. 711, 725 (1969). In Blackledge v. Perry, 417 U.S. 21, 28–29 (1974), the Court further held that the "apprehension" that the state will retaliate by increasing the charges if the defendant pursues his right to appeal is sufficient to constitute a due process violation.

[17] It seems a questionable characterization of the facts to interpret as "notice" what must have appeared to Hayes at the time to be a coercive threat. It is clear, as Stewart recognized, that the prosecutor's intention was not to give notice, but rather, to induce the defendant to plead guilty. Yet, Stewart insisted that the prosecutor did not act vindictively. The viability of this characterization will be discussed more fully in section III, *infra*.

[18] 434 U.S. at 364.

[19] Justices Brennan and Marshall joined in Blackmun's dissent.

denkircher invalid might be to encourage prosecutors to bring heavier charges initially, he nevertheless advanced several arguments in favor of holding the prosecution to its initial charge. First, he pointed to the socially desirable objective of keeping charging practices visible so that prosecutors will be forced to justify their charges to the public and so that the public can in turn evaluate the fairness of these charges.[20] Second, he noted that forcing prosecutors to bring all of their charges initially would lead them to reach charging decisions without any knowledge of the particular defendant's willingness to plead guilty. Thus, Blackmun reasoned, "the defendant who truly believes himself to be innocent and wishes for that reason to go to trial, is not likely to be subject to quite such a devastating gamble since the prosecutor has fixed the incentives for the average case."[21] Finally, such a policy would avoid the problem of the defendant's inability to assess the realistic likelihood that a prosecutor will in fact be able to procure an indictment which he threatens.

In a separate dissent, Justice Powell also considered the issue of whether, practically, the situation would have been any different had the recidivism charge been brought initially. However, rather than focussing on the policy issues surrounding that question, Powell concentrated on the facts of the particular case and thus identified the crucial question as whether the prosecutor might reasonably have charged Hayes under the Habitual Criminal Act in the first place. Given the fact that Hayes' third felony charge was for a relatively minor offense and given the circumstances surrounding his prior convictions, Powell inferred that the prosecutor's decision not to initially charge Hayes under the recidivist statute was a reasonable and responsible determination that the public interest would not be served by subjecting Hayes to a potential sentence of life imprisonment. Thus, Powell accorded great weight to the peculiar facts of the case, facts which the majority had relegated to a footnote.[22] Powell's approach highlighted the apparent attempt by the majority to downplay the glaring injustice of imposing a life sentence on a man who, despite two prior convictions including one committed as a teenager, had only forged a check for $88.30.[23]

Powell also noted the majority's failure to characterize the prosecutor's conduct as vindictive. Thus, he concluded that "[i]n this case, the prosecutor's actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights."[24]

II

To understand fully the Court's distinction between deterrence from exercising a legal right and retaliation for the exercise of such a right which is at the heart of Justice Stewart's opinion, a brief history of the Court's recent treatment of statutory, judicial, and prosecutorial encouragement of guilty pleas is helpful. There are two interwoven strands to this history. The first consists of a series of cases in which the Court has explicitly dealt with the determination of the voluntariness of guilty pleas

[20] 434 U.S. at 368–69 n.2 (Blackmun, J., dissenting). One might wonder whether in fact the visibility of charging practices would be enhanced if prosecutors were forced to bring all of their charges initially. Under the Court's holding in *Bordenkircher*, the prosecutor has to return to the grand jury after the defendant pleads innocent if he wishes to secure further indictment. It might be argued that to justify an increased charge upon return to the grand jury would subject the prosecutor and his charging practices to greater public exposure than had he simply requested the higher charge initially. The practice of increasing charges would not, as Blackmun implies, be likely to remain secretly within the confines of the plea bargaining session.

[21] 434 U.S. at 368–69 n.2 (Blackmun, J., dissenting). Upon close examination, however, the logic of this argument becomes elusive. The prosecutor who brings his charges initially, whether or not he fixes them for the average case, will fix them higher than the prosecutor who is permitted the option of making increased charges an element of his plea negotiations. The prosecutor in the former situation can only bargain down and thus to gain any bargaining leverage must start high. The prosecutor in the latter situation, on the other hand, need not set the stakes as high initially since he retains bargaining leverage in the form of potential further indictment throughout negotiations. The defendant in the former situation thus faces a high risk if he continues to insist on going to trial in the hopes of eliciting a better deal. Such risks are largely removed for the defendant in the latter situation since the parameters of the offer are known to him. This point will be developed more fully in section III, *infra*.

[22] 434 U.S. at 359 n.3.

[23] Powell's language captures the unfairness of Hayes' plight:

> Although respondent's prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in imprisonment; yet the addition of a conviction on a charge of $88.30 subjected respondent to a mandatory sentence of imprisonment for life. Persons convicted of rape and murder often are not punished so severely.

Id. at 370 (Powell, J., dissenting) (footnote omitted).

[24] *Id.* at 372–73 (Powell, J., dissenting).

in situations in which defendants have chosen to plead guilty rather than risk the potentially greater penalties attendant on pursuing their rights at trial.

In 1968, the Court in *United States v. Jackson*[25] invalidated a death penalty clause in the Federal Kidnapping Act,[26] which created an offense punishable by death upon a jury recommendation but limited to a maximum penalty of life imprisonment without such a recommendation. The statute set forth no procedure for imposing the death penalty on a defendant who either waived the right to jury trial, or who pleaded guilty,[27] but rather, it limited the death penalty to those defendants who asserted the right to contest their guilt before a jury.[28] The Court reasoned that the effect of this provision was "to discourage assertion of the fifth amendment right not to plead guilty and to deter exercise of the sixth amendment right to demand a jury trial."[29] According to the Court, the provision thus imposed an impermissible burden on the exercise of constitutional rights and encouraged guilty pleas and waivers of jury trials which in particular cases might be constitutionally involuntary.[30]

In the ten years since *Jackson*, the Court's approach to the determination of the voluntariness of guilty pleas has evidenced a retreat from the position articulated therein, with the effect that the rationale for the *Jackson* decision has been significantly undercut. In three 1970 cases,[31] for example, the Court held that a guilty plea is not involuntary simply because it is entered into so as to avoid the risk of a harsher sentence following a finding of guilt at trial. In each of these cases defendants entered into pleas of guilty to avoid potential imposition of death sentences by a jury. Each was dissuaded from exercising rights to a jury trial and from pleading not guilty, and thus was discouraged from asserting rights. In each case, however, the Court found no constitutional infirmity despite the claim by each defendant that *Jackson* compelled a contrary result.

In *Brady v. United States*,[32] the Court dealt with a challenge to the same kidnapping statute at issue in *Jackson*.[33] In 1959, the defendant Brady was indicted under that statute before its death penalty provision had been invalidated by the *Jackson* decision. He initially pleaded not guilty but changed his plea to guilty upon learning that his codefendant had pleaded guilty and intended to testify against him. After questioning Brady as to the voluntariness of his plea, the trial judge imposed sentence. In 1967, Brady sought post-conviction relief on the ground that the statute, because of its death penalty provision, operated to coerce his plea. Relief was denied by both the district court[34] and the court of appeals.[35] Brady argued in the Supreme Court that those decisions were inconsistent with the holding in *Jackson*. The Court disagreed and held that Brady's guilty plea was a "voluntary" and "intelligent" choice among available alternatives, which was not made invalid even though it may have been influenced by the fear of

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[25] 390 U.S. 570 (1968).

[26] 18 U.S.C. § 1201(a) (1976).

[27] 390 U.S. at 571.

[28] In *Jackson*, the Court explained that:

> Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forwarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.

Id. at 581.

[29] *Id.*

[30] In deciding whether a guilty plea meets constitutional standards of voluntariness, courts have traditionally inquired whether it was made "voluntarily" and "intelligently" with full understanding and appreciation of the consequences. Boykin v. Alabama, 395 U.S. 238, 242 (1968); Parker v. North Carolina, 397 U.S. 790, 801 (1970). However, as Justice Brennan noted in a dissenting opinion in *Parker*:

> The concept of "voluntariness" contains an ambiguous element .... There is some intimation in the Court's opinions ... that, at least with respect to guilty pleas, "involuntariness" covers *only* the narrow class of cases in which the defendant's will has been literally overborne. At other points, however, the Court apparently recognized that the term "involuntary" has traditionally been applied to situations in which an individual, while perfectly capable of rational choice, has been confronted with factors that the government may not constitutionally inject into the decision-making process ... [For example] it has long been held that certain promises of leniency or threats of harsh treatment by the trial judge or the prosecutor unfairly burden or intrude upon the defendant's decision-making process.

397 U.S. at 801-02 (citing Machibroda v. United States, 368 U.S. 487 (1962)).

[31] Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790 (1970); North Carolina v. Alford, 400 U.S. 25 (1970).

[32] 397 U.S. 742 (1970).

[33] 18 U.S.C. § 1201(a) (1976).

[34] After an evidentiary hearing, the district court found that the plea was voluntary. *See* Brady v. United States, 404 F.2d 601, 749 (10th Cir. 1969).

[35] 404 F.2d 601 (10th Cir. 1969), *aff'd* 397 U.S. 742 (1970).

a possible death penalty if the conviction were obtained.[36] The Court distinguished *Jackson* by noting that the Court there had merely prohibited the imposition of the death penalty under the kidnapping statute. According to the Court in *Brady*, "*Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not."[37]

In *Parker v. North Carolina*,[38] over a vigorous dissent by Justice Brennan, the Court, relying on *Brady*, declined to overturn a guilty plea although it was influenced by a statutory scheme very similar to the one invalidated in *Jackson*. In 1964, Parker was indicted in North Carolina for first-degree burglary, an offense then punishable by death unless a plea of guilty was entered, in which case the punishment was life imprisonment. Thus, as in *Jackson*, a defendant could avoid the possibility of a death penalty on a capital charge by pleading guilty to the charge. In *Parker*, the defendant had pleaded guilty and was sentenced to life imprisonment. He sought post-conviction relief claiming *inter alia*[39] that his guilty plea was involuntary because it was coerced by the statutory scheme. In rejecting his claim, the Supreme Court reaffirmed the holding in *Brady* that an otherwise valid plea is not made involuntary because it was influenced by the defendant's desire to avoid the risk of more severe punishment.[40] In dicta the Court noted that under *Jackson* it might have been unconstitutional to impose the death penalty for first-degree burglary under the North Carolina scheme,[41] but declined to draw from this any implications as to the validity of Parker's guilty plea and attendant life sentence.

In *North Carolina v. Alford*,[42] again over Justice Brennan's dissent, the Court went even further and upheld a plea of guilty which was induced by a threat to subject the defendant to the risk of death even where the record demonstrated that the actual effect of the threat was to induce a guilty plea from a defendant who continued to claim innocence. The *Alford* Court maintained that when a guilty plea represents a voluntary and intelligent choice among available alternatives, it is not compelled within the meaning of the fifth amendment even if it was entered to avoid the possibility of the death penalty.[43]

What emerges from these cases are two inconsistent holdings. On the one hand, the Court has held it unconstitutional for a prosecutor to discourage the right not to plead guilty and the right to go to trial by exposing to the risk of death only defendants who exercise those rights. This is the import of *Jackson*; but note its implications. Since the defendant has no option but to plead guilty or to plead not guilty and go to trial,[44] the effect of discouraging pleas of not guilty must necessarily be to encourage pleas of guilty. Thus if it is unconstitutional to discourage pleas of not guilty, logically it must be equally unconstitutional to encourage pleas of guilty. But the holdings in *Brady*, *Parker* and *Alford* are at variance with the logic of this argument. Those cases hold that it is *not* unconstitutional to encourage guilty pleas by exposing to the risk of death only those defendants who exercise their rights to plead not guilty and to go to trial.

In light of this apparent logical inconsistency, one might wonder what policy the Court is implementing in departing from the rationale in *Jackson*. Why has the Court in *Brady*, *Parker* and *Alford* indicated such seeming unwillingness, despite the holding in *Jackson*, to eliminate government imposed choices in the criminal process even where they have the effect of discouraging the exercise of constitutional rights?[45] The opinion in *North Carolina v. Alford*,[46] provides some clues as to the source of this unwillingness. In *Alford*, the Court held that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the

[36] The Court continued:

> We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

397 U.S. at 751.

[37] *Id.* at 747.

[38] 397 U.S. 790 (1970).

[39] Parker also argued that his guilty plea was the product of a coerced confession and that his indictment was invalid because it was returned by a grand jury from which members of his race had been systematically excluded. The Court rejected the first contention, *id.* at 796, and declined to consider the second because it had been rejected by the North Carolina Court of Appeals on an independent and adequate state procedural ground, namely that Parker's claim was not timely. *Id.* at 798.

[40] *Id.* at 795.

[41] *Id.* at 794–95.

[42] 400 U.S. 25 (1970).

[43] *Id.* at 39.

[44] Of course a defendant may plead *nolo contendere* but the effect of this plea is the same as a guilty plea.

[45] Justice Brennan in his dissent in Parker v. North Carolina, 397 U.S. 790 (1970), characterized this development as "a design to insulate all guilty pleas from subsequent attack no matter what influences induced them." 397 U.S. at 800 (Brennan, J., dissenting).

[46] 400 U.S. 25 (1970).

imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."[47] The Court's subsequent language indicates that its objective in so holding was to preserve the availability of choice for defendants who might conclude that it is in their interest to avoid the risks of trial. As the *Alford* court explained:

> Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term.[48]

A second reason why the Court may be declining to invalidate guilty pleas which are encouraged by government imposed choices is suggested by the Court in *Brady*.[49] There, the Court stated that:

> [T]he more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.[50]

Perhaps it is fair to say that this strand of cases reflects not, as Brennan would have it, "a design to insulate all guilty pleas from subsequent attack,"[51] but rather a conscious decision to preserve the availability of choice for defendants who may benefit from such choice and to conserve scarce trial resources for cases in which they are most crucial. Thus while the Court's holdings in this area reflect logical inconsistencies, there are policy reasons which may underlie the Court's shift in view and its seemingly increased willingness to tolerate government efforts to induce guilty pleas.

The trend reflected in the preceding line of cases raises the question of whether there are any limits on the degree to which government may act to induce guilty pleas. It is in the other strand of recent Supreme Court decisions in this area that the delineation of such limits emerges. These cases present factual situations in which the defendants, unlike those in the cases noted above, have refused to be discouraged in the assertion of their rights despite the potential risk of increased sentences. As a consequence they have faced increased charges or increased sentences and have challenged these results as violations of due process because they impose penalties on the exercise of constitutional rights. The Court's response to these challenges has been to distinguish between situations in which actual vindictive motive or the potential for vindictive motive is present and those in which such potential is minimal, and to find due process violations only in the former. Thus, in *North Carolina v. Pearce*,[52] in which a defendant, following an appeal and reconviction, was subjected to a greater punishment than that imposed at his first trial, the Court held that due process requires that:

> [V]indictiveness 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.[53]

Accordingly, the Court held that whenever a judge imposes a more severe sentence on a defendant upon retrial, his reasons must affirmatively appear.[54]

While the theme of deterrence from exercising constitutional rights as the source of a due process violation is clearly present in the *Pearce* opinion (following as it did only one year after *Jackson*), it is the element of retaliation that the Court continued to find offensive to due process. Thus in *Colton v. Kentucky*,[55] the Court declined to extend the holding in *Pearce* to Kentucky's two-tiered criminal justice system which allows a misdemeanor defendant convicted in an inferior trial court to seek retrial *de novo* in a court of general jurisdiction. In *Colton*, the Court upheld the imposition of increased sentences at the second trial. In distinguishing *Pearce*, the *Colton* Court noted that since the Kentucky procedure involves a completely new determination of guilt or innocence by a different court than is involved in the initial trial, there is no

[47] 400 U.S. at 37.
[48] *Id.*
[49] 397 U.S. 742 (1970).
[50] *Id.* at 752.
[51] *See* note 45 *supra.*
[52] 395 U.S. 711 (1969).
[53] *Id.* at 725.
[54] *Id.* at 726.
[55] 407 U.S. 104 (1972).

motive to deal more strictly with a *de novo* defendant than with any other defendant and thus the potential for personal vindictiveness is absent.[56] In *Chaffin v. Stynchcombe*,[57] the Court adopted a similar rationale in upholding the imposition of a higher sentence on retrial by a jury which is uninformed as to the earlier sentence. The *Chaffin* Court reasoned that the likelihood that a jury would impose an increased sentence out of vindictiveness was minimal.

In *Blackledge v. Perry*,[58] the holding in *Pearce* was made applicable to prosecutors. Thus, the Court held that it is a violation of due process for a state to initiate more serious charges than initially brought against a defendant upon that defendant's invocation of a statutory right to appeal. The focus on the potential for vindictiveness is clear from the Court's language:

> 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.[59]

The principle that emerges from this second strand of cases is that where the exercise of a constitutional right is penalized by actual vindictiveness or is threatened by a realistic likelihood of vindictiveness, the potential for deterring future exercises of such rights reaches a constitutionally impermissible level. The distinction, then, between the *Brady-Parker-Alford* strand of cases and the *Pearce-Colton-Chaffin-Perry* strand lies in the absence of vindictiveness in the former which prevents the deterrent effect from rising to the level of constitutional violation.[60]

III

The decision in *Bordenkircher v. Hayes* represents a significant departure from this state of the law. While Justice Stewart refused to recognize the prosecutor's conduct in *Bordenkircher* as vindictive, vindictiveness was present in *Bordenkircher* to the same degree as it was thought to be in *Pearce*[61] and in *Perry*.[62] In *Bordenkircher*, the prosecutor admitted that his intent in threatening further indictment was to discourage the defendant from exercising his right to trial.[63] In *Bordenkircher*, just as in *Perry*, the prosecutor sought to discourage the exercise of constitutional rights by "upping the ante" through a more serious indictment. That the Court now chooses to characterize this conduct as a natural and legitimate consequence of the prosecutor's interest at the bargaining table signals a narrowing of the broad language in *Pearce* and in *Perry*. Those cases can no longer be viewed as standing for the proposition that where the exercise of a constitutional right is threatened by vindictive retaliation a due process violation lies. Rather, their impact has been limited to their facts such that vindictiveness is only constitutionally impermissible when it is attendant on the exercise of a defendant's legal right to attack his original conviction.

One might wonder why it makes sense to distinguish between vindictiveness in the context of an appeal and vindictiveness for the exercise of other legal rights;[64] the potential for deterring the exer-

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[56] *Id.* at 116–17.

[57] 412 U.S. 17 (1973).

[58] 417 U.S. 21 (1974).

[59] *Id.* at 27–28.

[60] As Justice Brennan has argued in dissent in *Parker*, 397 U.S. at 799, and *Alford*, 400 U.S. at 39, the distinction between deterrence of the exercise of constitutional rights and retaliation for their exercise is not without problems. For example, the anomalous result of this pattern of decisions is that those defendants who resist the pressure to plead guilty are likely to receive relief where such a choice subjects them to more severe punishment because the Court will likely view that result as a product of judicial, or prosecutorial, vindictiveness or of statutory discouragement of the exercise of trial rights as in United States v. Jackson, 390 U.S. 570 (1968). On the other hand, those defendants who succumb to the same pressure and are induced to surrender their constitutional rights are left without any remedy at all. *See* Parker v. North Carolina, 397 U.S. at 807 (Brennan, J. dissenting). *Bordenkircher* may have altered this result at least in the context of plea bargaining so that both types of defendants are left in an equally unenviable position.

[61] 395 U.S. 711 (1969).

[62] 417 U.S. 21 (1974).

[63] 434 U.S. at 358 n.1; *Id.* at 361 n.7.

[64] Indeed Blackmun in his *Bordenkircher* dissent levels this criticism against the majority:

> Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect. I perceive little difference between vindictiveness after what the Court describes, .. as the exercise of a "legal right to attack his original conviction," and vindictiveness in the "give-and-take negotiation common in plea bargaining."

434 U.S. at 367–68 (Blackmun, J., dissenting).

cise of such rights would seem to be the same in either case. The Court's answer is to point to the plea bargaining situation and to say, in effect, that in that context, the concept of vindictiveness does not exist. This is a difficult conclusion to accept. To characterize the prosecutor's conduct in *Bordenkircher* as anything but vindictive is at best counterintuitive. Yet, a careful examination of the consequences for the defendant of not allowing prosecutors to use the leverage of further indictments to elicit guilty pleas suggests a reason for the Court's position.

The viability of plea bargaining depends on the assumption that it is mutually advantageous for defendant and prosecutor to avoid going to trial.[65] Each is willing to make certain concessions to avoid that outcome. The defendant's bargaining power derives from the prosecutor's desire to avoid the costs of trial and perhaps also the risks of losing the case if his evidence is less than conclusive. The degree of leverage a defendant in any particular case has is fixed. Nothing he does will diminish or enhance it. The prosecutor's bargaining power, on the other hand, is determined by several factors, the most important of which is the degree of risk which he makes attendant on going to trial and thus on the charge under which he secures an indictment. To induce a defendant to plead guilty, the prosecutor must be able to offer a sufficiently reduced penalty to make the risks of trial seem too great. The prosecutor can enhance his leverage by increasing the differential between the charge under which he secures the indictment and the bargain he is ultimately willing to strike. *Bordenkircher* raises the question of whether he must make his decision as to the "stakes" before the plea bargaining session begins and thus fix his bargaining leverage initially or whether he can preserve some flexibility until he sees how determined the defendant is to go to trial. As noted earlier,[66] Justice Blackmun argued that the choice should be made initially. Yet it may be that the defendant in fact fares better if the prosecutor can preserve the option of increasing the charges after plea negotiations.

If the prosecutor is forced to make his charging commitment initially, he will overcharge so as to preserve leverage in plea negotiations. Under such circumstances, the defendant who wishes to avoid trial must make his decision as to whether or not to accept the prosecutor's offer based on a guess as to whether the offer is or is not the best one he will get. Is the prosecutor bluffing or is he truly unwilling to make further concessions to avoid trial? The defendant is faced with the choice of accepting an offer which may or may not be the best one he can get, or insisting on going to trial in the hopes that the prosecutor will offer greater leniency. But here the stakes of guessing wrong are high. The defendant, knowing that if he holds out for a better offer and it is not forthcoming he will face serious charges at trial, will probably accept a less advantageous offer than the defendant for whom the costs of being mistaken are less great. Thus because of the high initial stakes, the defendant is likely to end up with less than the best offer the prosecutor was willing to make.

Consider, on the other hand, the situation in which the prosecutor's leverage continues throughout the bargaining session in the form of the availability of further indictment. Here the prosecutor need not overcharge initially. Most likely his initial charge will be somewhere between the charge he would have made if further indictments were precluded and the lowest offer he is willing to make. Much of the uncertainty as to whether the defendant has the best offer he will get is therefore removed. Because the prosecutor has not heavily overcharged initially, his bottom line is most likely set or at least approached in his initial offer. It is unlikely that he will make many additional concessions. Instead, the defendant's uncertainty is as to whether the prosecutor will indeed seek, or will be able to secure, the further indictments he threatens if the defendant insists on trial. Thus, the defendant is faced with accepting what he knows is probably the best offer he will get or risking trial on a charge which is at worst the one the prosecutor has threatened but which is potentially less severe if the prosecutor was bluffing and either cannot or does not wish to secure the indictment he threatened. In this case, then, the boundaries of the deal are known to the defendant. He need not guess as to whether the prosecutor will bargain further. If he chooses to plead guilty he can rest fairly sure that the offer was the best he could get. If he insists on trial, at worst the situation is no different than if the prosecutor had overcharged initially, and, in many instances, he may be better off.

Viewed in this context, it does not make sense to characterize the prosecutor who threatens further indictment during plea negotiations as vindictive. He is simply exercising an alternate form of leverage. In order for the concept of plea bargaining to

[65] *See* Brady v. United States, 397 U.S. at 752.

[66] *See* notes 19–21 and accompanying text *supra*.

work, both parties must have something with which to bargain. The prosecutor's leverage derives either from an initial overcharge or from the availability of making the threat of increased charges an element of his plea negotiations. The above discussion suggests that the defendant is no worse off and may in fact be better off if the second form of leverage is available. On close analysis, then, the potential for deterring the exercise of trial rights is no greater and may even be reduced if the prosecutor is free to threaten further indictments during plea negotiations.

In light of this analysis, the rationale for the Court's decision in *Bordenkircher* becomes more understandable. Rather than reflecting a "design to insulate all guilty pleas from subsequent attack no matter what influences induced them,"[67] *Bordenkircher* can be viewed as an extension of the salutory policies enunciated in *Brady*,[68] *Parker*[69] and *Alford*.[70] It is a decision which furthers the advantages of plea bargaining by preserving the availability of choice for defendants who view such choice as advantageous. It is also a decision which conserves scarce trial resources for cases in which they are most crucial, without the costs to defendants in the form of deterrence of the exercise of constitutional rights that existed in *Pearce*[71] and in *Perry*.[72] While there is some deterrence of the exercise of the right to trial, it is no greater than that which was found permissible in *Brady, Parker* and *Alford*.

The impact of *Bordenkircher* is thus not easily evaluated. While it signals the expansion of the prosecutor's legitimate leverage in the plea bargaining situation by holding that he is free to use threats of further indictment to elicit guilty pleas, the above analysis suggests that we are not likely to see a resultant increase in guilty pleas. On the contrary, the analysis suggests that while the number of guilty pleas will remain constant, where such pleas are entered, on the average, they will be for lower charges than had threats of further indictment been precluded. If this interpretation is correct then it is not the decision in *Bordenkircher* for which the Court is to be faulted. Rather the Court should be faulted for the rationale it articulates which leaves the impression that the decision is a thinly veiled attempt to further weight the balance of power at the bargaining table in favor of the prosecutor.

[67] *See* note 45 *supra*.
[68] 397 U.S. 742 (1970).
[69] 397 U.S. 790 (1970).
[70] 400 U.S. 25 (1970).
[71] 395 U.S. 711 (1969).
[72] 417 U.S. 21 (1974).

Conclusion

It is only recently that the Court has recognized and accepted as legitimate the institution of plea bargaining as an element of the criminal process. Until *Bordenkircher*, the Court's few rulings on the issue have been directed at introducing safeguards into the plea bargaining situation. Thus the Court has held that a prosecutor's plea bargain promise must be kept,[73] has recognized the need for a public record indicating that a plea was knowingly and voluntarily made,[74] and has recognized the importance of counsel during plea negotiations.[75] While *Bordenkircher* does not undercut these safeguards, it would be regrettable if it signalled the end of this trend. If the Court were to move toward weighing the balance of power at the negotiating table in favor of the prosecutor, the long run effect would be to undercut the value to defendants of the carefully evolved safeguards for their protection which exist in other aspects of the criminal justice system. This is a development to be anticipated and avoided. In this newly developing area, it is likely that future cases will see the delineation of limits on the prosecutor's legitimate use of leverage in the plea bargaining situation.

[73] Santobello v. New York, 404 U.S. 257, 262 (1971).
[74] Boykin v. Alabama, 395 U.S. 238, 242 (1969).
[75] Brady v. United States, 397 U.S. at 758.